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personal covenant being six years only, a claim upon that covenant would have been time-barred on the date on which the suit was brought, more than six years having elapsed on that date from the date of the accrual of the cause of action. That being so, the Courts below have, in our opinion, rightly held that the amount which the appellant seeks to recover by a decree under section 90 is not legally recoverable from the mortgagors within the meaning of that section, and this appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Banerji.

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PULANDAR SINGH (PLAINTIFF) *v.* JWALA SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 13 expl. II—Res judicata—Matter which might have been a ground of defence in a former suit.

A defendant in a suit for the recovery of possession of immovable property pleaded only a right to the proprietary possession of the property in suit in himself. This defence failed, and a decree was given in favour of the plaintiff. Subsequently the plaintiff sold a portion of the property so decreed to them, and the *quondam* defendant brought a suit for pre-emption. *Held,* that the suit must fail, inasmuch as the plaintiff's claim was one which he might have made when defendant in the former suit as an alternative to his defence of title. *Srimut Rajah Moottoo Vijaya, &c.,* v. *Katama Natchiar* (1), *Kameswar Pershad* v. *Raj Kumari Ruttan Koer* (2) and *Baldeo Sahai* v. *Bateshar Singh* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri,* for the appellant.

Maulvi *Ghulam Mujtaba,* for the respondents.

KERSHAW, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was one for pre-emption brought by the present appellant in respect of a sale made by one Musammat Subta on the 11th of May 1894. The suit has been dismissed as barred by the

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* Second Appeal No. 522 of 1896, from a decree of W. F. W. Wells, Esq., District Judge of Shahjahanpur, dated the 16th April 1896, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 7th December 1895.

(1) 11 Moo. I. A., 50. (2) I. L. R., 20 Calc., 79.
(3) I. L. R., 1 All., 75.

rule of *res judicata.* It is contended before us that this ruling of the Courts below is erroneous. We are unable to accede to this contention.

The facts out of which the plea of *res judicata* arose were these: —The share now sold is a part of a 5-biswa share which belonged to the father of Musammat Subta. After the death of both her parents she sold the share now in question to the vendees respondents. The whole property, however, consisting of 5-biswas, was in the possession of the present appellant. The vendees and Musammat Subta therefore brought a suit for possession against the present appellant. That suit was resisted on the sole ground that the present appellant was the owner of the property. The Court decided against him and made a decree in favour of the then plaintiffs The Courts below have held that the present plaintiff ought to have put forward his right of pre-emption in respect of the property now in suit as an answer to the claim of the vendees in the former suit, and that as he did not do so the present claim is barred by the rule of *res judicata,* having regard to explanation II of s. 13 of Act No. XIV of 1882.

It has been urged before us that the present plaintiff might no doubt have defeated the claim of the then plaintiffs by setting up his right of pre-emption, but he was not bound to do so, and therefore this is not a case to which explanation II of section 13 applies. In our opinion this contention is untenable. The present plaintiff being in possession of the property, it was his duty to resist the claim of those who sought to oust him upon all possible grounds. In *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Swamy Periya Odaya Taver* v. *Katama Natchiar, Zemindar of Shivagunga* (1) it was observed by the Privy Council (at p. 73), that " when a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will, but instead of doing so

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when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed." These observations apply with full force to the present case. It is true that if the present plaintiff had raised in the former suit the defence that he had a right of pre-emption, that defence would have been only in the alternative, but such a defence is one which a party who resists a claim ought to bring forward for the purpose of defeating the claim. In the case of *Kameswar Pershad* v. *Raj Kumari Ruttan Koer* (1), their Lordships of the Privy Council explained what the word "ought" in explanation II of section 13 means. In that case their Lordships said:—"Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' might become important." It is urged that the defence on the ground of pre-emption, if raised, would have been so dissimilar to the other defence, namely, on the ground of proprietary title, that confusion would have arisen, and consequently according to their Lordships of the Privy Council the defence on the ground of pre-emption ought not to have been raised in the former suit. In our opinion, however, the two defences would only have been alternative ways of seeking to defeat the claim of the plaintiff. This view is supported by the ruling of this Court in *Imam Khan* v. *Ayub Khan* (2). We are therefore of opinion that as the present plaintiff did not in the former suit set up his right of pre-emption in answer to the claim advanced in that suit he is precluded by the provisions of section 13 of the Code of Civil Procedure from maintaining the present suit. The ruling of this Court in *Baldeo Sahai* v. *Bateshar Singh* (3) is directly in point. For the above reasons we hold that the Courts below were right. We dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 20 Calc., 79. (2) I. L. R., 19 All., 517.
(3) I. L. R., 1 All., 75.