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therefore the provisions of the Regulation above-mentioned relative to the payment of interest are inapplicable.

SPANKIE, J.—I adhere to the view of the case expressed by me in my judgment of the 24th November, 1880.

Appeal allowed.

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March 26.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

LALJI MAL AND ANOTHER (PLAINTIFFS) v. HULASI AND ANOTHER (DEFENDANTS).*

Suit for recovery of Immoveable property—Mesne profits—Relinquishment of part of claim—Act X of 1877 (Civil Procedure Code), s. 43, 44—Mortgage—Specific performance of contract—Compensation.

According to the terms of a mortgage possession of the mortgaged property was to be delivered to the mortgagee, and he was to take the mesne profits. The mortgagor refused to deliver possession of the property, and the mortgagee sued him to enforce specific performance of the contract to deliver possession, and obtained a decree. At the time this suit was brought, the mortgagee had been kept out of possession of the property for two years, during which time the mortgagor had taken the mesne profits. The mortgagee subsequently sued the mortgagor to recover the mesne profits of the mortgaged property for those two years. *Held* that, as the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, *viz.*, the breach of the contract to give possession, the second suit was barred by the provisions of s. 43 of Act X of 1877.

THIS was an application to the High Court by the plaintiffs in this suit to revise the appellate decree therein of Mr. R. G. Currie, Judge of Aligarh, dated the 25th March, 1880. It appeared that the defendants had mortgaged a certain estate to the plaintiffs, promising to place them in possession thereof. They failed to perform this promise, and consequently the plaintiffs had instituted a suit against them on the 24th August, 1878, claiming possession as mortgagees of such estate. The plaintiffs obtained a decree in that suit on the 31st January, 1879. The plaintiffs subsequently instituted the present suit against the defendants, in which they

* Application, No. 51B. of 1880, for revision under s. 622 of Act X. of 1877 of a decree of R. G. Currie, Esq., Judge of Aligarh, dated the 25th March, 1880, modifying a decree of Munshi Shankar Lal, Munsif of Khair, dated the 16th December, 1879.

claimed, *inter alia*, Rs. 296 odd, the mesne profits of such estate which had accrued in the period, prior to the institution of the first suit, during which the defendants had, contrary to their promise contained in the contract of mortgage, retained possession of such estate. The defendants set up as a defence that, inasmuch as the plaintiffs had omitted in the former suit to claim such mesne profits, their claim for the same in the present suit could not, under the provision of s. 43 of Act X of 1877, be entertained. The Court of first instance disallowed this contention and gave the plaintiffs a decree for such mesne profits. On appeal by the defendants the lower appellate Court allowed the contention, and reversed the decree of the Court of first instance. The plaintiffs applied to the High Court for the revision of the lower appellate Court's decree, contending that the claim was not barred by s. 43 of Act X of 1877. The application came for hearing before Pearson, J., and Straight, J., and was referred by those learned Judges to the Full Bench for disposal.

The *Senior Government Pleader* (Lala Juala Prasad) and Munshi *Hanuman Prasad*, for the plaintiffs.

Mr. *Chattarji*, for the defendants.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J., (STUART, C. J., PEARSON, J., and OLDFIELD, J., concurring).—The original suit, which was instituted on the 24th August, 1878, was in reality one for the specific performance of the contract of mortgage, by which defendants, mortgagors, had undertaken to give possession to the plaintiffs, mortgagees, but had failed to do so. At the time of that suit being brought the plaintiffs, mortgagees, had been kept out of possession during the years 1284-85 fasli, during which period the defendants had received and enjoyed the mesne profits derived from the mortgaged property, which the plaintiffs were entitled to under the mortgage upon the basis of possession being given to them. It seems therefore clear that the plaintiffs might in the original suit, in addition to seeking relief by specific performance of the mortgage contract, have asked for compensation for the breach of it, the measure of which would have been reasonably estimated at the amount of mesne profits misappropriated. Moreover it is plain that the claims to pos-

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session and mesne profits were in respect of one and the same cause of action, namely, the breach of the contract to give possession. It may well be that in some cases a claim to mesne profits would, as contemplated by s. 44 of Act X of 1877, amount to a cause of action distinct from that on which a suit for the recovery of immovable property or for declaration of right to immovable property might be founded. But in the present instance the possession and mesne profits were so mixed up and involved with one and the same common cause, namely, the non-delivery of possession, that they must be taken as constituting "the whole claim the plaintiffs were entitled to make in respect of the cause of action" on which the suit was instituted in August, 1878. We would refuse the application for revision of the Judge's order with costs and direct the record to be returned.

SPANKIE, J.—The Judge is, I consider, right. S. 44, Rule a., provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, *except* claims in respect of mesne profits or arrears of rent in respect of the property claimed. Claims by a mortgagee to enforce any of his remedies under the mortgage also are included in the exception. Such claims therefore can be joined in a suit for recovery of immovable property without the leave of the Court. The Munsif has misread, and so misapprehended, the section. Certainly the claim for mesne profits up to date of suit could have been joined with the claim to recover the immovable property, and it may be that the claim to enforce the terms of the mortgage and to obtain possession of the land under it would include the relief to which the mortgagee would be entitled in respect of the mesne profits, which he would have realized if possession had been given to him, and under s. 43, third paragraph, a person entitled to more than one remedy may sue for all or any of his remedies; but if he omits, except with the leave of the Court obtained before the first hearing, to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted. This, however, I do not insist upon in regard to the present case, in which it is sufficient to say that s. 43, Rule a., (a), seems clearly to govern the question, for if the original plaintiff was at all entitled to possession as claimed in the suit of the 24th August, 1878, he was entitled to all the

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mesne profits up to date of suit. They form really a part of the claim which he was entitled to make in respect of the cause of action arising out of the breach of contract to put him in possession of the land. Under the terms of the first paragraph of s. 43 of the Code every suit shall include the whole of the claim; s. 44, Rule a., (a), allows the claim to be made. If the claim for mesne profits prior to suit was not made in the original suit in 1878, it cannot now be made in regard to that period. I think this is shown from other sections of the Code. S. 211 gives the Court power to provide in the decree for the payment of mesne profits in respect of the property in suit from its institution until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs). S. 212 also empowers the Court itself in a suit for immoveable property to determine the amount of profits due prior to the institution of the suit, or to pass a decree for the property and direct inquiry into the amount of mesne profits, and dispose of the same on further orders. S. 244 provides for the determination of the amount of mesne profits due, where the decree has directed inquiry, or where the decree, as in s. 211, has made mesne profits payable from the institution of the suit until the delivery of possession. That question, s. 244 declares, shall be determined by the Court executing the decree and not by a separate suit. But the last part of this section shall not be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree. Looking at the terms of ss. 43 and 44, Rule a., (a), ss. 211, 212 and 244 of the Code, I come to the conclusion that mesne profits which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a separate suit, though a separate suit is permissible for mesne profits accruing between the institution of the first suit and the execution of the decree therein, when such profits are not dealt with by such decree. I would therefore say that the Judge's order is not open to revision under s. 622 of the Code, his order being according to law.