(including interest) below 500 rupees. The defendant having questioned the plaintiff's title—HELD that it was sufficient for the plaintiff either to show that he had obtained a certificate under section 2, Act XXVII. of 1860, or to prove that he was in *de facto* possession of the deed, and that the Lower Appellate Court acted beyond jurisdiction in directing an enquiry into the plaintiff's *de jure* title.

Although the case was one cognizable by a Small Cause Court, and no special appeal therefore lay to this Court under section 27, Act XXIII. of 1861, yet, under section 35 of that Act, the Court set aside so much of the Lower Appellate Court's order as was beyond jurisdiction.

PLAINTIFF in this case sued as the executor of an alleged adopted son of the party in whose favour the bond was executed for the sum due under the same, which with interest amounts to less than 500 rupees.

The defendant pleaded: *1st.* That plaintiff was not the adopted son; and *2nd.* That, though he had executed the instrument, he had received no consideration for the same.

The first Court gave plaintiff a decree, being of opinion that the fact of plaintiff being in possession of the deed as executor of the heir of the party in whose favour the bond admitted by defendant to be genuine was executed was sufficient to entitle him to maintain the present action, and also that the defendant had failed to prove the absence of valuable consideration.

On appeal, the Principal Sudder Ameen remanded the case for enquiry into the validity of the adoption of the party whose executor plaintiff is, inasmuch as his title has been questioned by defendant.

The plaintiff then appealed specially against this order; and the first point we have to determine is, whether such an appeal is maintainable or not? We are clearly of opinion that it is not. The case is one of a nature cognizable by a Court of Small Causes, and is for a sum less in amount than 500 rupees. Under section 27 of Act XXIII. of 1861, therefore, there is no appeal to this Court. But, in hearing the appeal, the Principal Sudder Ameen has exercised a jurisdiction not vested in him by law, and therefore we are entitled, under section 35 of the law above cited, to set aside so much of that order as is done beyond his jurisdiction. In a case like the present, when the defendant questions the title of the plaintiff, it is enough for that party either to show that he has obtained a certificate under section 2, Act XXVII. of 1860, or to prove that he is in *de facto* possession of the deed upon which the suit is instituted as the heir of the party in whose favour the instrument was executed. When he has proved one or the other of those states of circumstances, he has done sufficient for the purposes of the suit; and any enquiry into his *de jure* title is beyond the scope of the case. Under this view we think that the order passed by the Principal Sudder Ameen in appeal was beyond his jurisdiction in the case. We, therefore, as we are empowered by the law above cited to do, set it aside, direct him to re-call the case to his own file, and decide it in the mode suggested in the above remarks.

The 16th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Suit by Heir—Same cause of action—Different property.

Case No. 21 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 10th August 1864.

Sooruj Pershad Tewary and others, paupers (Plaintiffs), *Appellants,*

versus

Saheb Lal Tewary and others (Defendants), *Respondents.*

Baboo Woomesh Chunder Mookerjee for Appellants.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

Suit laid at Rupees 23,958-5 annas 4 gundahs.

A suit by an heir on the same cause of action on which a suit was previously brought by his father, though, for property different from that which was the subject of that suit, is barred by section 7, Act VIII. of 1859.

IN this case plaintiff sued to recover possession of one third of certain landed property held in co-parceny, also of a one-third share of the money value of certain other landed joint property, and one-third of certain cash, also joint property.

In his examination, plaintiff also states he "is entitled to obtain one-third share of the afore-mentioned (joint ancestral) talooks and cash."

Defendant pleaded that section 2, Act VIII. of 1859, barred the suit as a *res adjudicata.*

The lower Court has decided that this suit was barred by section 7, Act VIII. of 1859, inasmuch as, although this suit was not for the *identical* property for which

previous suit had been brought by plaintiff's father, still it was for property from which plaintiff's father had been ousted by the same defendants (as alleged by plaintiff in 1258); while plaintiff's father had sued the same defendants for this one-third share of ancestral property as held jointly up to 1259, and then taken from plaintiff by defendants. Further, because in that suit plaintiff's father had omitted to sue for the particular items *now* sued for by plaintiff. The lower Court states its opinion more fully thus: "The Court finds that "plaintiff, as heir to his father, has brought "the present suit on the same cause of action "(on which the suit was previously brought "by his father, which suit was dismissed), "though the property, the subject of this "suit, is different from the property which "was the subject of that suit. Hence it "is perfectly clear that this claim is for a "portion, relinquished by plaintiff's father, of "the claim instituted by him, and plaintiff "has now preferred it on the same ground."

The Court then referred to the fact that plaintiff states that his father was dispossessed from the property now in suit in 1258, while plaintiff in that suit claimed as for ancestral property of which he had been dispossessed up to 1259, and held that it was incumbent on plaintiff's father to have included this claim in *that* suit; but that, as plaintiff's father knowingly relinquished it, plaintiff cannot, under section 7, Act VIII. of 1859, now sue. The plaintiff's suit was accordingly dismissed, and plaintiff now appeals:—

1st. That his present suit was for *partition*, while his father's was for *possession*.

2ndly. That the property now sued for is not the same as that for which his father sued; and that the cause of action is the claim to obtain possession wrongfully withheld, while that of his father's was dispossession.

3rdly. That even if his father had omitted in his suit property of which he had not possession up to 1259, still it was competent for plaintiff to sue for what was omitted to be sued for and relinquished by his father.

On the *first* plea, we shall merely remark that it is a vague and groundless assertion, unsupported, as before shown, by anything in the plaint, or in the plaintiff's examination and statement of his own claim.

On the *second* and *third* points, we observe that this suit has been dismissed under the provisions of section 7 of Act VIII. of 1859, which enacts: "Every suit shall "include the *whole* of the claim arising "out of the *cause of action*; but a plaintiff may relinquish any portion of his "claim in order to bring his suit within the "jurisdiction. *If the plaintiff relinquish "or omit to sue for any portion of his claim, "a suit for the portion so relinquished or "omitted shall not afterwards be entertained.*"

Now, for the purpose of applying this law, it is almost needless to observe that plaintiff, as heir to his father, can only do what his father could have done. Nor could his father have brought his suit after that which he brought was dismissed. The father's suit was also for one-third share of ancestral joint property. This specific property was not included in terms in that suit. But the plaintiff's father then stated that he sued to obtain possession of the joint ancestral property, which he had lost up to 1259, and by the ousting of these same defendants, his co sharers. Ought not then plaintiff's father to have included the present specific items in that claim? The cause of action was to obtain possession of the joint ancestral property from the same dispossessing defendants as here, or the co parceners; and, plaintiff's father having relinquished this present claim on the cause of action in that suit, can the present suit be entertained? We think the section (7) cited prohibits this suit being entertained. A case in Marshall's Reports, 19th February 1863, page 286, Shumsuhnissa and Buzl-ul-Ruheem, has been cited to us by the appellant to support his view. But in that case the wife, who sued, had come subsequently to the knowledge that a certain item had, amongst other items, been misappropriated by her husband, and she had no means of knowing the fact before, the husband alone having full and entire control over each and every portion of his wife's property. But here such is not the case, and the plaintiff's father had the same means of knowledge, as the plaintiff, of the property which form the subject of this suit.

On the other hand, in a case, 2nd February 1865, page 149, No. 12, Sutherland's Weekly Reporter, it was clearly held that, where the subject of both suits in that case was to establish the plaintiff's husband's title, and obtain possession of the land as the husband's widow and representative, there was but one cause of action, and the plaintiff ought, under section 7 of Act VIII. of 1859, to have included her whole claim in one suit.

We think the principle of this ruling is applicable to the facts of this case, and that plaintiff is on that principle precluded by section 7 of Act VIII. of 1859 from suing; and we, therefore, affirm the decision of the Court below, and dismiss this appeal with costs.

The 16th May 1865.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Land taken for Railway—Right of way.

Case No. 418 of 1865.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 2nd December 1864, affirming a decision passed by the Moonsiff of that District, dated the 26th July 1864.

Collector of the 24-Pergunnahs and another (Defendants), *Appellants,*

versus

Nobin Chunder Ghose (Plaintiff), *Respondent.*

Baboo Kissen Kishore Ghose for Appellants.

Baboos Kali Prosunno Dutt and *Romesh Chunder Mitter* for Respondent.

A right of way cannot, by the provisions of Act VI. of 1857, continue to exist over land acquired by a Railway Company under that Act with the aid of Government. If, however, the Railway Company, by their representations and conduct, lay themselves under legal obligation to provide a way, such obligation may be enforced.

THE line of the South-Eastern Railway, passing through the plaintiff's mouza, has severed about 1,200 beegahs of land from the remaining portion of the mouza, which lies on the south side of the line. The ryots of the land so severed live on the southern side of the Railroad, and, before the making of the line, they had access by a road from their dwelling-houses to the land cultivated by them. This suit is brought against the Railway Company (the Government being also made defendant) to procure the removal of obstructions caused by them, and to establish the right of the plaintiff and his ryots to a road across the railway. Both the lower Courts have decreed in substance the plaintiff's suit, principally because the Courts find that the plaintiff's ryots have no mode of access to their lands except by crossing the line; and that their right to pass over the land now occupied by the railway remains as it was before the railway was made, notwithstanding that the land itself has been acquired by the Railway Company.

We think the decision cannot be supported on these grounds. The Railway Company, with the aid of Government, acquired the land under the provisions of Act VI. of 1857; and by the 8th section of that Act, the land taken became vested in the Government, and afterwards in the Railway Company, absolutely, and free from every right or interest therein, of whatever description, possessed by the former proprietors, or by other persons. All rights before existing, whether of passage or of any other kind, absolutely ceased upon the acquisition of the land for the railway; and no right of way afterwards arose, or was continued, merely because there remained no mode of access to the land on the north, otherwise than by crossing the line. The express provisions of the law are not consistent with the existence of such a right.

In the judgment of the Lower Appellate Court there is reference to a promise stated to have been made by the Railway Company to provide a level crossing at the place in question; and the Railway Map, which is in evidence, shows the trace of a road there. If the Railway Company have, by their representations and conduct, laid themselves under legal obligation to provide a road or crossing, the plaintiff is entitled to enforce that obligation; and, although the present suit is based on a misconception of his strict rights (which in our view arise, not as he supposes from the continued existence of the old rights, but from the acts of the Railway Company in conferring a new right of way), we think the suit may nevertheless proceed for the purpose of obtaining the relief to which he is really entitled. We must remand the case in order that it may be ascertained whether the Railway Company have, by their conduct or representations, contracted to provide and maintain any and what description of way for the plaintiff and his ryots over the line. If the Court is satisfied by the evidence that the defendants have so engaged, a decree may be awarded in plaintiff's favour.