Bayley, J.—We think that this special appeal ought to be decreed with costs, and the judgment of the Lower Appellate Court reversed.

Plaintiff sued for confirmation of *ijaradaree* rights, and claimed the lands as rent-paying lands; he sued also for assessment of rents.

It is necessary to see whether the lands in dispute were rent-paying lands, and whether plaintiff had evidence on the record to show that he collected rents from these lands.

The plaintiff's suit for rent was dismissed on the 27th of April 1867, and upon this dismissal the plaintiff instituted this present suit on the allegation that he had been dispossessed.

On the 10th of September 1867 he was ordered to produce his witnesses, and the 1st of November was fixed as the date of hearing. But as on that day, which was the fourth day after the re-opening of the Court, neither plaintiff nor his pleaders appeared, the case was dismissed agreeably to Section 114, Act VIII. of 1859.

An application was then made under Section 119 of the said Act for a new trial on the ground that Section 114 did not strictly apply to the present case.

The re-trial was refused, and the case was again dismissed, but the Judge, on appeal, directed a determination to be come to under the provisions of Section 148.

Then after remand for this purpose, new witnesses and new documents were produced, and the suit of the plaintiff was again dismissed.

In dissatisfaction of this decree of the first Court, an appeal was preferred to the Judge, and the Judge decreed the appeal of the plaintiff, and reversed the decision of the first Court.

The grounds taken in special appeal against the decision of the Lower Appellate Court are, *1st*, upon the plea of limitation, the Lower Appellate Court has erroneously placed the burthen of proof upon the defendants; and, *2nd*, that the Lower Appellate Court had not the authority to decide the case upon documents admitted subsequent to the completion of the record, contrary to the provisions of Section 148, Act VIII. of 1859.

The Lower Appellate Court's judgment is erroneous, and must therefore be reversed. The case was remanded to be re-tried under the terms of Section 148, Act VIII. of 1859, which is as follows: "If either "party to a suit to whom time may have "been granted shall fail to produce his "proofs, or to cause the attendance of his "witnesses, or to perform any other act "for which time may have been allowed, "the Court *shall* proceed to a decision of "the suit on the record, notwithstanding "such default."

The words of the law are that the Court *shall* proceed to a decision of the suit on the record, and not that the Court *may* proceed to a decision of the suit; and consequently the Court was not justified in taking and in determining on any evidence not on the record when the case was remanded, and such evidence must, therefore, be taken as if it had no existence.

It would then ordinarily be necessary to remand the case in order that the Judge might come to a finding on any other evidence legally on record. It is pointed out to us, however, that there is no evidence, other than that taken after remand, on the record in support of plaintiff's case. We have ascertained that the fact is so, and it is, therefore, unnecessary to remand the case, and it remains only to dismiss the plaintiff's suit, and decree this special appeal with costs of all Courts.

The 7th June 1869.

Present:

The Hon'ble H. V Bayley and C. Hobhouse, *Judges.*

Survey proceedings—Cause of action—Objection.

Case No. 2849 of 1868.

Special Appeal from a decision passed by the Judge of Dacca, dated the 30th June 1868, affirming a decision of the Moonsiff of Bhangah, dated the 14th December 1866.

Soodukhina Chowdhrain (one of the Defendants), *Appellant,*

versus

Issur Chunder Mojoomdar (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Romesh Chunder Mitter* and *Sreenath Doss* for Appellant.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondent.

Plaintiff having sued as the shebait of certain lands in defendant's talook, alleging that they belonged to his lakheraj *debutter*, and asking to have a thak demarcation amended, and his right declared, it was held that, as plaintiff had been present at the survey-proceedings which were his own act, he had no cause of action, and that in this case such an objection on the part of the defendant ought to be admitted even in special appeal

Hobhouse, J.—In this case, it is necessary to set forth exactly what was the claim and prayer of the plaintiff, in order that we may come to a right understanding and to a right judgment upon the points taken before us in special appeal.

Plaintiff sues on the ground that he was the shebait of certain lands in the talook of the defendant (special appellant before us), and he alleged that some 13 beegahs 7½ cottahs of land belonging to his lakheraj *debutter* had, without his knowledge, been thak demarcated with the defendant's talook; and so he sued to have that thak demarcation amended, to set aside a certain Act X. decree, and to have his right declared to the lands as his *debutter*, alleging that his cause of action arose from the time of the thak measurement.

Several issues were taken in the first Court and in the Lower Appellate Court, but it is not necessary that we should now refer in detail to those issues, because there are only two points taken before us in special appeal, and they are these—

First, the thak measurement of the lands in suit being the cause of action which the plaintiffs sets up, it is urged that, as regards all the lands in dispute, the plaintiff had no cause of action against the defendants.

The second point has reference to only a small portion, *viz.*, one beegah and six cottahs of the lands in dispute. And in the matter of these lands, it is urged that the case is *res judicata* without reference to the Act X. decision which the plaintiff sues to set aside.

With reference to the second point, we think it unnecessary to give judgment upon it, because we are of opinion that the special appellant must succeed upon the first point.

In accordance with the decisions which we have from time to time given upon this point, we would not in the Court of last appeal ordinarily dismiss the plaintiff's suit, simply on the ground that that suit did not originally disclose any cause of action. But here we think that the plaintiff, upon his own showing and upon his own plaint, had no cause of action whatever against the defendant; and that this being so, he was altogether unjustified in dragging the defendant into Court.

We are referred by the special respondent's pleader to two cases, one of which is to be found at page 350, Volume XI. of the Weekly Reporter, and another at page 460, Volume X. of the Weekly Reporter, which are said to be on all fours with the present case.

We are of opinion, however, that the present case materially differs as to its facts from both those cases.

In the *first* case cited, the facts found are (page 352) that the defendants actually ousted the plaintiff out of about half of the lands in dispute, and never for a moment denied that the plaintiff had a cause of action against them in regard to the other half of the lands, but, on the contrary, at once joined issue with the plaintiff as to both the plots of lands on one common ground.

In the *second* case cited, the fact found was that the conduct of the defendants in the course of a particular suit did most certainly put an obstacle in the way of the plaintiffs' enjoying their rights, if they had them, and fully justified the plaintiffs in bringing the suit.

It is only necessary to state these facts to show that they materially differ from the facts in the present case. Here, as the Lower Appellate Court puts it, the case is of an unusual nature, the plaintiff coming in to undo an act by which he is ordinarily expected to abide. And the meaning of that is this, *viz.*, that, if there was any error in the thak proceedings, the plaintiff was himself the perpetrator of that error. He was present at the thak proceedings; and in these thak proceedings the lands were demarcated, not as his *debutter*, but as *mál* lands of this very talook of which the defendants are now the proprietors, and of which he, the plaintiff, was then the proprietor; so that, the plaintiff's cause of action, as set forth by his own plaint, being the thak proceedings, that cause of action was not only not given by the defendants or any one else, but by the plaintiff himself.

This is a much stronger case than that to be found in page 64, Volume VIII. of the Weekly Reporter, in which it was held that the plaintiff had no cause of action in a suit

of an exactly similar description, and in which the Division Bench held that the suit must be dismissed by reason that no cause of action was disclosed in it.

It is contended by the pleader for the special respondent that the thak proceedings are not shown to have been conducted with his knowledge. But on this point, we think that the record of the Court below clearly shows that those proceedings were actually the act of the plaintiff himself.

The issues between the parties were not, whether those proceedings were the act of the plaintiff, but whether those proceedings having been the act of the plaintiff, he could, in the words of the second Court, "proceed with his present suit in contravention of his own act."

Both the Courts have tried the case as if the plaintiff had admitted that the survey-proceedings were the acts of the plaintiff. The first Court said that it would be an injustice for the plaintiff if he were precluded from obtaining redress in contravention of his errors, which clearly proceeded from ignorance. And the second Court, in the words which I have already quoted, distinctly referred to the survey-proceedings as the act of the plaintiff.

We think, then, that the plaint discloses no cause of action against the defendants, and that this is quite a case in which we ought to admit the objection taken, even at the last moment, and we direct that the plaintiff's suit be dismissed with costs of all Courts.

The 7th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Alienation by Hindoo widow—Suit by reversioner—Declaratory decree.

Case No. 246 of 1868.

Regular Appeal from a decision passed by the Judge of Patna, dated the 1st September 1868.

Shewuk Ram Pershad (Plaintiff), *Appellant,*

versus

Mahomed Shumsool Hada and another (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Toolsee Doss Seal* and *Umurnath Bose* for Appellant.

Messrs. A. T. T. Peterson and *R. E. Twidale, Baboo Romesh Chunder Mitter* and *Moonshee Mahomed Yusuff* for Respondents

A reversioner can, during the lifetime of the alienor, commence a suit to declare that a conveyance is not binding upon him beyond the life of the alienor.

A deed of conveyance by a Hindoo widow is an act hostile to and invades a reversioner's rights, and as such, warrants his suing for a declaratory decree.

Kemp, J.—THIS is a suit the substantial object of which is to have a deed of conveyance by one Ranee Dhun Koer, dated the 13th of November 1854, declared to be not binding as against the plaintiff beyond the lifetime of Dhun Koer. The plaintiff has asked to have the deed of sale cancelled, but it does not follow that, because he has asked too much, the Court will refuse to give him that relief which he may be entitled to.

The plaintiff claims as reversionary heir to Hur Narain. The defendant No. 2, Dhun Koer, is the alienor. The defer No. 1, Moulvie Shumsool Hada, is alienee.

The Judge raised the following issues for trial:—

1st.—Has the suit been undervalued?

2nd.—Is the suit barred under the general or any special law of limitation?

3rd.—Is the plaintiff entitled to a declaratory decree?

4th.—Whether the plaintiff is the heir of Hur Narain or not; and, if so, whether the alienation by Ranee Dhun Koer, the daughter-in-law of Hur Narain, is valid or not?

5th.—Whether the properties alienated belong exclusively to Ranee Dhun Koer, or not?

The Judge disposed of the suit on the *third* issue. He observes that granting the suit is in time, he was of opinion that there is no sufficient reason for making a declaratory decree, inasmuch as the alienation which took place fourteen years ago may be as effectually questioned on the death of Ranee Dhun Koer whenever that event may take place, as now that it is by no means certain whether the plaintiff will be alive to question the alienation