to have been, to enter upon possession and enjoyment of the land, which is the subject of lease, eight months before he was let into it, he would have put into his pocket a certain margin of rents and profits, namely, the difference between the net receipts which he would have got from the land and the payments which he would have had to make to the lessors in the shape of rent. Plainly this claim is of the nature of a claim for damages, and it can only be ascertained by a trial what the amount of the loss sustained by the defendant in this way actually was. We think that an indefinite claim of the nature of damages of this sort cannot be set up as a set-off against the specific claim of the plaintiff for rent of later years which is made in this present suit. It must be made the subject of a separate suit if the defendant has really any ground whatever to make a claim for substantial damages.

Again, with regard to the third objection, the defendant has manifestly no right to ask that the deposit-money should be set off against the plaintiff's claim, unless it is money which is, at the present time, or rather was, at the time when the suit was brought, due from the plaintiff, and payable to the defendant. But it seems that there is no evidence before the Court upon which this could be established. It is admitted that the money was deposited under the terms of the lease, whatever those were, to meet the requirements of certain provisions in the lease. But the lease is not in evidence in this case; and we have no means of knowing whether this sum of money was, at the time when the suit was brought, money in the hands of the plaintiff due and payable to the defendant. And, unless it was so, the defendant had no right to claim that it should be set off against the plaintiff's claim; or, in other words, that he should be credited with it as against the plaintiff.

But, while we think that the three first objections put forward by the special appellant fail, we are also of opinion that the fourth and the last is good. The plaintiff claims to be paid interest, not only in respect of his share of the annual rent which, the defendant admits, is due from him to the lessors as from the date when it became due, but he also asks for interest upon the kists of this rent which, he says, became due during the currency of the different years from the dates in each year at which they so became due. The defendant's admission, however, did not extend to this length; and, in the absence of the kubooleut or pottah, we are unable to say whether the plaintiff in entitled, on the terms of the lease, to interest for default of payment of the different kists in the manner alleged by him. We have already said that the kubooleut upon which the plaintiff sues was not admissible, and was not admitted in evidence. We are thus without the means of knowing whether the plaintiff's claim could be rightly established in this respect or not. Of course this objection does not in any way affect the lawfulness of the arrear of interest from the end of the year, when, undoubtedly, the annual rent became due according to the admission of the defendant. Consequently, the allowing of this objection will have only the effect of diminishing the amount which has been awarded by way of interest by the lower Courts to the extent of the interest on the different kists within the year. The decree of the Lower Appellate Court must be modified to this extent. Substantially, however, we think that the appeal has failed, and that the respondent ought to have his costs of this Court.

The 22nd April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Possessory Suit—Wrongs and Remedies—Right to Relief.

Case No. 621 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 21st December 1872, reversing a decision of the Moonsiff of Lushkerpore, dated the 21st June 1872.

Bishnoo Pershad Bunnick (Plaintiff), *Appellant,*

versus

Ram Coomar Deb and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Bykunt Nath Doss* for Appellant.

Baboo Debendro Narain Bose for Respondents.

A plaintiff, proving a wrong done to him, though not exactly to the extent of which he complains, is entitled to relief though not to the extent or on the ground on which he asks it.

Case in 12 W. R. 248 explained.

Markby, J.—It appears that in this case the plaintiff turned the defendant out of

possession on the 3rd Bysack 1277. The defendant immediately recovered possession by a summary proceeding under section 15 of Act XIV. of 1859, whereupon the plaintiff brought this suit.

Both parties claim the land as their separate property.

The first Court gave the plaintiff a decree for possession of an undivided 12-annas and 15-gundas share.

The second Court set aside that decree, and dismissed the suit *in toto*.

We are now satisfied that the view taken by the Moonsiff as to the nature of the plaintiff's interest was right; the question turns entirely on the construction of one document, and it is clear that upon that document the plaintiff is entitled to a 12-annas 15-gundas share.

The only doubt is whether the plaintiff having sued to recover exclusive possession of the whole property can recover an undivided share. But we think he can. In right of his share, the plaintiff could claim to be admitted to a joint possession of the property, and the defendant was guilty of a wrong in keeping him out. The plaintiff has a right, as against the defendant, to be restored to possession, although not to possession exactly of that nature to which he laid claim. We think it would be useless and unnecessary to put the plaintiff to a fresh suit. But, both parties having been in the wrong, we are not disposed to give any costs in this Court or the Courts below.

The case in 12 Weekly Reporter 248 has, we think, been misunderstood. We believe that decision to be in accordance with the prevailing opinion in this Court that a party, asking to have a right declared of a specific nature, must prove the right which he claims (see 6 Weekly Reporter 311). The case is quite different when the plaintiff proves a wrong done to him, though not exactly to the extent of which he complains, or that he is entitled to relief, though not exactly to the extent or on the very ground which he asks it. The stricter rule applied to declaratory decrees does not apply to all other cases. Possibly it escaped the attention of the Court in the case reported in 19 Weekly Reporter 195 that the decision in 12 Weekly Reporter dealt only with a suit for a declaratory decree.

The decision of the Subordinate Judge will be set aside, and that of the Moonsiff restored and affirmed. And each party will pay their own costs in this Court and the lower Courts.

The 23rd April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Mortgage prior to Registration Act.

Case No. 1438 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 8th April 1873, affirming a decision of the Additional Moonsiff of that District, dated the 4th January 1873.

Sreemutty Fyezoonnissa (one of the Defendants), *Appellant*,

versus

Moulvie Sadutoollah (Plaintiff), *Respondent*.

Baboo Bama Churn Banerjee for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where a complete title as mortgagee was acquired before the Registration Act of 1864, the mortgage, though not registered, was held to be good against a registered deed of sale executed after Act XX. of 1866 came into operation.

Couch, C.J.—In this case the mortgage was in 1861, and it has been found that the money was advanced, and the mortgage completed by possession. The mortgagee, therefore, even before the Registration Act of 1864, acquired a complete title as mortgagee. We agree with the learned Judges who decided the case reported in Volume X., Weekly Reporter, page 65, in the reasons which they give for holding that section 50 of Act XX. of 1866 would not operate to invalidate that title. The mortgage, although not registered, would be good against the defendant's deed of sale, which was executed after Act XX. of 1866 came into operation, and which *was* registered.

The appeal must be dismissed with costs.