

his right, to shew that the sales which they set up are binding upon him. There appears no objection whatever to the frame of the suit. The decree will be reversed and the case remanded for decision.

1873.  
July 23.  
R. A. No. 56  
of 1873.

INNES, J. :—I agree that there is no objection whatever on the frame of the suit. See as to this, *the Commissioners of Sewers of the city of London v. Glasse (Epping Forest Case)* reported in 41, L. J. CHY., p. 409.

### Appellate Jurisdiction. (a)

*Regular Appeal No. 80 of 1873.*

JANAKI AMMA'L.....*Appellant.*

KA'MALATHAMMA'L.....*Respondent.*

In a former suit the present defendant sued as owner by right of inheritance to recover the property of her deceased husband, and the present plaintiff resisted that suit on the ground of her preferable right to inherit. Having failed in that suit, plaintiff brought the present suit to recover half the property on the basis of a family agreement made between her and the present defendant's deceased husband. This agreement was designedly suppressed at the period of the former suit. *Held*, that the suit should be dismissed. That plaintiff in the present suit insisted upon a valid family compact varying the ordinary rules of inheritance, having, however, previously appealed to that general rule and designedly kept back the compact upon which she now sought to insist. That there could be no stronger case of an absolute waiver of that contract and of conduct rendering it wholly inequitable to permit her now to insist upon it.

*Seemle*, where a defendant has been sued by a plaintiff upon his right of ownership, plaintiff's recovery negatives all grounds of defence to that action then existent and within the plaintiff's knowledge.

**T**HIS was a Regular Appeal against the decision of E. B. Foord, the District Judge of Chingleput, in Original Suit No. 22 of 1872.

1873.  
August 6.  
R. A. No. 80  
of 1873.

The plaint stated that plaintiff's late husband, Arumuga Mudali, and defendant's late husband, Kumarasámi Mudali, were brothers that 9 days after the death of Arumuga, in accordance with an arrangement made by the relatives of the family, plaintiff and Kumarasámi jointly executed an agreement (A) on plain paper, dated 13th April 1859, which was subsequently engrossed on a stamp paper (B) on

(a) Present : Holloway, Acting C. J. and Innes, J.

1873.  
August 6.  
R. A. No. 80  
of 1873.

the 25th idem, in which it was agreed that if Kumarasámi died without male issue, the family property should be divided equally between plaintiff and defendant, and that Kumarasámi having died without male issue in 1865, the plaintiff sued to recover a moiety of the said property valued at Rupees 2,567-2-7.

The defendant pleaded that the plaintiff was estopped from bringing this suit in opposition to the pleas raised by her in Suit No. 143 of 1867, District Munsif's file (*Appeal No. 83 of 1870* this Court's file, and *Special Appeal No. 41 of 1872*, High Court's file), in which the agreements now sued on were not produced; that the said agreements were forged; and that Kumarasámi 5 or 6 days before his death, which occurred on the 18th March 1865, made a nuncupative Will, to the effect that defendant should enjoy the family property, adopt a son, and maintain the plaintiff:

The District Judge delivered the following judgment:—  
 “The due execution of agreements A and B, has, in my opinion, been proved beyond a doubt by the plaintiff's witnesses. I do not believe the improbable statements of defendant's witnesses regarding the alleged nuncupative Will with authority to adopt, which they say was made by Kumarasámi 5 or 6 days before his death, in the presence of plaintiff, who acquiesced therein. I think it most unlikely that after executing A and B and depositing them (as is proved by plaintiff's witnesses) with one of the arbitrators, Kumarasámi should have taken no steps to revoke them by means of another document, more especially as defendant's 3rd witness said that he (Kumarasámi) was able to settle accounts with him at the time in question.

Although there can, in my opinion, be no doubt that plaintiff's defence in Suit No. 143 of 1867 was false, and that she ought to have based her defence on A and B, I think she ought not, on that ground alone, to be debarred from recovering the property she is entitled to, under the terms of those agreements. That she acted so under legal advice seems certain, for her 12th witness who was her pleader in the former suit says that the agreements were then shown to him, and that *he* advised their non-produc-

tion, because she had pleaded division and adoption. It seems therefore neither just nor reasonable that she should be deprived of her right, because, acting under bad advice, she made a false defence in the former suit between the parties.

1873.  
August 6.  
R. A. No. 80  
of 1873.

The result is that I adjudge that defendant do put plaintiff in possession of the property claimed in the plaint, but, under the circumstances of the case, I think each party should bear her own costs."

The defendant appealed on the following grounds, among others:—

I.—The plaintiff is estopped from bringing this suit.

2. Her claim in this suit is in opposition to the pleas raised by her in Suit No. 143 of 1867 of Carungooly District Munsif's Court, Appeal Suit No. 83 of 1870 of the Civil Court of Chingleput, Special Appeal Suit No. 141 of 1872 of the High Court.

*Gould* (with him *Rungiah Nayudu*) for the appellant (having stated the facts)—We sued in 1867 and defendant was then bound to set out all her title. We recovered in that suit. What title did defendant then put forward? First, that the brothers were divided, and secondly, that her husband gave her authority to adopt. She cannot now come forward with this new case on the agreements, having designedly suppressed them in the former suit.

He referred to the judgment of Holloway, J. in the *Shivaganga case* (II, M. H. C. R.)

[HOLLOWAY, J. referred to the passage at page 144—  
"There is no question here as to the technicalities flowing from the nature of the English action of ejectment. The decree could be arrived at only by affirming all matters necessary to the proof of the plaintiff's title, and by negating all matters, perhaps whether pleaded or not, which would enable the defendant to resist such a decree. It is unnecessary, however, in justification of my judgment, to push the proposition so far."]

1873.  
August 6.  
R. A. No. 80 Stewart.  
of 1873.

*Rama Rau*, for the respondent, referred to *Hunter v. Stewart*.

[HOLLOWAY, J.—See my explanation of that case in III, M. H. C. R. That case depended on a peculiarity of Bills in Equity.]

In the new Evidence Act only two sorts of estoppel are mentioned (Secs. 115, 116, 117) and I submit that this case does not fall under either.

The following judgment was delivered by

HOLLOWAY, Ag. C. J.—In a former suit the present defendant sued as owner by right of inheritance to recover the property of her deceased husband and the present plaintiff resisted that suit on the ground of her preferable right to inherit. Having failed in that suit, present plaintiff sues to recover half the property on the basis of a family agreement made between her and the present defendant's deceased husband. It is part of the case that this agreement was designedly suppressed at the period of the former suit.

In this case, therefore, the question suggested at II, M. H. C. R., 144, arises directly for solution.

Where a defendant has been sued by a plaintiff upon his right of ownership, does the plaintiff's recovery negative all grounds of defence to that action then existent and within the plaintiff's knowledge?

An affirmative answer to that question will probably be found to be the correct one, both on principle and authority, when regard is had to the difference of the action from the English one, and to the fact that no English authority on this matter can be precisely in point.

It is unnecessary, however, to discuss this point at large, for there is another perfectly satisfactory ground for saying that this suit cannot be maintained.

The plaintiff now insists upon a valid family compact varying the ordinary rules of inheritance. She has, however, previously appealed to that general rule, litigated the matter through three Courts, designedly keeping back the compact

upon which she now seeks to insist. There can be no stronger case of an absolute waiver of that contract and of conduct rendering it wholly inequitable to permit her now to insist upon it.

1873.  
August 6.  
R. A. No. 80  
of 1873.

The original suit must be dismissed ; there will be no costs throughout.

**Appellate Jurisdiction.(a)**

*Regular Appeal No. 140 of 1872.*

NA'RA'YANASA'MI MUDALI and 7 others.....*Appellants.*

KUMARASA'MI GURUKKAL.....*Respondent.*

Plaintiff sued to establish his right to the dharmakartaship and to the hereditary office of Pooja Stanika in a pagoda. He alleged that he held the office of Pooja Stanika hereditarily, and that dharmakartaship was assigned to him by the original dharmakartas by deed (No. I) but that he was afterwards forcibly dispossessed by defendants. Defendants denied plaintiff's hereditary right to the office of Pooja Stanika and declared that he was removed from the dharmakartaship for neglecting his duties and that they were appointed instead (by Document No. IV). The District Judge gave judgment in favor of plaintiff. The defendants appealed. An issue was sent to the Lower Court, whether, assuming Exhibit I to be revocable, did the persons who executed Exhibit IV constitute the collective body entitled to revoke it. The Lower Court found this issue in the negative. *Held*, (by the High Court) that this was not properly a suit for a declaration. The object of the suit and the effect of the declaration would have been to put the plaintiff in possession of that from which he had been ousted. That as to the claim to the dharmakartaship, Document I showed that the plaintiff was a mere appointee as agent and that, as the authority given by it was not revoked by IV, the case was that of one ousted from a possession which he held upon a good title by those who had shown none. That on the principle of such cases as *Asher v. Whitlock*, the plaintiff had a right to the restoration of that possession.

**T**HIS was a Regular Appeal against the decision of E. B. Foord, the District Judge of Chingleput, in Original Suit No. 4 of 1871.

1873.  
July 23.  
R. A. No 140  
of 1872.

The plaintiff sued to establish his right to the dharmakartaship and to the hereditary office of "Pooja Stanika" in the pagoda of Mookteswarar at Conjeveram, together with arrears of income.

The plaint alleged that the plaintiff held the office of "Pooja Stanika" hereditarily, and dharmakartaship was

(a) Present : Holloway, Ag. C. J. and Innes, J.