Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Soorjomonee Dayee v. *Suddanund Mohapatter, from the High Court of Judicature at Fort William in Bengal; delivered on the 8th July* 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS suit was brought by Suddanund Mohapatter, as adopted son and heir-at-law of Chuckurdhur, against Soorjomonee Dayee, the widow of Bonomalee, the devisee of Chuckurdhur, to obtain possession of all the estate, real and personal, of Chuckurdhur. Other Defendants were joined, but inasmuch as Soorjomonee is the only Appellant against the judgment, which was in favour of the Plaintiff, the rights of the Plaintiff, as against Bonomalee, have only to be considered. The claim to the personal property was abandoned by the Plaintiff, nor did he dispute that Chuckurdhur had the right to dispose by will of all real property which had been self-acquired by him; but he asserted that there was no self-acquired real property, that all the real property of Chuckurdhur was either ancestral in the strict sense of the word (that is, acquired by inheritance from his father) or bought out of the income of ancestral property, whereupon it also became ancestral. The Defendant did not maintain that Chuckurdhur could devise his ancestral property, properly so called, but maintained that what he had bought from the income of ancestral property was, according to the Mitakshura law (which is admittedly applicable

to this case) self-acquired, and disposable by his will.

She further maintained that this very question had been decided in favour of Bonomalee in a previous suit between the Plaintiff and him. She also contended that in fact a large portion of the property had been bought by Chuckurdhur from other sources than the income of ancestral property.

The High Court held that this question had not been so determined as to bind the Plaintiff. After directing further evidence to be taken upon the point, they found as a fact that the real property bought by Chuckurdhur had been bought from the income of ancestral property; and, that being so, they ruled that, according to the Mitakshura law, he had no power to dispose of it by will.

The first question which arises in the cause is, whether or not it had been decided in a manner binding upon the parties, that Chuckurdhur had the power to devise by will such real property as he had acquired out of the income of his ancestral property.

The suit in which this question is alleged by the Defendant to have been so decided was brought by the Plaintiff against Bonomalee and others in January 1859, and judgment was given in it in 1863. It is not now denied by the counsel for the Respondent that this question was in fact decided by that judgment; but it is argued that the question was not so raised as to give the Court jurisdiction to decide it, and that the judgment upon it was *ultra vires*.

The facts necessary to make that suit intelligible are as follows:—

Chuckurdhur had first adopted the Plaintiff, and subsequently adopted Bonomalee. On the 5th April 1849 he made a will, giving a nine annas share of his real estate to the Plaintiff, and a seven annas share to Bonomalee, dividing his personal estate equally between them. The will contained a clause to the effect that if either devisee disputed it, he should forfeit all benefit

under it. Chuckurdhur shortly afterwards published this will by filing it in the Court of the Collector.

Violent disputes having arisen between the Plaintiff and his father, in the course of which the Plaintiff disputed his father's competence to make a will, Chuckurdhur, in 1857, filed in the same Court two petitions, the purport of which was that he disowned the Plaintiff as his son, and adopted, and acted upon, the clause of the will depriving either devisee who disputed it of any benefit under it. On the 14th January 1859 the Plaintiff filed a plaint against his father, and against Bonomalee and some other persons who had obtained property under deeds executed by his father, for cancellation of those deeds, for cancellation of the adoption of Bonomalee, for cancellation of the will, and for maintenance. He alleged the will to be inoperative and fraudulent, on the ground that his father had no testamentary power over his ancestral property, to which the Plaintiff was jointly entitled with him during his life; he further alleged that his father had acquired such property as he had not inherited, from the proceeds of his ancestral property, and that such property was therefore ancestral; and in a schedule appended to his plaint, entitled "A schedule of the disputed pro- " perty," he distinguished ancestral zemindaries from zemindaries acquired from the profits of ancestral estate.

The case of Kanth Narain Singh v. Prem Lal Paurey and others, reported in the third volume of the "Weekly Reporter," 201, decides that it was competent for the Plaintiff to bring such suit in his father's lifetime.

Chuckurdhur, in his answer, maintained his right of disposition by will in these terms: "The " Plaintiff writes that I had no authority to " transfer ancestral estates by sale or gift, and " prays for the reversal of the will and the " deeds of gift executed by me. This is his " mistake, because I am the owner of all the

" estates, ancestral and self-acquired, and have " every power to alienate them by sale or gift in " various ways." He further denied the fact that his purchases of land were made solely from profits of the ancestral estate. In the replication the Plaintiff re-asserted his right of inheritance, and maintained that in that right he was entitled to require, among other things, the cancellation of the will.

He re-asserted that all the estates of his father were ancestral estates, and none self-acquired according to Hindoo law, and that by that law they are not transferable by sale or gift or otherwise; and joined issue on the fact that the purchased estates were acquired otherwise than from the proceeds of ancestral estate.

In their Lordships' opinion, the effect of the pleadings is that the Plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father, and such as he had bought out of the income of it.

It is true that this question is not raised as distinctly as it ought to have been in the issues, the only issue directly referring to the will being, whether or not it was assented to by the Plaintiff, an issue clearly embracing but a portion of the controversy between the parties.

That the question was, however, raised in the suit, appears not only by the pleadings which have been referred to, but by the grounds of appeal by the Plaintiff from the decision of the Principal Sudder Ameen, which was against him, wherein he insists (among other things) that the will is wholly irregular and illegal, and that the Defendant had no power under the shastres to execute such a will or wills. He says, "all the properties moveable " and immoveable are ancestral, and not the

"self-acquired properties of my adopted father;
"therefore, according to the provisions of the
"Mitakshura shastre, gifts of even a portion
"without the consent of your petitioner are
"illegal and improper." Chuckurdhur, in opposition to the grounds of appeal, insists that his will was valid and regular, and that he had the power to dispose by it of all property not ancestral in the proper sense.

If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of Mussamat Mitna v. Syad Fuzl Rub and others, reported in 13 Moore's Indian Appeals, page 573, wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.

Their Lordships are of opinion that the Plaintiff sought for the decision of the Court on this question, whether his father had or had not the power to dispose of all or part of his real property by will, he himself dividing that property under two heads, viz., ancestral property, and that derived from the income or profits of ancestral property, that this question was raised by the pleadings and treated by both parties as before the Court, and that the Court had jurisdiction, and indeed were called upon, to decide whether or not the will was operative as to all, or to any, or what portion of the property. The Principal Sudder Ameen decided in substance in favour of the Plaintiff as far as the ancestral property was concerned, but dismissed his suit as far as it related to the property derived from the income of ancestral property.

An appeal from this decision came before the High Court on the 28th February 1863, after the death of Chuckurdhur, and it now becomes necessary to refer to the judgment given on that appeal. After stating that "the present suit is " brought by Suddanund for maintenance, to " declare the adoption of Bonomalee invalid and " unlawful, to declare that the father's repudiation " of the Plaintiff as a son is illegal and beyond " the father's powers, to declare the will and " petitions disinheriting him inofficious and in- " operative, and to set aside certain deeds of sale " and gift," (with which we are not concerned at present,) the High Court proceed to say that the case involves several important questions of Hindoo law, and they thus divide those questions:—First, "the status of Bonomalee, " whom the Plaintiff seeks to declare to be no " lawful son of Chuckurdhur;" secondly, "the " status of Plaintiff who seeks to be declared a " son, and whom the father sought to repudiate;" and thirdly, "the property." After deciding in favour of the Plaintiff on the question of adoption and status, they then proceed to deal with the question of property in these terms:—"With " respect to the property, our decision must " follow the decisions regarding personal status " above laid down. By the Mitakshura law " applicable to the case, the son has a vested " right of inheritance in the ancestral immove- " able property; and as the question was raised " before us, we must declare that the ancestral " property is only that actually inherited, and " not that which has been acquired or recovered, " even though it may have been acquired from " the income of the ancestral property, for the " income is the property of the tenant for " life to do as he likes with it. On the " other hand, the father has it in his power " to dispose as he likes of all acquired and " all personal property. Such, then, being the " status of the parties, and such the law, we " declare that the will and the petitions sought

" to be set aside are inofficious and inoperative " so far as they profess to deprive the Plaintiff, " the only son of Chuckurdhur, of his right to " succeed to the whole ancestral immoveable " property held by the said Chuckurdhur; but " as regards all other property, seeing that " Chuckurdhur was entitled to do as he chose, " and chose to disinherit his son, we cannot " interfere, and in so far dismiss the prayer of " the Plaintiff. There is not the least doubt that " by the petitions presented by Chuckurdhur, " he unmistakeably published his will and desire " to deprive the Plaintiff of all right to the " property so far as he could deprive him, and " give it to Bonomalee." They then deal with the question of consent to the will, which they find in favour of the Plaintiff; and then they proceed to say, "the father being dead, the " Appellants have waived a decision of the claim " to maintenance; and with respect to the deeds " of sale and gift sought to be set aside, as the " Appellants must again go into Court to recover " possession of the ancestral property, they are " satisfied with the simple declaration that such " deeds cannot affect the ancestral property, and " that they are at liberty in any fresh suit, to " recover possession of all such ancestral pro- " perty." In their Lordships' opinion the Court had the power to substitute, with the consent of the parties, such a declaration for the relief specifically asked for, viz., the cancellation of the will.

The 2nd clause of Act VIII. of the Code of Procedure of 1859 is in these terms: "The Civil " Courts shall not take cognizance of any suit " brought on a cause of action which shall have " been heard and determined by a court of com- " petent jurisdiction in a former suit between " the same parties, or between parties under " whom they claim." Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action, and they are of opinion

that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata,* founded on the principle "*nemo debet bis vexari pro eadem causâ.*" This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns, Gregory v. Molesworth, in which Lord Hardwicke held that where a question was necessarily decided in effect though not in express terms between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston.

Applying these principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the Plaintiff and the Defendant, who, for this purpose, stands in the position of her late husband, that Chuckurdhur's will was operative to dispose of all such real property as he had acquired out of the income of ancestral property. Their Lordships agree with the High Court that Chuckurdhur did in fact devise the property over which he had the power of disposition to Bonomalee; and they regard the petitions of 1857 not as in the nature of new wills, but as declarations of his intention to act upon the clause of forfeiture in his will, a clause which, according to the case of Cook and Turner, reported in 15 Meeson and Welsby, p. 727, and in Symonds' Reports, would be valid and operative.

Having come to this conclusion, their Lordships forbear from intimating any opinion on the points of law which would have arisen had their decision on this been different, on one of the most important of which the Judgment of the 28th of February 1863, and that which is now under appeal, are in conflict.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed.

Considering that the complications which have arisen have been due in some measure to the manner in which Chuckurdhur himself dealt with his property, and that the Courts below, both that of the Principal Sudder Ameen and the High Court, thought this a case in which each party ought to bear his own costs, their Lordships are of opinion that each party should bear his own costs in this Appeal, and before the High Court.