Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Hut Narain Singh v. *Baboo Ram Pershad Singh and another from the High Court of Judicature, at Fort William, in Bengal; delivered May 12th*, 1880.

Present:

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

THIS is a suit brought by the Plaintiffs for an adjudication of their right to and possession of eight annas out of the entire sixteen annas of mouzah Mokundpore Bhatta. The only question is whether the suit is barred by section 2, Act VIII. of 1859; and that depends upon the construction of a decree which was given in suit No. 357 of 1865. In that suit Chuttersal Singh, the father of the Appellant and the son of Pertab Narain Singh, was the Plaintiff. His claim was founded upon a mortgage which Nagbansi Kowar, the widow of Gunga Pershad Singh, had executed in favour of Pertab Narain Singh of a portion of the property, including eight annas of mouzah Bhatta, which had descended to her as the widow and heiress of her husband. The suit was brought against the widow alone, for the purpose of recovering possession of the mortgaged property after foreclosure of the mortgage, and to have a mutation of names. The present Plaintiffs, who were the reversionary heirs of Gunga Pershad Singh, intervened in the suit, and a decree was given against them for the Plaintiff. In a schedule to the plaint in that suit mouzah Bhatta is described as "mouzah Bhatta, usli with dakhili, that is, " mouzah Bhatta Kurun and mouzah Mokund-

Q 1448. 125.—6/80. Wt. . E. & S.

" pore Bhatta;" but in the body of the plaint it is described simply as mouzah Bhatta. There was another mouzah, called Hakumpore, which was also included in the mortgage; it is described in the plaint in that suit as " mouzah Hakumpore, original with dependency." There appears to be a very good reason why mouzah Bhatta was not described in the body of the plaint as usli and dakhili when mouzah Hakumpore was described as mouzah Hakumpore, original with dependency, because, upon referring to the mortgage which is to be found at pages 17 and 18 of the Record, it will be found that the mortgage was of " mouzah Bhatta," not " mouzah Bhatta, usli with dakhili," and of " mouzah Hakumpore, original with dependency." The plaint in the suit followed the description in the mortgage deed.

It was very correctly pointed out by the First Court that the property sought to be recovered was distinctly enumerated in the body of the plaint, and that there was no mention in it that the claim had reference to the description in the schedule. The description in the body of the plaint, and not that in the schedule, was that upon which the Court was called upon to adjudicate; and in so adjudicating the Court ordered, " That a decree be passed in " favour of the Plaintiff; that the shares of " the disputed mouzahs do come into the " possession of the Plaintiff." It is found, as a fact in the present suit, that mouzah Bhatta Kurun and mouzah Mokundpore were not usli and dakhili, but that they were two separate and distinct mouzahs; that they were purchased originally by an ancestor of the Plaintiffs about 100 years ago, eight annas of the one mouzah and sixteen annas of the other. Being, then, two separate and distinct mouzahs, the mortgage deed did not describe them as usli and

dakhili, but conveyed only the eight annas share of mouzah Bhatta. It has been found by both the Lower Courts that the mortgage deed did not include the two mouzahs, that the plaint did not include the two, and that the decree did not include the two; and it is not contended now by the learned Counsel for the Appellant, which he could not well do after the finding of the two Lower Courts, that the mortgage did include the two mouzahs. The question then comes simply to this, was the decree given in favour of Chuttursal Singh for mouzah Mokundpore Bhatta as well as for mouzah Bhatta Kurun. It seems clear that the former suit was not intended to include, and did not include, anything which was not included in the mortgage, and that the decree in the former suit did not affect Mokundpore Bhatta, which is the subject of the present suit, and consequently that the former suit was no bar to the present. Their Lordships, in the course of the argument, expressed their opinion, in concurrence with the judgment of the High Court, that the Plaintiffs were not precluded by sect. 11, Act XXIII. of 1861, from maintaining the present suit.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed. The Appellants must pay the costs of this Appeal.

32