Present: Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

1907. *March* 13.

BABAN APPU *v.* GUNEWARDENE *et al.*

D. C., Galle, 8,159.

Res judicata—*Dismissal of action—Setting up same claim on different ground—Civil Procedure Code, s.* 207.

A party who has failed in one action cannot afterwards set up the same claim in another action between the same parties, and support it on grounds which might have been put forward in the first action.

Section 207 of the Civil Procedure Code makes a judgment conclusive, not only as to matters actually pleaded, put in issue, and tried and decided, but also as to matters which might, and (according to the rules of the Code) ought to, have been pleaded, tried, and decided.

APPEAL by the first and second defendants from a judgment of the District Judge of Galle (G. A. Baumgartner, Esq.).

The facts and arguments are fully stated in the judgments.

Bawa, for the first and second defendants, appellants.

A. St. V. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

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The plaintiff claims a declaration of his title to a piece of land. The first and second defendants denied his title, and also, among other pleas, said that the plaintiff's claim was barred by the decree of the District Court of Galle made on the 21st August, 1903, in a former action between the same parties. In that former action,

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No. 7,013, the present first defendant sued the present plaintiff for a declaration of his title to this same land, and by its decree the Court declared that the present first defendant was entitled to the land, and ordered the present plaintiff to be ejected therefrom.

The second defendant claims by purchase from the first defendant since the date of that decree.

The plaintiff suggested six issues; the first and second defendants agreed to those issues, but suggested some others, one of which was whether the decree in action No. 7,013, D. C., Galle, is a bar to the plaintiff's present claim. The record does not state that the plaintiff agreed to the issues proposed by these defendants, or that the Court accepted them. But on the 28th November, 1906, when the case was called in, it is recorded that these defendants raised the preliminary objection that plaintiff is barred by the decree in D. C., 7,013; arguments were heard on that objection, the plaintiff alleging that in that action he was not represented by any legal adviser, and that no issue whether he had obtained a title by prescription was gone into, and that the decree was made *per incuriam*. The plaintiff in fact wished to set up in this action a claim that he was entitled to the land by prescription—a claim which he might have set up in the previous action.

The Court after hearing the arguments fixed the case for trial on the other issues, without giving any opinion on the preliminary objection. Next day the defendants' proctor applied to the Court for a ruling forthwith on the issue which had been argued the day before, quoting in support of his application section 147 of the Civil Procedure Code. The Judge after hearing both parties took time to consider the application, and on the 28th December, 1906, he refused it. The first two defendants now appeal against that refusal.

The appellants rely on section 207 of the Civil Procedure Code and the explanation appended to that section, which is that "every right ..... to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties." The right to this land was claimed in the former action, and a final decree was passed in that action declaring the present first defendant entitled to that right. The same right is again claimed in this action by the party against whom the decree in the former action was passed, against the party in whose favour it was passed. I do not see how it is possible to say that this claim is not a *res adjudicata*.

The District Judge held that the issue of law put forward by the defendants would not be decisive of the case, and he therefore thought that he was not bound by section 147 to decide that issue

first. He so held, contrary to his own opinion as to the right construction of section 207, because he thought he was bound to follow a judgment of Layard C.J. and Moncreiff J. given on 11th February, 1903, in a case No. 5,905 of the Galle District Court. We have looked at the record of that judgment, which is not reported. It is very short. Layard C.J. says: " A reference to the judgment in District Court, Galle, 1,245, shows that the case was dismissed on the ground that the defendant had failed to prove his cause of action, namely, that he had been ousted from the premises by the defendant in that action. The judgment did not decide the question of title as between the plaintiff and the defendant in that case, and consequently cannot be pleaded as *res judicata* by the defendant in this case, for it did not decide nor purport to decide the question of title. " And Moncreiff J. concurred.

That judgment is, I think, founded on a misapprehension of fact. The plaintiff in the earlier action, 1,245, claimed a declaration that he was entitled to the land; the defendants denied his right, and set up their adverse title; the Court found that the defendants had proved their title; and the decree dismissed the plaintiff's action. That decree might be set aside or varied by an order of a competent Court in proceedings taken for that purpose; but until set aside or varied, it was final between those parties.

The plaintiff in that action afterwards, in action 5,905, made the same claim against the same defendants and sought to support it by an allegation that at the date of the decree in the former the defendants' title, which the Court had held to be good, was bad; the defendants' title was under a certain deed of conveyance, and the plaintiff now alleged that that deed was fraudulent. The main issue to be tried in the second action was therefore whether that deed was fraudulent. But that issue might have been raised in the former action. It was therefore after the decree in the former action a *res adjudicata*. The judgment of Layard C.J. was, I think, based on a mistaken belief that the plaintiff's claim was for damages because he had been ousted; whereas it was for a declaration of his title to the land and only incidentally for damages. His action was dismissed by the District Court, his main claim failing, because the defendants succeeded in the contest as to title. The question of ouster would only have been material if he had succeeded on the contest as to title. The judgment of Layard C.J. is no authority for the proposition that a party who has failed in one action can afterwards set up the same claim in another action between the same parties, and support it by reasons which might have been urged in the first action. I think, therefore, that the District Judge ought to have decided the issue of law raised by the appellants in favour of the appellants, and ought to have dismissed the action; and our judgment should be that the action be dismissed, and that the plaintiff should pay the defendants' costs in both Courts.

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This is an action to vindicate from the defendants a parcel of land which plaintiff claims to be his exclusive property on a title acquired many years ago, and of which he alleged that defendants are in unlawful possession since April, 1904. The first defendant alone sets up title against the plaintiff, and he claims the whole land on a conveyance of 1878. The other defendants claim under the first. Besides setting up title, the defendants plead in bar of the action the decree passed in August, 1903, in an action No. 7,013, District Court, Galle, in which the first defendant, Gunewardene, and two others sued the present plaintiff, Baban Appu, and others to recover the land on the strength of the title now pleaded by defendants. Baban Appu set up his own title, and his co-defendants disclaimed. At the trial of that action judgment was given in Gunewardene's favour, declaring his title to the land, and ordering Baban Appu to be ejected. He resisted the execution of that decree, but was committed to prison, and Gunewardene put in possession. and that is apparently the plaintiff's present cause of action.

On the trial day of the present action a number of issues were agreed upon, amongst them an issue, No. 10, as to whether the decree No. 7,013 and a certain earlier decree, which need not be particularized, were a bar to plaintiff's claim. This issue was discussed as a preliminary matter, but the Court without deciding it adjourned the hearing so as to try the other issues as well. Next day defendants moved the Court for an immediate ruling on the tenth issue, and the learned District Judge made order on a later day holding the decision of the plea of *res judicata* depended on matters still to be tried, and he therefore formally refused to rule on the tenth issue apart from the other issues. He considered himself bound so to hold by the decision of this Court in District Court, Galle, No. 5,905 (I) which I shall presently discuss.

Respondent's counsel before us took a preliminary objection on the ground that no appeal lay against such an order made in the course of the trial. But he admitted that the defendant's plea, if upheld, would be decisive of the whole action, and as it appeared to us that all the material necessary for the right decision of that plea was on the second, we over-ruled the objection.

Now our law of *res judicata*, as laid down in section 207 of the Code of Civil Procedure, is very strict. The whole object of the Code is to discourage a multiplicity of actions and to make each action, once begun, absolutely decisive of the rights of parties in respect of the subject-matter. Section 207 accordingly makes the judgment of the Court conclusive not only as to matters actually pleaded, put in issue, and tried and decided, but also to matters which might, and (according to the rules of the Code) ought to, have been pleaded

(1) *S. C. Min., February* 11, 1903.

tried, and decided. For example, suppose a man has title to a piece of land from two sources, A and B. He brings an action on title A and is defeated; he cannot afterwards sue his defendant on title B. Or, if he is sued in ejectment, and sets up title B only, and is beaten, he cannot thereafter assert title A against his adversary. This is the effect, as I read it, of the explanation to section 207, which says that ' every right of property. . . . . .which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes on the passing of the final decree in the action a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties." Consequently such a decision as that in District Court, Kandy, No. 90,099, would not now be possible, where the plaintiff claimed the incumbency of a Buddhist Vihare on a deed executed by one Ratanapala Unnanse, the admitted former incumbent (1). Being defeated, plaintiffs sued again, claiming the incumbency as the sole surviving pupil of Ratanapala's tutor and predecessor, Mahalla Sobhita (2). It was held that the judgment in the former action was no bar to the new claim. (The decision is not reported.)

Plaintiff concedes that he has acquired no new right to the land since case No. 7,013 was decided, but I understand him to say that at that date he had a prescriptive title, which was never tried or decided against him. That clearly is a " right of property, " which would have been a good defence, which therefore ought to have been set up, and which is now conclusively negatived by the decree in the appellant's favour.

The case No. 5,905, upon which the District Judge relies, arose under the following circumstances. One Cassim Lebbe claimed certain land by virtue of an execution sale in 1872 against the admitted original owner Dona Ana. His adversaries claimed under a deed of donation from Dona Ana dated 1871. Cassim Lebbe first sued them in action No. 1,245, and they pleaded their earlier title, and, alleging a continuous possession thereunder, denied having ousted plaintiff. At the trial plaintiff sought to attack the donation as a fraud on creditors, but the Court refused to settle that issue, and the only issues tried were: (i.) Did Dona Ana execute the donation deed? (ii.) Did defendants oust plaintiff? The first was found in the affirmative and the second in the negative, and thereupon the action was dismissed. Subsequently one Jansz, a creditor of one of the successful defendants, seized the land in execution against her, and Cassim Lebbe's claim having been disallowed, he sued Jansz under section 247 of the Code (action No. 5,905) to have his title declared. Jansz pleaded the decree No. 1,245

(1) (1881) 4 *S. C. C.* 121. (2) *Wendt* 25.

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in bar, and the District Court upheld the plea and dismissed the action. Cassim Lebbe appealed, and this Court on 11th February, 1903, reversed the dismissal. Layard C.J., with whom Moncreiff J. concurred, said: " A reference to the judgment in District Court, Galle, No. 1,245, shows that the case was dismissed on the ground that the plaintiff had failed to prove his cause of action, namely, that he had been ousted from the premises by the defendant in that action. The judgment did not decide the question of title as between the plaintiff and the defendant in that case, and consequently cannot be pleaded as *res judicata* by the defendant in this case, for it did not decide, nor purport to decide, the question of title. " With unfeigned respect for the learned Judges who decided that case, I must say that I cannot subscribe to their decision. It would appear that the question of title was in issue in the older action; at any rate, the claim for the declaration of plaintiff's title could fail only on the assumption that parties were agreed that plaintiff had title, and that defendant only denied having interfered with it, which interference plaintiff had failed to prove. If the title was denied, and defendants set up their own title, it would have been incumbent on the Court to try and determine the question of title, notwithstanding that defendants had not ousted plaintiff, especially if, while denying such ouster, the defendants admitted that they were in adverse possession, and had been from a date anterior even to plaintiff's acquisition or title. This probably was what defendants in action No. 1,245 did allege. Possibly the decision in case No. 5,905 may be supported on the law of *res judicata* as it stood prior to the enactment of the Code of Civil Procedure. Certainly the judgment makes no mention of section 207, and there is nothing to show that the Court's attention was drawn to it. But since the Code, the plaintiff's title was a " right of property, " and also a " right of relief," which could have been claimed or set up in his claim for possession of the land upon the cause of action, for which action No. 1,245 was brought, and the final judgment dismissing that action rendered that title a *res adjudicata* against the plaintiff which he could not agitate afresh.

The case No. 5,905 differs from the present action in the circumstances that the decree relied upon as an estoppel was there a decree for the defendants, while here it was a decree for the plaintiff. Whatever may be said in favour of a plaintiff with two titles to land being allowed first to assert the one and then the other, it cannot reasonably be contended that a defendant when sued in ejectment may first set up one of several defences he possesses, and afterwards, when sued again, set up another of them; or, what comes to the same thing, himself immediately attack his successful adversary in a new action, setting up the matter of that second defence as a ground of claim. That is what the present plaintiff seeks to do, and in my opinion he cannot be permitted to do it.

Plaintiff's counsel alleged that the several judgments obtained against his client were founded far back on a fraudulent partition decree of many years ago, and that each judgment against him merely relied on its predecessor, and that his claim to the land had never been tried on evidence. That fraudulent decree, however, holds good until it is reduced in a properly constituted proceeding, and plaintiff cannot attack it incidentally in an action like the present. But, assuming he could, how about the subsequent decrees, which although based on the partition decree, were passed in plaintiff's presence and after he had been fully heard? They will not fall with the cutting away of their foundation, but will in each instance afford ground for an estoppel. Similar fraud is not alleged against them.

For the reasons I have given I think the appeal should be allowed, the plea of *res judicata* upheld, and plaintiff's action dismissed with costs in both Courts.

Appeal allowed.