1958 *Present :* **Basnayake, C.J., and Pulle, J., and de Silva, J.**

HERATH, Appellant, *and* THE ATTORNEY-GENERAL and another, Respondents

S. C. 152—D. C. Colombo, 7184

Land Redemption Ordinance, No. 6 of 1942—Sections 3 (1) (b), 3 (4), 3 (5), 5 (1), Schedule I—Land Acquisition Act, No. 9 of 1950, ss. 5, 6 et seq., 36, 37 (a), 62 (1)—Land acquired by Land Commissioner without authority—Declaration by Minister—Legality—Can it be canvassed by way of a suit against the Attorney-General ?—Effect of words " the determination of the Land Commissioner shall be final "—Effect of words " shall be conclusive evidence "—Evidence Ordinance, s. 4 (3)—Paraveni Nilakaraya—Is he "owner" of the lands comprised in his share of a paraveni panguwa ?—Difference between the rights of the ninda lord and the nilakaraya—Service Tenures Ordinance, ss. 24, 25— Partition Act, No. 16 of 1951, s. 54 et seq.

Res judicata—*Scope of doctrine—Non-appearance of plaintiff—Decree* nisi *made absolute—Can such a decree operate as* res judicata *?—Civil Procedure Code, ss. 34, 84, 184, 206, 207, 406.*

(i) A paraveni nilakaraya is not the owner of the lands comprised in his share of the paraveni panguwa within the meaning of the expression " owner " in section 3 (1) (*b*) of the Land Redemption Ordinance, No. 61 of 1942.

Where the Land Commissioner purports to acquire lands which he has no authority to acquire under section 3 (1) (*b*) of the Land Redemption Ordinance, his determination to acquire such lands, being illegal and without jurisdiction, is not final within the meaning of section 3 (4) and can, therefore, be questioned in a competent Court of law.

The legality of a declaration by the Minister under section 5 (1) of the Land Acquisition Act, No. 9 of 1950, as modified for the purpose of acquisition under section 3 (5) of the Land Redemption Ordinance, can be canvassed by way of a suit against the Attorney-General. An invalid declaration does not have the conclusiveness given by section 5 (2) of the Land Acquisition Act to a valid declaration. Nor does the publication of a void Order under Section 36 authorising the acquiring officer to take possession of a land have the effect of vesting that land in Her Majesty as provided in section 37 (*a*) of the Act and of enabling the Land Commissioner to alienate the land under section 5 (1) of the Land Redemption Ordinance.

(ii) In D. C. Kandy Case No. 3,632 the plaintiff sued the Land Commissioner and the Assistant Government Agent, Nuwara Eliya, for a declaration that the lands described in the plaint were not liable to be acquired under the provisions of the Land Redemption Ordinance and for an injunction restraining the Assistant Government Agent from proceeding with the acquisition of those lands. The two defendants denied the allegations of illegality and pleaded also that the Court had no jurisdiction to hear and determine the action. The plaintiff having failed to appear on the day fixed for the hearing of the action, the action was dismissed under section 84 of the Civil Procedure Code. His attempt to show cause for his non-appearance was unsuccessful.

In the present action the plaintiff and the subject matter were the same as in D. C. Kandy 3,632, but the defendants were the Attorney-General and another person who sought to avail himself of the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance. The plaintiff sought a declaration of title to the lands in question and, in addition to it or in the alternative, a declaration of his right to their possession and to have the second defendant ejected therefrom.

He based both actions on the ground that the Land Commissioner had no authority in law to acquire the lands.

Held, that the dismissal of the action in D. C. Kandy 3,632 could not operate as *res judicata* in the present action. The plea of *res judicata* failed substantially for the reason that the parties in the two actions were different.

By BASNAYAKE, C.J.—The whole of our law of *res judicata* is to be found in sections 34, 207 and 406 of the Civil Procedure Code. The decrees spoken of in section 207 are decrees drawn up by the Court under section 188 after judgment has been pronounced in the manner contemplated in sections 184, 185, 186 and 187 of the Civil Procedure Code. Section 207 will therefore apply only to decrees pronounced after there has been adjudication on the merits of a suit and not to a decree entered under section 84 of the Civil Procedure Code in consequence of the non-appearance of plaintiff.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *G. T. Samerawickrame* and *G. L. L. de Silva*, for Plaintiff-Appellant.

V. Tennekoon, Senior Crown Counsel, with *A. Mahendrarajah*, Crown Counsel, for 1st Defendant-Respondent.

T. P. P. Goonetilleke, with *S. Sharvananda* and *R. D. B. Jayasekera*, for 2nd Defendant-Respondent.

Cur. adv. vult.

March 6, 1958. BASNAYAKE, C.J.—

It was agreed at the hearing of this appeal that the decision on the questions of law which are common to this appeal and the appeal in the case of *Ladamuttu Pillai v. Attorney-General and others* [1] which was argued earlier should be regarded as equally binding in this case. As the judgment in that case was delivered on 31st January last, only the following questions need be decided for the purposes of this appeal :—

(*a*) whether a praveni nilakaraya is the owner of the lands comprised in his share of the praveni panguwa within the meaning of the expression " owner " in section 3 (1) (*b*) of the Land Redemption Ordinance, No. 61 of 1942,

(*b*) whether the legality of a declaration by the Minister under section 5 (1) of the Land Acquisition Act, No. 9 of 1950, as modified for the purpose of the Land Redemption Ordinance, can be canvassed by way of a suit against the Attorney-General,

(*c*) whether the plaintiff is precluded by the Order of the Minister under section 36 of the Land Acquisition Act from seeking the relief he claims, and

(*d*) whether the dismissal on 23rd October 1953 of the plaintiff's action No. L. 3632 against the Land Commissioner and the Assistant Government Agent, Nuwara Eliya, in the District Court of Kandy, operates as *res judicata* and bars this action.

In the instant case no oral evidence was led by either side at the trial. The plaintiff and the Attorney-General, the 1st defendant, who will hereinafter be referred to as the Attorney-General, by agreement tendered

[1] *(1957) 59 N. L. R. 313.*

without proof the documents on which they relied. The trial proceeded on the pleadings, the admissions of counsel, and the documents relied on by the parties.

The material facts are as follows : The 2nd defendant P. B. Attanayaka of Dumunumeya in Hanguranketa was one of the praveni or paraveni nilakarayas of the kapu panguwa belonging to the Pattini Dewale of Hanguranketa. His share of the panguwa consisted of the two lands, described in the Schedule to the plaint, of a total extent of 2 acres 1 rood and 27 perches.

On 26th May 1926 by 1D4 he mortgaged as security for a loan of Rs. 1,500 to Udawattege Don Allis Perera Appuhamy (hereinafter referred to as Allis Perera) a field Walliwela kumbura and a highland Huludorawatta. His rights in those lands were thus described in the deed—

> I the undersigned Attanayake Kapugedera Mantilaka Mudiyanselage Punchi Banda Attanayake, Kapurala of Damunumeya in Diyatilaka Korale of Udahewaheta by right of purchase upon the annexed deed of transfer No. 1112 dated 9.12.1909 and attested by E. D. W. Siebel, Notary Public, (bearing Registration References G. 83/255-256 O. 16/338, 339), *being in possession of*
>
> (1) All that field Walliwela kiyana kumbura . . . .
>
> (2) All that land called Huludorawatta . . . . .

On 5th March 1931 by 1D5 the 2nd defendant transferred to Allis Perera the mortgagee in consideration of a sum of Rs. 2,400 being the amount of the principal and the accrued interest on the mortgage debt the two lands mortgaged by him and which he again described as lands possessed by him by virtue of the deed referred to in 1D4. Allis Perera gifted Walliwela kumbura and Huludorawatta to his daughter Florence Letitia Premawathie Gunasekara (P26). She sold them to Daluwattage Solomon Sumanaweera (P25) who sold them to the plaintiff (P21) on 28th October 1946.

On 14th March 1947 the plaintiff was directed by a notice under section 7 (1) of the Land Redemption Ordinance (P1) signed by an Assistant Land Commissioner to furnish to the Land Commissioner a return. The notice reads as follows :—

> You are hereby directed under section 7 (1) of the Land Redemption Ordinance, No. 61 of 1942, to furnish to the Land Commissioner before the (29th) Twenty-ninth day of March 1947 a return, on the form sent herewith, in respect of the land known as (1) Walliwela Kumbura and (2) Huludorawatta situated in the village of Hanguranketa in Diyatilake Korale of Uda Hewaheta in the District of Nuwara Eliya, Central Province.
>
> 2. Please attach to the return a plan of the land to enable the verification of such extent of the land as may be mentioned in the return.
>
> 3. If the space in the form sent herewith is found to be insufficient the entry of the particulars should be continued in an annex.

4. The return should be sent to the abovementioned office in an envelope addressed to the Land Commissioner and marked with the letters " L. R. O. "

5. It should be noted that section 7 of the aforesaid Ordinance provides that any person who, when required to furnish a return, or any information or explanation, or any evidence under that section, fails or refuses to furnish such return, information, explanation or evidence, or knowingly furnishes a return containing any particulars which are false or any information or explanation which is false, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred rupees.

6. If you have any objections to the acquisition of the said land, please state your objections in writing.

He complied with the Assistant Land Commissioner's notice and in forwarding the return on 22nd March 1947 wrote the following letter :—

With reference to your letter No. LRO/A. P. L. 1736 of the 14th instant, I return herewith the form in duplicate sent therewith duly completed together a copy of the registers of encumbrances and rough sketch showing the position of the lands as I possess no other plans.

I strongly object to the acquisition of these lands on the following grounds :—

1. Though these lands are purchased in my name they are held by me in trust for my brother W. B. Herath. Half of the purchase money was supplied by him. On receipt of the balance I have to transfer the lands to him. At present all the members of my family are resident together in my house. After my brother marries in the near future he wishes to live separately by putting up a house on these lands. My said brother owns no other immovable property.
2. According to the encumbrances I do not think that the original owner is capable of maintaining these properties.

In the event of a compulsory acquisition I claim on behalf of my said brother Rs. 5,000 at which the lands were purchased plus all costs incurred, up to date.

On 16th January 1950 he received the following notice signed by a Government Surveyor (P3) :—

I, P. Arampu, being a person acting under the written authority of Mr. A. C. L. Abeyesundere, Assistant Land Commissioner, do hereby give you notice, that I shall on the 25th day of January 1950 at 8 a.m. enter the above-mentioned land together with servants and workmen and do all such acts as may be necessary for the purpose of making a survey of that land. I therefore request you or your representative to be present at the survey of the land and to make to me such representations regarding the survey of the land as you may desire.

You are requested to meet me at the abovementioned land at 8 a.m. on the said date to point out the land to me.

Thereupon on 28th February 1950 the plaintiff wrote to the Land Commissioner the letter P4 which is as follows :—

With reference to your memo No. LRO/APL. 1735 of the 14th March 1947, I beg to lay the following facts for your kind and sympathetic consideration :

The Forms in duplicate referred to in the above memo of yours were duly perfected and forwarded to your address together with the Register of Encumbrances, a rough Sketch, of the property, and my objection to the acquisition of the said land under registered post on the 22nd March 1947, but no acknowledgment has been made.

Further in 1948, I interviewed your honour and explained that this property belongs to " Pathini Dewale " of Hanguranketha which is subject to the " Rajakariya " of the Buddhist Temporalities Society, which is clearly proved by the two Documents I handed over to your honour at the interview.

On the consultation with my council he too advised me that the redemption Ordinance does not apply on the properties of the Buddhist Temporalities Society.

Further let me mention you Sir, that this Claimant is owning some more properties of his own.

It was not queried up to this date and on the 16th of January last the said land was surveyed by a Government Surveyor named Mr. P. Arampu.

I shall be very much grateful to you if you will kindly cause an Investigation and enlighten me on the subject as to why it was surveyed.

Thanking you in anticipation of an early reply.

The documents referred to in the above letter are the Public Trustee's acknowledgment of the notice required to be given under section 27 of the Buddhist Temporalities Ordinance in respect of any transfer of interest in any temple land. They read as follows :—

(P7)

To : Sirimalwatte Heratmudiyanselage Ranbanda Herat, Damunumeeya, Hanguranketa.

The receipt is hereby acknowledged of your notice datd 19th November 1946 under section 27 of the Buddhist Temporalities Ordinance, Chapter 222, relating to the transfer in your favour subject to services to the Hanguranketa Pattini Devale of the paraveni pangu tenant's interest in the land called Walliwela, situated at Hanguranketa in the District of Nuwara Eliya.

Colombo, December 21, 1946.

.. .. ..

(P8)

To : Sirimalwatte Heratmudiyanselage Ran Banda Herat, Damunumeeya, Hanguranketa.

The receipt is hereby acknowledged of your notice dated November 19, 1946, under section 27 of the Buddhist Temporalities Ordinance, Chapter 222, relating to the transfer in your favour subject to services to the Hanguranketa Pattini Devale of the paraveni pangu tenant's interest in the land called Huludorawatta situated at Damunumeya in the District of Nuwara Eliya.

Colombo, December 21, 1946.

The following letter (P5) was received from the Acting Land Commissioner in reply to P4 :—

With reference to your letter dated 28.2.50, I have the honour to inform you that the land in question has been surveyed for acquisition for the purposes of the above Ordinance.

2. Please furnish detailed particulars of the properties which belong to the applicant.

On the receipt of letter P5 the plaintiff appears to have consulted his lawyers. On 15th November 1950 the plaintiff's proctor wrote the following letter to the Land Commissioner :—

(P9)

With reference to your letter of he above number dated the 11th instant, I have been instructed by my client Mr. R. B. Herath to inform you that he objects to the acquisition of the lands claimed by the applicant on the ground that the applicant is the owner and is possessed of the following lands :—

1. Weuliyaddewatte in which the applicant resides at present
2. Weuliyadde Kumbura which adjoins land No. 1
3. Weuliyaddemullewatte in which the applicant's son now resides
4. Yathakmalpekumbura of 2 pelas
5. Dambuyaddehena situate at Karalliyade
6. Shares in the paddy fields known as Kotagepitiyeyaya and Mapanakumbureyaya
7. Weuliyaddewatte

The applicant has also transferred a number of lands to his children and has also disposed of several other lands to outsiders.

He is the trustee of Hanguranketha Potgul Vihare and has furnished security for the due performance of his services as such trustee in land.

The applicant is not a person who is in need of any assistance and is in receipt of a considerable income which is quite sufficient or more than is necessary for the maintenance of himself and his family.

I shall therefore thank you to kindly stay all further proceedings in this matter.

The plaintiff's objection to the acquisition of the two lands and his furnishing a list of the lands owned by the 2nd defendant seem to have had no effect. Neither he nor his proctor received from the Land Commissioner a reply to the letter P9. Instead he received from the Assistant Government Agent, Nuwara Eliya, the following letter forwarding the notices published in the *Government Gazette* under section 7 of the Land Acquisition Act No. 9 of 1950.

(P10)

30.8.1951

I have the honour to forward herewith, in Sinhalese, Tamil and English, a *Gazette* extract of my Notice under Section 7 of Land Acquisition Act, No. 9 of 1950, published in the *Government Gazette* No. 10,285 of 24.8.51 in the above connection.

The English notice which is the only one produced in these proceedings reads as follows :—

(P11)

I, Eardley Godfrey Goonewardene, Assistant Government Agent of the Nuwara Eliya District, do hereby give notice under section 7 of the Land Acquisition Act, No. 9 of 1950, that—

(1) it is intended to acquire under the said Act, for the purposes of the Land Redemption Ordinance, No. 61 of 1942, the land described in the schedule hereto,

(2) claims for compensation for the acquisition of such land may be made to me, and

(3) every person interested in such land shall—

(*a*) appear, personally or by agent duly authorised in writing, before me at the Nuwara Eliya Kachcheri, on October 4, 1951, at 10.30 a.m., and

(*b*) notify to me in writing, on or before September 27, 1951, the nature of his interests in the land, the particulars of his claim for compensation the amount of compensation, and the details of the computation of such amount.

.. .. ..

SCHEDULE

Preliminary Plan No. P. P. A. 1,684. Village—Hanguranketa

Lot	Name of Land	Description	Name of Claimant	Extent A.	R	P.
1	Walliwelakumbura Assessment No. 105	Paddy Field ..	R. B. Herat, Ananda Transport Service, Hanguranketa	1	2	31
2	Do.	do. ..	do.	0	0	4
3	Do. ..	do. ..	R. B. Herat, Ananda Transport Service, Hanguranketa, and Hanguranketa Pattini Dewale (Trustee : A. B. Pannanwela, Basnayake Nilame, Talatu Oya)	0	0	16
4	Huludorawatta Assessment No. 106	Chena ..	R. B. Herat, Ananda Transport Service, Hanguranketa	0	0	8
5	Do. ..	do. ..	R. B. Herat, Ananda Transport Service, Hanguranketa, and Hanguranketa Pattini Dewale (Trustee : A. B. Pannanwela, Basnayake Nilame, Talatu Oya)	0	0	13
6	Do. ..	do. ..	do.	0	1	35
			Total ..	2	1	27

I have quoted in full the correspondence between the officers of Government and the plaintiff produced at the trial as they show the plaintiff's bona fides and that from the very outset he took up the stand that the two lands in question were not lands that fall within the ambit of section 3 (1) (*b*) of the Land Redemption Ordinance. His representations do not seem to have received the careful attention they deserved. For if they, especially the representation that the Pattini dewale was the owner of the land that the Government sought to acquire, had been examined more closely, all these years of litigation might have been avoided.

As all the plaintiff's protests and efforts to have the threatened acquisition of these two lands stayed were of no avail he appears to have decided after he received P11 to seek the assistance of the Courts in defending his rights. On 23rd June 1952 his proctor filed in the District Court of Kandy a plaint (P22[a]) against the Land Commissioner and the Assistant Government Agent of Nuwara Eliya in which he asked for—

(*a*) a declaration that the lands in question are not liable to be acquired under the provisions of the Land Redemption Ordinance,

(*b*) an injunction restraining the Assistant Government Agent from proceeding with the acquisition.

On 8th July 1953 more than a year after the institution of the action the Land Commissioner and the Assistant Government Agent filed a joint answer (P22[d]) denying the allegations of the plaintiff that the lands do not fall within the category of lands the Land Commissioner was authorised to acquire under the Land Redemption Ordinance. They also took the plea that the Court had no jurisdiction to hear the action and prayed its dismissal. The plaintiff having failed to appear on the day fixed for the hearing of the action, on 23rd October 1953 the Court entered decree nisi under section 84 of the Civil Procedure Code dismissing the

plaintiff's action (P23). The plaintiff appeared within the prescribed time and showed cause for his non-appearance but was not successful and the decree became absolute.

The acquisition proceedings seem to have gone on despite the plea of the plaintiff in paragraph 3 of his plaint that " the continuance of the acquisition will cause loss and damage to the plaintiff ", and in January 1953 while the action was pending the plaintiff received the following letter from the Assistant Government Agent, Nuwara Eliya :—

(P 12)

I have the honour to forward herewith a Notice in accordance with Section 10 (1) (*a*) of the Land Acquisition Act, No. 9 of 1950, in connection with the above acquisition.

.. .. ..

I, Victor Alexander Justin Senaratne, Assistant Government Agent of the Nuwara Eliya District, do hereby give notice under Section 10 (1) (*a*) of the Land Acquisition Act, No. 9 of 1950, that in respect of your claim or dispute relating to any right, title or interest to, in or over the land described in the schedule hereto which is to be acquired or over which a servitude is to be acquired, my decision is as follows :—

" Mr. R. B. Herat, Ananda Transport Service, Hanguranketa, is declared entitled to the land subject to the ' kapu services ' which are due on all the lots in the schedule below to the Trustee of the Hanguranketa Pattini Dewale. "

I hereby declare that unless you make a written application to me within fourteen days of the receipt of this notice, for reference of your claim or dispute for determination to the District Court/Court of Requests, my decision shall be final.

Schedule

Lots 1, 2, 3, 4, 5 and 6 in Preliminary Plan No. A. 1684, land called Walliwelakumbura (lots 1–3) and Huludorawatta (lots 4, 5, 6) in extent acres 2, roods 1, perches 27.

It is not clear why the acquiring officer proceeded with the acquisition while the plaintiff's challenge of his right to acquire was still pending in the District Court of Kandy. That challenge was in the following terms :—

The plaintiff pleads that the said lands do not fall within any of the categories of lands that are liable to be acquired under the said Ordinance and that the acquisition of them in excess of the powers unlawful and is a denial of the rights of the plaintiff who holds the said lands by payment of dues and or performance of services to the Pattini Dewale at Hanguranketha.

The other steps in the acquisition proceedings followed and the plaintiff received from the Assistant Government Agent, Nuwara Eliya,

the following letter dated 19th March 1953 (P14) and the award (P15) annexed to it :—

(P14)

I have the honour to forward herewith my Notice of Award made under Section 16 of the Land Acquisition Act No. 9 of 1950 in connection with the acquisition of the above land for the purposes of the Land Redemption Ordinance, No. 61 of 1942.

.. .. ..

(P15)

I, Victor Alexander Justin Senaratne, Assistant Government Agent of the Nuwara Eliya District in the Central Province of the Island of Ceylon, make the following award :—

1. Every person referred to in column I hereunder shall be entitled to the interest specified in the corresponding entry in column II

I	II
Name and address of person entitled to compensation	*Nature of interest in land to be acquired*
1. Mr. R. B. Herat, Ananda Transport Services, Hanguranketa	By Right of Purchase
2. Trustee, Hanguranketa Pattini Dewale (Mr. A. B. Pananwela, Basnayake Nilame, Talatu Oya)	By Kapu Services (Rajakariya) due to the Dewale

2. The total amount of the claims for compensation for the acquisition of the land or servitude is Rupees Fifteen thousand only.

3. The sum of Rupees Three thousand three hundred and thirty only shall be paid by the Government of the said Island for the acquisition of the said land by way of compensation to the said persons, each person to be paid the amount specified below against his name.

Names of persons entitled to compensation		*Amount of Compensation*
1. Mr. R. B. Herat	..	Rs. 3,108.50
2. Trustee, Hanguranketa Dewale	..	Rs. 221.50

On 8th March 1954 the Divisional Revenue Officer of Uda Hewaheta placed the 2nd defendant in possession of the lands and reported to the plaintiff as follows :—

(P16)

This is to inform you that I have handed over lots 1 and 6 in P. P. A. 1684 acquired under the L. R. O. to the applicant Mr. P. B. Attanayake of Damunumeya today.

2. In this connection your reference is requested to my letter of even number dated 13.2.54.

The plaintiff next received from the Assistant Government Agent, Nuwara Eliya, the following letter of March 23, 1954 :—

(P17)

With reference to my letter No. LD. 1051 dated 19.3.1953 forwarding my Notice of Award under Section 16 of the Land Acquisition Act No. 9 of 1950, I have the honour to request you to receipt the annexed voucher for Rs. 3,108.50 on a 06 cts. stamp duly witnessed by a responsible person and to return same early to enable me to tender you the amount of my Award by cheque.

The plaintiff did not comply with the request contained in the letter P17 and he did not return the voucher. It is produced in these proceedings marked P18. As his action in the District Court of Kandy had been dismissed for default of his appearance and his further representations to the Land Commissioner and the Assistant Government Agent had been unsuccessful he decided once more to seek his legal remedy and on 9th April 1954 he wrote the following letter to the Land Commissioner with a copy to the Assistant Government Agent, Nuwara Eliya :—

(P19)

I have the honour to inform you that I am instructed by my lawyers to file action for the recovery of the property known as Walliwela Cumbura in the above acquisition for the purpose of the Land Redemption Ordinance No. 61 of 1942 Lots 1-6 in PPA. 1684 No. LD. 1051.

I understand that the A. G. A., Nuwara Eliya, has given instructions to the D. R. O., Uda Hewaheta, to harvest the crop of the above property referred to.

As the property is under litigation I wired the A. G. A., Nuwara Eliya, to suspend the Paddy pending the decision of the action. Further I beg to state that I will hold you responsible for damage to the value of the paddy harvest.

Please acknowledge the receipt of this letter and take immediate steps.

His request was turned down by the following letter :—

(P20)

With reference to your letter of 9.4.54, I have the honour to inform you that I regret that your request cannot be complied with.

The plaintiff purchased the rights he claims in the lands in question for Rs. 5,000 on 28th October 1946, but he has been offered as compensation only a sum of Rs. 3,108.50 on 19th March 1953. These proceedings do not show why the plaintiff has been offered less than the purchase price. His claim was Rs. 15,000. As all his attempts to stop his lands from being acquired were in vain, and as his action against the Land Commissioner failed owing to default of his appearance on the date of trial, he had to resort to the Courts to obtain relief.

On 1st May 1954 the plaintiff instituted the present action against the Attorney-General in which he challenges the authority of the Land Commissioner to acquire the lands in question, and asks—

(*a*) that he be declared entitled to them and to possess them,

(*b*) that he be restored to and quieted in possession of them, and

(*c*) that the 2nd defendant be ejected therefrom.

The Attorney-General in his answer states—

(*a*) that the Pattini Dewale of Hanguranketa is not the "owner" of the lands within the meaning of the term in the Land Redemption Ordinance,

(*b*) that upon the determination by the Land Commissioner to acquire the lands the Minister made a declaration under section 5 (1) of the Land Acquisition Act as modified,

(*c*) that the Minister made an order under section 36 of the Land Acquisition Act and that the order was published in the *Gazette.*

He contends that—

(*a*) the lands fall within the description of lands which are liable to be acquired under the Land Redemption Ordinance,

(*b*) the declaration made by the Minister under the Land Acquisition Act is conclusive proof that the lands are needed for a purpose which is deemed to be a public purpose,

(*c*) it is not open to the plaintiff to canvass in these proceedings the question whether the lands fall within the categories of lands which are liable to acquisition under the Land Redemption Ordinance,

(*d*) until the order under section 36 of the Land Acquisition Act is set aside the plaintiff is not entitled to the relief he claims,

(*e*) the dismissal of the plaintiff's action in D. C. KANDY case No. L. 3632 operates as *res judicata.*

It is admitted by the Attorney-General that the lands in question form part of the kapu panguwa of the Pattini Dewale and that the nilakarayas of that panguwa of whom the plaintiff is one are liable to render services to the Dewale in respect of the land held by them. There is no evidence as to what the services are. The sannasa or grant under which the lands in question were given to the Dewale has not been produced, nor has any evidence as to any special custom governing the tenure of these lands been placed before the Court. It was assumed at the hearing of this appeal that these lands are held on the usual tenure of dewalagama lands and that the services are personal services rendered to the Dewale.

The learned trial Judge held—

(*a*) that the lands in question formed a part of the kapu panguwa belonging to the Pattini Dewale of Hanguranketa,

(*b*) that the plaintiff was by virtue of deed No. 6032 of 28th October 1946 entitled to possess them,

(*c*) that the Land Commissioner purported to acquire them under the Land Redemption Ordinance, and that the Crown took possession of them on 8th March 1954,

(*d*) that the lands fall within the category of lands liable to be acquired under the Land Redemption Ordinance,

(*e*) that the plaintiff is not the owner of the lands in question,

(*f*) that the lands have vested absolutely in the Crown,

(*g*) that the decision in the D. C. Kandy Case No. L. 3632 is not *res judicata*.

It would be helpful if a brief reference is made to the system of land tenure under the Kandyan Kings before the questions arising on this appeal are discussed. In this judgment I shall for the sake of convenience refer to the grantee of a gama (village) be it a nindagama, viharagama or dewalagama, as the ninda lord.

A village or gama in respect of which services (rajakariya) were performed are of four kinds, viz., gabadagama, nindagama, viharagama, and dewalagama. A gabadagama is a royal village which was the exclusive property of the Sovereign. The Royal Store or Treasury was supplied from the gabadagama, which the tenants had to cultivate gratuitously in consideration of being holders of praveni panguwas. A nindagama is a village granted by the Sovereign to a chief or noble or other person on a sannasa or grant. Similarly, a village granted by the Sovereign to a vihare is a viharagama and to a dewale is a dewalagama. Each gama or village consisted of a number of holdings or minor villages. Each such holding or minor village was known as a panguwa. Each panguwa consisted of a number of fields and gardens. Panguwas were of two kinds, viz., praveni or paraveni panguwa and maruwena panguwa. A praveni panguwa is a hereditary holding and a maruwena panguwa is a holding given out to a tenant for each cultivation year or for a period of years. The holder of a panguwa was known as a nilakaraya. They were of two kinds: Praveni or paraveni nilakarayas and maruwena nilakarayas. The praveni nilakarayas are generally those who were holders of panguwas prior to the Royal Grant and the ninda lord is not free to change them. They were free to transmit their lands to their male heirs, but were not free to sell or mortgage their rights. They were obliged to perform services in respect of their panguwas. The services varied according as the ninda lord was an individual, a vihare or a dewale. In the case of vihares or or dewales personal services were such as keeping the buildings in repair, cultivating the fields of the temple, preparing the daily dana, participating in the annual procession, and performing services at the daily pooja of the vihare or dewale. In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to render services or pay dues. Though the panguwa was indivisible, especially after a praveni nilakaraya's right to sell, gift, devise, and mortgage his panguwa came to be recognised, the practice came into existence of different persons who obtained rights

from a nilakaraya occupying separate allotments of land for convenience of possession. The maruwena nilakaraya though known as a tenant-at-will held on a tenancy which lasted at least for one cultivation year at a time. Unlike the praveni nilakaraya he could be changed by the ninda lord; but it was seldom done. He went on year after year, but was not entitled to transmit his rights to his heirs. On the death of a maruwena tenant his heirs are entitled to continue only if they receive the tenancy. Though in theory maruwena tenure was precarious, in fact it was not so. So long as he paid his dues the ninda lord rarely disturbed him. Besides the praveni and maruwena panguwas in a nindagama, viharagama or dewalagama, there were also lands owned absolutely by the ninda lord both ownership and possession being in him.

Under the Kandyan Kings and during the early British period there were also lands held by nilakarayas directly under the Sovereign. The holders of these lands were not free to gift, sell, bequeath or mortgage their rights. Their rights were transmissible only to their male heirs and the possession reverted to the State on the failure of the male heirs or breach of the Conditions of Tenure. The rights of the State in respect of such lands called in early British legislation " Service Parveny Lands " were declared by Regulation 8 of 1908 thus :

> Whereas there is reason to believe that abuses prevail with respect to the lands called Service Parveny Lands, in prejudice of the Rights of Government, and to the impoverishment of Families holding the said Lands.
>
> His Excellency The Governor in Council deems it necessary to declare, conformably to the ancient Tenure of the said Lands, and it is hereby declared accordingly—
>
> 1st. That all such Lands are held, as in former times, immediately under Government :
>
> 2ndly. That the privilege of succeeding thereto is in the Male Heirs only, of those who die possessed of such Lands, and that the same revert to His Majesty's use on failure of such Male Heirs or breach of the Conditions of Tenure :
>
> 3rdly. That the same are not capable of alienation by Gift, Sale, Bequest or other Act of any party, or of being charged, or incumbered with any Debt whatsoever :
>
> 4thly. That the said Lands, are not liable to be sold by virtue of any Writ of Execution or other legal process of any Court or Courts in this Island :

The Service Praveni Lands Succession Ordinance of 1852, however, extended to female heirs the right of succession to persons who die possessed of service praveni lands. It also declared that service praveni lands were capable of alienation, gift, sale, devise or other act or of being charged or encumbered with any debt. Similar legislation was not enacted in respect of service tenure lands not owned by the State but by a ninda lord. The Service Tenures Ordinance which applies to such lands did not give the nilakaraya power to sell, gift, devise, or

mortgage his panguwa but provided for the commutation of his services by a money payment and imposed a period of limitation of one year in respect of the recovery of arrears of personal services and two years in the case of commuted dues. The right to recovery of services or dues if not enforced for ten years was to result in the loss for ever of the ninda lord's rights and on the nilakaraya becoming the owner (section 24). The Ordinance also deprived the proprietor of the right to proceed to ejectment against the nilakaraya (section 25) on his failure to render personal services or dues. He was permitted to recover the value of the services by seizure and sale—

(*a*) of the crop or fruits of the panguwa, or failing them,

(*b*) of the personal property of the nilakaraya, or failing both,

(*c*) by the sale of the panguwa, subject to the personal services or commuted dues in lieu thereof.

The proceeds of sale have to be applied in payment of the amount due to the proprietor, and the balance, if any, is to be paid to the evicted nilakarayas. If there is a prior encumbrance upon the holding the balance is to be applied to satisfy such encumbrance. Despite these far-reaching changes the character of the ninda lord or proprietor remained the same. In course of time it seems to have been assumed, though no express legislative provision in that behalf was made, that the nilakarayas of a nindagama, viharagama or dewalagama had the same rights of alienation, gift, and mortgage as the holder of a service praveni land.

Though the nilakaraya's rights in respect of his holding became enlarged in the course of time it was never at any time doubted that the ninda lord was the owner of the soil and the legislation relating to service tenure lands recognised that position of the ninda lord and did not alter but preserved it. Sections 12 and 27 of the Buddhist Temporalities Ordinance refers to the nilakarayas as " temple tenants " (section 21) and speaks of the transfer of " a paraveni pangu tenant's interest in any land held of a temple " (section 27), and gives implied legislative recognition to the alienability of a nilakaraya's rights and not the land. It leaves no doubt as to what the praveni nilakaraya may transfer. Section 54 of the Partition Act No. 16 of 1951 also proceeds on the footing that the nilakaraya is not the owner of his panguwa, for it provides " Every praveni nilakaraya shall, for the purposes of this Act, *be deemed* to be a co-owner of the praveni panguwa of which he is a shareholder ". Today the ninda lord stands in the shoes of the Royal Grantor subject to the restrictions or conditions imposed by the sannasa or grant and the nilakarayas continue as tenants of the grantee, though with far greater rights than they ever enjoyed under the Kandyan Kings. Despite the extension of their rights the nilakarayas had to render services or pay commuted dues to the ninda lord. If ever the line of succession of the nilakarayas of a panguwa became extinct the possession of the land would revert to the ninda lord. As the nilakaraya was free to sell his rights the ninda lord was free in course of time by purchase to enlarge his rights of ownership, by adding to his rights those of the nilakaraya.

It is not clear why the Service Tenures Ordinance refers to the ninda lord as proprietor and not as owner. The same expression is used in the Partition Act No. 16 of 1951. Now to my mind there is no difference between the expressions proprietor and owner in the context in which the former expression is used. The Oxford dictionary defines " proprietor " as one who holds something as property ; one who has the exclusive right or title to the use or disposal of a thing ; an owner. Webster's dictionary defines the expression thus : " One who has the legal title or exclusive right to anything, whether in possession or not ; an owner. " The ninda lord is the owner of his service lands without possession and the nilakaraya is the possessor of those lands without ownership. The writers on Jurisprudence, both ancient and modern, bring out clearly the difference between the concepts of ownership and possession. For the purpose of this judgment it is sufficient to quote a passage from Salmond, one of the modern writers. (Salmond on Jurisprudence, 11th Edn, p. 302)

> No man is said to own a piece of land or a chattel, if his right over it is merely an encumbrance of some more general right vested in some one else . . . . In its full and normal compass corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. This compass, however, may be limited to any extent by the adverse influences of *jura in re aliena* vested in other persons. The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet he none the less remains the owner of the thing, while all the others own nothing more than rights over it. For in him is vested that *jus in re propria* which, were all encumbrances removed from it, would straightway expand to its normal dimensions as the *universum jus* of general and permanent use. He, then, is the owner of a material object, who has a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons.

How true these words are of the ninda lord and the nilakaraya. The latter cannot be said to be the owner of the land as his rights are merely an encumbrance of a general right vested in the ninda lord and the ninda lord whose rights are reduced to merely the receipt of personal services or commuted dues is none the less the owner of the land. Apart from legal concepts even laymen in the Kandyan provinces will not regard the nilakaraya as the owner of the nindagama. The difference between ownership and possession is so clearly ingrained in the minds of the people in the Kandyan Provinces that the lands of a nindagama are spoken of as lands of the ninda lord and not of the nilakaraya. They would speak of nindagama lands as lands belonging to the Dalada Maligawa or Sri Maha Bodhi or Ridi Vihare or to such and such a family. In the instant case the reference in the mortgage bond (1D4) to the mortgagor " being in possession of " the lands referred to therein by virtue of the deed recited and the absence of any reference to title are significant and to my mind indicate that the mortgagor and the notary realised the difference between the rights of the ninda lord and the nilakaraya.

Learned counsel for the Crown has not been able to cite a single decision of this Court in support of his contention that a nilakaraya of a service panguwa is its owner. In fact the decisions of this Court are the other way. They hold that a nilakaraya is not the owner and that it is not competent for him to institute a partition action as he is not the owner of the land of which he is in possession. The first of these decisions is the case of *Jotihamy v. Dingirihamy* [1]. In that case Wendt J. observed—

> Now the *dominium* in Service Tenures land is generally regarded as vested in the person usually described as proprietor of the *Nindagama*, or the overlord, while the *Nilakarayo* are similarly spoken of as tenants. I do not of course forget that the interests of a Paraveny Nilakaraya cannot be determined against his will by a proprietor although upon the non-performance of services judgment can be recovered for damages and the interest of the tenant sold up and so brought to an end. But I do not see that this makes a tenant an owner ; he cannot therefore claim partition of the land.

This case was followed by *Kaluwa v. Rankira* [2], which is also an action for the partition of nindagama land. One of the defences set up was " that the plaintiff cannot maintain the action because he is not an 'owner' within the meaning of section 2 of the Partition Ordinance 10 of 1863, as the land is subject to Rajakaria Services ". Hutchinson C.J. was invited by the plaintiff-appellant to hold that the case of *Jotihamy v. Dingirihamy* (*supra*), a decision of two judges (Wendt J. and Middleton J.) was wrong. But he declined to do so as he thought the decision was right.

The next decision is the case of *Appuhamy v. Menike* [3], which was an action brought by a praveni nilakaraya of a panguwa of the Dodampe Nindagama for the partition of certain lands appertaining to his panguwa. The proprietors of the nindagama intervened and disputed the right of the plaintiff to bring an action for partition. That case was heard by a Bench of three Judges. Two of the Judges agreed with the decision in *Jotihamy v. Dingirihamy* (*supra*) while De Sampayo J. dissented from the view that a praveni nilakaraya is not the owner of his holding but agreed that he could not compel a partition. As stated above, to-day a nilakaraya can institute a partition action, though he is not the owner of his panguwa, by virtue of the special provisions (sec. 54 *et seq.*) in the Partition Act No. 16 of 1951.

I am in respectful agreement with the previous decisions of this Court cited above and the opinion formed by the majority of the Judges in *Appuhamy v. Menika* (*supra*). I must confess I am unable to follow the view taken by De Sampayo J. If a praveni nilakaraya cannot bring an action for partition it can only be on the ground that the land does not belong to him for if it does he is entitled to compel a partition. The relevant words of section 2 of the repealed Partition Ordinance which was considered in that case are " When any landed property

[1] *(1906) 3 Bal. Reports 67.* [2] *(1907) 3 Bal. Reports 264.*

[3] *(1917) 19 N. L. R. 361.*

2**——J. N. R 171 (2/59)

shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property. ." If it is not rights of ownership that the ninda lord has what are his rights ? A ninda lord can gift, sell, or mortgage his nindagama, his heirs can inherit it, or his rights can be sold in execution against him (*Tillekeratne v. Dingey Hamy*) [1]. A nindagama can be acquired by prescription (*C. P. Samarasinghe v. Radage Weerapulia and others* [2]) by establishing that a person has enjoyed the ninda lord's rights over every component part of the nindagama for the prescribed period.

In the course of his judgment in *Samarasinghe's* case Clarence A.C.J. observed —

> The entry in the services tenures commutation register, though conclusive against the tenants on the question of tenure, is not conclusive against anybody on the question—Who is the owner of the nindagama ?

It appears from the judgment in that case that the fact that the ninda lord is the owner of the nindagama was never in doubt or dispute. Our legislation has always assumed that the ninda lord is the owner of the nindagama and in the decisions of this Court too the ninda lord has always been regarded as the owner of the service lands of the nindagama and the praveni nilakaraya as his tenant. However extensive the rights of a praveni nilakaraya may have become in the course of time still he never became the owner of his holding ; he remained a nilakaraya.

I shall now turn to section 3 (1) (*b*) of the Land Redemption Ordinance. It speaks of agricultural land " transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer, secured by a mortgage of the land ". In the instant case the transfer was by the praveni nilakaraya of his interests in the holding of which as I have said above he is not the owner. It was not the land that was transferred, but the right to possess and enjoy it with the attendant rights of a praveni nilakaraya subject to the rendering of services or payment of commuted dues. The debt was not due from the owner but from his tenant the 2nd defendant. The debt of the praveni nilakaraya the 2nd defendant was not secured by a mortgage of the land but by a mortgage of the 2nd defendant's rights as praveni nilakaraya. It will therefore be seen that section 3 (1) (*b*) has no application whatsoever to the transactions evidenced by deeds 1D4 and 1D5. The Land Commissioner had therefore no authority under section 3 (1) (*b*) of the Land Redemption Ordinance to acquire the lands. His determination that the lands should be acquired is not one to which sub-section (4) applies as the determination which is declared by that provision to be final is a determination in a case in which " he is authorised by sub-section (1) to acquire the lands ". The meaning and effect of sub-section (4) has been discussed in my judgment in *Ladamuttu Pillai v. Attorney-General (supra)*. In this case too the Land Commissioner's decision is not final as he has by a wrong construction of the expressions " owner " and " land " in section 3 (1) (*b*) given himself a jurisdiction he

[1] *Ramanathan 1860-61-62, p. 114.* [2] *(1882) 5 S. C. C. 40.*

did not have. I think I should take this opportunity of referring to the case of *Bogolle Punchirala and others v. Kadapatwehera Ding and others* [1] (which was not cited in my previous judgment) wherein a similar matter under the Service Tenures Ordinance was decided. In that case it appeared that the Service Tenures Commissioners had travelled outside their powers and entered in the register they were authorised to make under the Ordinance particulars which they were not required to determine or enter in the register. The defendants claimed that their determination of the matters they were not empowered by the Ordinance to determine was not final and conclusive as the finality and conclusiveness conferred on their determination by section 9 of the Service Tenures Ordinance did not extend to the determinations made outside the scope of their authority. This Court upheld their submission.

There is a further circumstance which appears in document P15 which cannot be allowed to pass unnoticed. The acquiring officer appears to have acquired the interests of the dewale as well. His act is clearly illegal. The praveni nilakaraya did not, and could not in law, transfer to his creditor the rights of the ninda lord, the dewale, nor did he purport to do so. The authority granted by section 3 (1) (*b*) is to acquire land transferred by the owner in satisfaction or part satisfaction of a debt which was due from the owner and which was immediately prior to such transfer secured by a mortgage of the land. The ninda lord owed no debt, his rights were not secured by a mortgage, he did not transfer his rights to the 2nd defendant. Clearly the Land Commissioner had no authority to acquire the ninda lord's rights and his determination to acquire his rights being illegal cannot be final.

The result of this intrusion on the rights of the ninda lord is that the dewale has been illegally deprived of its rights to the services it received in respect of these lands of the kapu panguwa and the 2nd defendant who possessed the lands under a tenure which obliged him to render services or pay commuted dues is now in occupation of them by virtue of the permit given to them by the Crown without any such obligation. The Land Commissioner's action in acquiring the interests of the nilakaraya and the dewale are both illegal and must be declared null and void.

I shall now deal with the question whether the legality of a declaration under section 5 (1) of the Land Acquisition Act as modified for the purpose of the Land Redemption Ordinance can be canvassed in these proceedings. The Land Redemption Ordinance adapts the machinery of the Land Acquisition Act for the purpose of acquisition under the Ordinance. Provision for such adaptation is made in section 3 (5) of the Ordinance, the relevant portion of which reads—

Where the Land Commissioner determines under sub-section (4) that any land shall be acquired, the purpose for which that land is to be required shall be deemed to be a public purpose, and the provisions of the Land Acquisition Act, subject to the exceptions, substitutions and modifications set out in the First Schedule, shall apply for the purposes of the acquisition of that land . . . "

[1] *(1884) 6 S. C. C. 157.*

We are here concerned with the modified sub-sections (1) and (2) of section 5 of the Land Acquisition Act. They read as follows :—

(1) Where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance, the Minister shall make a written declaration that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the province or district in which such land is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited on some conspicuous places on or near such land.

(2) A declaration made under sub-section (1) in respect of any land shall be conclusive evidence that such land is needed for a purpose which is deemed to be a public purpose.

It would appear from the copy of the declaration 1D1 that the Minister purporting to act under section 5 of the Land Acquisition Act on 10th May 1951 made the following declaration :—

Declaration under Section 5 of the Land Acquisition Act, No. 9 of 1950

Whereas the Land Commissioner has determined that the land described in the Schedule hereto shall be acquired for the purpose of the Land Redemption Ordinance, No. 61 of 1942 :

Now therefore, I, Dudley Shelton Senanayake, Minister of Agriculture and Lands, do hereby declare under section 5 (1) of the Land Acquisition Act, No. 9 of 1950 (read with section 3 (5) of the said Ordinance as amended by section 62 of that Act) that the said land is needed for a purpose which is deemed to be a public (*sic*) and will be acquired under that Act.

In the first place the caption to the declaration is inaccurate. The text of the declaration shows that it is not one which purports to be made under section 5 of the Land Acquisition Act, but one which purports to be made under section 5 (1) of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance. Though, where the statute does not require that a declaration should contain a caption, an incorrect caption to a declaration which is legal in all respects does not vitiate such a declaration, it is important that public functionaries charged with the responsibility of making statutory declarations, especially when they have far reaching consequences, should exercise extreme care in making them and they should not leave room for the impression that the declarant failed to give his mind to the document he was signing. For if it can be established that the declarant signed a document of the contents of which he was not aware he cannot be said to have discharged the function entrusted to him by the statute.

It would appear from the recital that the foundation of the declaration is the determination of the Land Commissioner under section 3 (4) of the Land Redemption Ordinance. I have shown above that the lands in

question are not lands the Land Commissioner is authorised by section 3 (1) (*b*) to acquire and that his determination is in consequence not final and that it being not a determination which he is authorised to make under the statute is bad in law and does not afford the Minister legal authority to make the declaration he has made. Where there is no valid determination under that Ordinance the Minister can make no declaration under section 5 (1) of the Land Acquisition Act as modified and therefore the declaration he has made in respect of the lands in the instant case is a nullity and is of no effect in law and is therefore not the statutory declaration contemplated in section 5 (1).

Where the declaration which purports to be made under section 5 (1) is a nullity it does not become "conclusive evidence" of the fact that the land is needed for a purpose which is deemed to be a public purpose ; because it is only a valid declaration that is given that effect by the Act. The opening words of section 5 (2) make the position clear. They are " A declaration made under sub-section (1) ", i.e., a declaration validly made under that sub-section, and not " A declaration which purports to be made under sub-section (1) " though not validly made thereunder. Similarly the publication of an invalid declaration in the Gazette will not be " conclusive evidence " of the fact that a declaration under sub-section (1) was duly made, for sub-section (3) also provides that the publication of a *declaration under sub-section (1)* in the Gazette shall be conclusive evidence of the fact that *such* declaration was duly made. An invalid declaration has the same effect as if no declaration was ever made and cannot be acted on and confers no authority for taking the steps consequential on a valid declaration under the Land Acquisition Act as modified and does not therefore have the conclusiveness given by section 5 (2) to a valid declaration.

There is a further inaccuracy in the declaration in that it states that the land will be acquired under the Land Acquisition Act. The acquisition is under the Land Redemption Ordinance ; but the legislature has authorised the use of the machinery of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance. It is the failure of the acquiring officer to appreciate the fact that the authority for the acquisition of lands for the purposes of the Land Redemption Ordinance is in that Ordinance itself that has led him to acquire the rights of the dewale when he had no authority to do so. The copy of the declaration produced by the Attorney-General 1D1 is in English alone. Neither copies nor originals of the Sinhalese and Tamil declarations have been produced nor is there any evidence that the Minister ever made them. I am of the view that sub-section (1) of section 5 of the Act requires the Minister to make a declaration in each of the three languages and the requirements of the section are not satisfied if he does not do so.

Sub-section (1) of section 5 further requires the Minister to direct the acquiring officer of the province or district in which the land which is to be acquired is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the *Gazette* and exhibited in some conspicuous places on or near the land. There is no evidence that such a direction was given nor is there any evidence that the acquiring officer of the province or district in which the land is situated caused

the declaration to be published in the *Gazette* in Sinhalese and Tamil. Learned counsel for the Crown tendered at the trial, not the *Gazette* in which the declaration was published, but an extract from the *Government Gazette* certified by an Assistant Land Commissioner (1D2) in which the declaration appears in the English language alone. This Court has always regarded the requirement that a publication should be made in English, Sinhalese and Tamil as imperative. Failure to publish in all three languages has been regarded as vitiating the publication. The cases of *H. Foenander v. M. Ugo Fernando* [1] and *Dias v. A. G. A., Matara* [2] are two of the cases that take that view. Apart from the fact that the declaration is invalid for the reason that the condition precedent to the making of the declaration is absent these other defects I have pointed out above also affect its validity.

I shall now deal with the contention of learned counsel for the Attorney-General that sub-section (2) of section 5 of the Act as modified precludes the plaintiff from questioning in these proceedings the legality of a declaration made by the Minister, whether or not his action is within the powers confided in him by the legislature. No decision of this Court or of any Superior Court in any other part of the Commonwealth was cited in support of his contention. The sub-section embodies a rule of evidence and not a rule of law. In the instant case the plaintiff is not seeking to produce counter evidence to prove that the land is not needed for a purpose which is deemed to be a public purpose ; but he is questioning the legality of the declaration and the words " conclusive evidence " do not preclude him from doing so. The expression " conclusive evidence " which is familiar in the law of England and the United States though used in some of our statutes when a rule of evidence is sought to be enacted is not used in our Evidence Ordinance which uses the expression " conclusive proof ". The former expression is used in the same sense as the latter and I for one think the latter expression is more precise and for that reason the better expression. The effect of the words " conclusive proof " in the Evidence Ordinance is thus stated therein (section 4 (3)) :

> When one fact is declared by this Ordinance to be conclusive proof of another, the court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Here it is not sought to lead evidence to disprove the declaration made by the Minister. Learned counsel's contention is not sound and cannot be upheld.

Even if the declaration had been a declaration *intra vires* of the statute its imperfections are so many that it cannot be received even for the purpose for which section 5 (2) declares it to be " conclusive evidence ".

The rule of construction applicable to provisions which declare the declaration or certificate of a person who is not before Court conclusive

[1] *(1881) 4 S. C. C. 113.*

[2] *(1898) 3 N. L. R. 175.*

evidence of a fact is stated thus by Viscount Dunedin in the case of *Penrikyber Navigation Colliery Co. v. Edwards* [1]—

> I think that a provision which gives this effect to a certificate of a person who is not before the Court, and makes it conclusive against the evidence of competent witnesses who are, is, if any provision ever is, one which must be applied strictly, and must be limited to an exact compliance with its terms.

As the question whether the declaration in question may be admitted as conclusive evidence of the fact that the lands referred to in the plaint are needed for a purpose which is deemed to be a public purpose does not arise for decision on this appeal it is not necessary to discuss the matter further.

Learned counsel for the Attorney-General contended that the Order made by the Minister under section 36 of the Land Acquisition Act was in the way of the plaintiff and that he could not succeed unless and until that Order is set aside. That contention would be sound only if the Order he had made is one which the Minister was entitled to make under the Act and he had complied with its requirements in doing so. But the Order in the instant case is one which he had no power in law to make and in the making of which he has not complied with the requirements of the Act. There being no valid declaration under the modified section 5 (1) of the Act, the acquiring officer had no authority in law to proceed under section 6 and the subsequent sections. The legal authority to proceed under these provisions flows only from a valid declaration under modified section 5 (1). All the steps taken by the acquiring officer and the Minister are therefore null and void and the position in law is as if both of them had taken no action under the statute and as if no Order under section 36 was ever made. The publication of a void Order under section 36 authorising the acquiring officer to take possession of a land does not have the effect of vesting that land in Her Majesty as provided in section 37 (*a*) of the Act. No question of setting aside the Order therefore arises. There being no Order under section 36 in existence in law the Land Commissioner had no power to alienate the two lands in question under section 5 (1) of the Land Redemption Ordinance. That being the case the 2nd defendant's possession is illegal and he is liable to be ejected from the two lands.

I now come to the plea of *res judicata* taken by the Attorney-General. It was raised in paragraph 7 of the amended answer filed on 8th September 1954 which reads—

> 7 (*a*) The plaintiff sued the Land Commissioner and the Assistant Government Agent, Nuwara Eliya in action No. L. 3632 of the District Court of Kandy for a declaration that the lands described in the plaint in this action are not liable to be acquired under the provisions of the Land Redemption Ordinance and for an injunction restraining the said Assistant Government Agent from proceeding with the acquisition of the said lands.
>
> (*b*) The said action was dismissed with costs.

[1] *(1933) A. C. 28 at 38.*

(*c*) The defendant pleads that the decision in the said case is Res Adjudicata of the matters in issue in the present action between the Plaintiff and the Crown, and that accordingly the plaintiff cannot maintain this action against the Crown.

Shortly the facts relevant to this plea are as follows :—On 23rd June 1952 the plaintiff instituted an action against the Land Commissioner and the Government Agent of Nuwara Eliya the Acquiring Officer. In his plaint he alleged—

(3) The plaintiff pleads that the said lands do not fall within any of the categories of lands that are liable to be acquired under the said Ordinance and that the acquisition of them is in excess of the powers unlawful and is a denial of the rights of the plaintiff who holds the said lands by payment of dues and or performance of services to the Pattini Dewale at Hanguranketa.

(4) The continuance of the proceedings for acquisition will cause loss and damage to the plaintiff.

(5) A cause of action has therefore accrued to the plaintiff to sue the defendant for a declaration that the said lands are not liable to be acquired under the provision of the Land Redemption Ordinance and for an injunction prohibiting the 2nd defendant from carrying on any further the proceedings to acquire the lands.

He asked—

(*a*) for a declaration that the lands and premises more fully in the Schedule at the foot hereof are not liable to be acquired under the provisions of the Land Redemption Ordinance,

(*b*) for an injunction restraining the 2nd defendant abovenamed from proceeding any further with the said acquisition until the final determination of this action.

The defendants filed a joint answer denying all the allegations of the plaintiff except that the lands are subject to performance of services to the Pattini Dewale of Hanguranketa. They also pleaded that the Court had no jurisdiction to hear and determine the action. The plaintiff having failed to appear on 13th October 1953, the day fixed for the hearing of the action, it was dismissed under section 84 of the Civil Procedure Code. His attempt to show cause for his non-appearance was unsuccessful.

I shall examine the features of the two actions before discussing the question whether the plaintiff's present action is barred by the dismissal of the Kandy case.

The present action is against the Attorney-General and the 2nd defendant the mortgagor. The Kandy case was against the Land Commissioner *nomine officii* and E. G. Goonewardene, Assistant Government Agent, Nuwara Eliya. In the present action the plaintiff seeks a declaration of title to the lands in question and in addition to it or in the alternative a declaration of his right to their possession and to have the 2nd defendant ejected therefrom. In the Kandy case the plaintiff sought a declaration that the lands in question were not liable to be acquired and asked for an injunction restraining the Assistant Government Agent from proceeding with the action. The plaintiff bases both actions on the ground that the Land Commissioner has no authority in law to acquire the lands.

This is a convenient point to discuss the scope of the doctrine of *res judicata*. It has its origin in the Roman Law where it is stated thus: *Res Judicata dicitur, quae finem controversiarum pronunciatione judicis accipit, quod vel condemnatione vel absolutione contingit* (Digest XLII, Tit. I, Sec. 1). Scott translates it into English thus: " By *res judicata* is meant the termination of a controversy by the judgment of a Court. This is accomplished either by an adverse decision, or by discharge from liability ". (The Civil Law, Vol. 9, p. 228.) Hukm Chand expresses the view that this doctrine is founded upon the maxim *nemo debet bis vexari pro una et eadem causa*, which is itself an outcome of the wider maxim, *interest reipublicae ut sit finis litium* (Hukm Chand, Res Judicata, 1894 Edn, p. 5). The Roman doctrine which has been adopted in Roman Dutch Law as well cannot be extended to cases not falling within its ambit except by legislation. Voet defines it in almost the same terms as the Digest: *Res judicata est, quae finem controversiarum pronunciatione judicis accepit, absolutione vel condemnatione* (Voet, Bk XLII, Tit. I, Sec. 1). Gane renders it into English thus (Vol. 6, p. 297): " A *res judicata* is a matter in which an end has been put to disputes in a declaration of a judge by absolution or adverse judgment." In our legal system the doctrine being one that appertains to the field of civil procedure provisions against parties being vexed twice for the same cause of action and provisions designed to prevent interminable litigation between parties have been enacted in our Civil Procedure Code. Similar though not the same provisions exist in the Indian Civil Procedure Code. The provisions of our Code in my opinion go beyond the scope of the doctrine as understood in Roman and Roman Dutch Law. The early English decisions adopted the doctrine as understood in Roman Law. This is

clearly shown in the following observations of Lord Romilly in *Jenkins v. Robertson* [1]: " *Res Judicata* by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion, *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter." Some of the early English cases adopt Vinnius's definition of *res judicata*. In *Hunter v. Stewart* [2] Lord Westbury cited with approval the following passage from his commentary on the Institutes (Lib. IV, Tit. XIII, S. 5): " *Exceptio rei judicatae non aliter agenti obstat quam si eadem quaestio inter easdem personas revocetur, itsque ita demum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.* "

As the English decisions I have cited set out the basic principles of the law of *res judicata*, it is unnecessary to refer to later English decisions for in England the law of *Res Judicata* is treated as a branch of the law of estoppel. In our law the subject of *res judicata* appertains to the province of civil procedure properly so called. In seeking the aid of English decisions for the solution of our problems of *res judicata* we have to bear in mind this fundamental difference between the two systems. In India too the subject has been dealt with in the same way as we have dealt with it; but when referring to Indian decisions we should not forget that almost from the earliest times statutory provision had been made in that country for barring actions on the ground of *res judicata*. In the result the decisions of the Indian Courts and of the Privy Council in appeal from those Courts were more concerned with interpreting the relevant statutes than in expounding the principles of *res judicata*. Nevertheless some of the judgments contain valuable discussions of the principle.

In this country our Civil Procedure Code very properly makes provision to ensure within limits the observance of the doctrine of *res judicata* and the maxims *nemo debet bis vexari pro una et eadem causa* and *interest reipublicae ut sit finis litium*. The provisions are sections 34, 207, and 406. In the case of *Samichi v. Pieris* [3] which was heard by a bench of three Judges two of the Judges refused to uphold the contention that the whole of our law of *res judicata* is to be found in sections 34, 207, and 406 of the Civil Procedure Code. Lascelles C.J. observed : " The law of *res judicata* has its foundation in the civil law, and was part of the common law of Ceylon long before Civil Procedure Codes were dreamt of. But even if these sections contain an exhaustive

[1] *(1867) L. R. 1 H. L. (Sc. Ap.) p. 117.*

[2] *4 De G. F. & J. 176, (1861) 45 E. R. 1151.*

[3] *(1913) 16 N. L. R. 257.*

statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian and American Courts ." Wood Renton J. observed in the same case : " It is suggested that the principles of English and Indian law as to *res judicata* are excluded by section 207 of the Civil Procedure Code. I see no reason to alter the opinion which I have already expressed in various other cases that section 207 and similar sections of the Civil Procedure Code do not embody the whole law as to *res judicata* in Ceylon ." The dissenting Judge, Pereira J., took the view that our law of *res judicata* was in the Civil Procedure Code and that we cannot go outside it.

With the greatest respect to the two most eminent Judges who formed the majority I find myself unable to agree that theirs is the proper approach to the interpretation of a Code. The principles of interpretation applicable to a Code are stated in the case of *Bank of England v. Vagliano Brothers* [1]. In that case Lord Halsbury stated at page 120 : " I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the Code so created, because before the existence of that Code another law prevailed. "

In the same case Lord Herschell made the following remarks at page 144 :—

" My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

" If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before,

[1] *(1891) A. C. 107.*

by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

As stated earlier *res judicata* is dealt with in Roman Dutch Law, a matter of Civil Procedure, as an "exceptio" which expression is used in the sense of a special defence or a special plea. Voet defines it thus: "Now an exception is the shutting out of an action which is available in strict law." (Bk. XLIV, Tit. I, S. 2, Gane Vol. 6 p. 337.) *Res Judicata* is an exception that must be pleaded and tried. I shall now examine the relevant provisions of our Code.

The first section that merits consideration is section 34. It provides as follows:—

"(1) Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.

(2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted."

The Attorney-General does not claim that the plaintiff is barred by section 34 (2) from bringing his present action. The Kandy case was brought while the acquisition was threatened and before the lands were

actually acquired and the plaintiff is not now seeking to sue for a remedy he omitted to seek in the Kandy case, nor is he seeking to enforce a claim he relinquished then.

The next provision that calls for attention is section 207. It reads :

> " All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties ; and no plaintiff shall hereafter be non-suited.
>
> *Explanation.* Every right of property, or to money, or to damages, or 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 first question that needs consideration is whether the expression " all decrees " includes decrees entered under section 84. Now section 207 occurs in a chapter which has a heading " Judgment and Decree " and makes elaborate provision regarding the pronouncing of judgment, the drawing up of decrees. Section 184 provides that upon the evidence which has been duly taken or upon the facts admitted in the pleading or otherwise and after the parties have been heard either in person or by their pleaders judgment shall be pronounced in open court after notice to the parties. Section 188 provides that as soon as the judgment is pronounced a formal decree bearing the same date as the judgment shall be drawn up by the Court in the form No. 41 in the First Schedule or to the like effect specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The succeeding sections make elaborate provisions regarding decrees in respect of immovable property, movable property, interest, specific performance, payment by instalments, set off, mesne profits, accounts etc.

Section 206 provides that the decree or certified copy thereof shall constitute the sole primary evidence of the decision or order passed by the Court. The preceding provisions of the Chapter in which section 207 occurs to my mind show that the decrees spoken of in that section are decrees drawn up by the Court under section 188 after judgment has been pronounced in the manner contemplated in sections 184, 185, 186 and 187. Such decrees are final between the parties subject to appeal. Section 207 will therefore apply only to decrees pronounced after there has been an adjudication on the merits of a suit and not to decrees entered under section 84.

Section 84 of the Civil Procedure Code under which the plaintiff's action was dismissed provides that if the plaintiff fails to appear—

(*a*) on the day fixed for the appearance and answer of the defendant, or

(*b*) on the day appointed—

(i) for the filing of the answer, or

(ii) for the filing of replication, or

(iii) for the hearing of the action, and

if the defendant on the occasion of such default of the plaintiff to appear is present in person or by proctor, and does not admit the plaintiff's claim, and does not consent to postponement of the day for the hearing of the action, the Court shall pass a decree *nisi* in the Form No. 21 in the First Schedule, or to the like effect, dismissing the plaintiff's action, which said decree shall, at the expiration of fourteen days from the date thereof, become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown to the Court good cause, by affidavit or otherwise, for his non-appearance.

Assuming for the moment that the action had been rightly dismissed does the dismissal operate as *res judicata.* Clearly there has been no judgment in the sense contemplated in section 184 of the Code. In this connexion Spencer Bower's observation at page 19 of his treatise on Res Judicata is apposite and bears repetition.

> Obviously, there is prima facie no decision in civil any more than in military warfare, where the attacking party sounds a retreat for strategic purposes. His retirement may indicate a perilous or even disastrous position for the moment, but there is no battle, and no "decision"; indeed, his very object in declining the former is to escape the latter. This was the effect of the old common law non suit, in which the plaintiff voluntarily withdrew from the contest at the trial for the express purpose of avoiding any judgment, and reserving his liberty to bring a fresh action. It is true that, in the Supreme Court, this ancient right of a plaintiff, and several, analogous rights, both in law and in equity, to abandon his claim are either abolished or qualified, but the authorities on the old practice are still very useful as illustrations of the principle now under discussion.

In the case of *Brandlyn v. Ord* [1] it was held by Lord Hardwicke that a bill dropped for want of prosecution is never to be pleaded as a decree of dismissal in bar to another bill. The view I have taken of section 207 of the Code is in accord with the basic concepts of *Res Judicata.* A decree of dismissal under section 84 of the Civil Procedure Code does not in my opinion operate as *Res Judicata* and the learned District Judge is right in so holding.

I shall now discuss the meaning of the words "no plaintiff shall hereafter be non-suited". Non-suit is an old English common law procedure

[1] *(1738) 1 Atk. 571, 26 E. R. 359.*

no longer in force in England. When the plaintiff failed to make out a legal cause of action or renounced it owing to the discovery of some error or defect in it or failed to support his pleadings by any evidence after the matter had so far proceeded when the stage of the verdict had been reached the Judge ordered a non-suit. A non-suited plaintiff might on paying all costs recommence his action. A procedure somewhat akin to non-suit is to be found in section 406 which reads as follows :—

(1) If, at any time after the institution of the action, the Court is satisfied on the application of the plaintiff (*a*) that the action must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

I now come to the explanation to section 207. According to it for a matter to be *res adjudicata* the previous action which is pleaded as a bar to the subsequent action must be—

(*a*) for the same cause of action, and

(*b*) between the same parties.

In the " same cause " is included every right to property, or to money, or to damages, or to relief of any kind which *can* be claimed, set up or put in issue between the parties upon the cause of action for which the action is brought. The instant case and the Kandy case are not between the same parties. The relief now claimed could not have been claimed in the Kandy case and the matters in issue except one are not the same.

Before I conclude I wish to observe that I find myself unable to appreciate the attitude of the Crown in raising the plea of *res judicata* in the instant case. In the amended answer in the Kandy case the officers of the Crown who were represented by the Crown Proctor and who must undoubtedly have acted on the advice of the Crown legal adviser took the plea that the Court had no jurisdiction to hear and determine the action. If the legal advisers of the Crown were satisfied of the soundness of that plea, and I must assume that they were so satisfied, then the decree of dismissal of the action was one made without jurisdiction. It is settled law that a judgment or decree of a Court acting without jurisdiction does not operate as *res judicata*. Why then did the Crown being satisfied that the Court had acted without jurisdiction raise the plea of *res judicata* in the instant case ? We have had no explanation from the learned counsel appearing for the Attorney-General. In this connexion I wish to repeat

the remarks of the Lord Chief Baron in the case of *Deare v. Attorney-General*[1] quoted by me in the citation from the judgment of Farwell L.J. in *Ladamuttu's* case (*supra*):

> It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of Justice when any real point of difficulty that requires judicial decision has occurred.

As this is the fourth appeal in which we have been called upon to decide whether a statutory functionary has acted within the ambit of his powers I wish to state that where statutory functionaries are vested with extraordinary powers such as those granted under the Land Redemption Ordinance they should show the greatest care in exercising such powers entrusted to them by the legislature in the faith that they would regard them as a sacred trust and show the greatest consideration to the rights of the citizen. They should always give close attention and due consideration to the representations of those affected by the exercise of such powers, ever mindful of the fact that it is not every citizen that has the means to assert his rights in the Courts if the functionary does not treat their representations with the consideration they deserve. In the instant case it would seem that in establishing his claim the plaintiff has had to spend more than the compensation he has been offered. The greater the powers entrusted to a statutory functionary the greater should be the care with which they are exercised.

I allow the appeal with costs and direct that decree be entered as prayed for with costs.

de Silva, J.—I agree.

Pulle, J.—

Three distinct matters have been raised in this appeal and the decision of any one of them in favour of the defendants, who are the respondents, would conclude the appeal in their favour. The learned trial Judge held that although the 2nd defendant was the *paraveni nilakaraya* of the lands in question he was none the less the owner for the purpose of satisfying the requirements of section 3 (1) (*b*) of the Land Redemption Ordinance, No. 61 of 1942. He also held that a declaration made by the Minister of Agriculture and Lands dated the 10th May, 1951, under the provisions of the First Schedule to the Land Redemption Ordinance, as amended by section 62 (1) of the Land Acquisition Act, No. 9 of 1950, ruled out even the possibility of challenging the proceedings taken to acquire the lands on the ground that the Land Commissioner had exceeded his powers under section 3 (1) (*b*) of the Land Redemption Ordinance. He did not, however, uphold the plea raised by the Crown that the decree in D. C. Kandy case No. 3632 dismissing an action instituted by the plaintiff in 1952 operated as *res judicata*.

[1] *1 Y. & C. Ex. p. 208.*

In the case of *Appuhamy et al. v. Menike et al.* [1] a Bench of three Judges held that a *paraveni nilakaraya* claiming an undivided share in a panguwa of a nindagama was not entitled under the Partition Ordinance, No. 10 of 1863, to bring a suit for the partition of the land. Section 2 which lays down the prime condition for the institution of a partition action reads :

" When any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property ; . . . . "

The submission on behalf of the appellants in that case was that, although they and the defendants were *paraveni nilakarayas*, the panguwa " belonged " in common to them and that the appellants came within the description of " one or more of such owners ". The reasons for holding against the appellants are stated differently in the three judgments. Nevertheless, I am compelled to come to the conclusion that the only basis on which the decision can be interpreted is that the *paraveni* tenants could not bring themselves within the scope of section 2, whatever each of the learned Judges thought was a good ground for denying their claim to be owners. I fail to see why if they were owners they should have been, in the face of the clear provisions of the section, refused the right to put an end to the common ownership and why two of the Judges should regard the indivisibility of the services due to the overlord as the only obstacle to a physical division of a panguwa or to a sale. I have had the advantage of reading in advance the judgment of my Lord, the Chief Justice, and I fully concur in the reasons given by him that a *paraveni nilakaraya* cannot for the purposes of section 3 (1) (*b*) of the Land Redemption Ordinance, be regarded as an " owner ".

If it be correct that the 2nd defendant cannot bring himself under section 3 (1) (*b*) of the Land Redemption Ordinance, then I see no difficulty in holding that the steps taken to acquire the lands and vest title thereto in the Crown are of no avail in law. The preamble to the modified form of section 5 of the Land Acquisition Act, No. 9 of 1950, which is incorporated as an amendment to the First Schedule to the Land Redemption Ordinance reads,

" Where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance, the Minister shall make a written declaration. . . . "

[1] *(1917) 19 N. L. R. 361.*

To my mind a valid declaration by the Minister is dependent on a valid determination by the Land Commissioner and that an invalid determination vitiates the steps taken thereafter to put in motion the machinery of acquisition for the ultimate vesting of title to the lands in the Crown.

On the issue of *res judicata* the facts are fully set out in the judgment of my Lord, the Chief Justice, and I need not repeat them. It is common ground that at the time D. C. Kandy case No. 3632 was filed title to the lands in question was in the plaintiff. The plaint alleged in effect that two statutory functionaries one the Land Commissioner and the other the Assistant Government Agent had done acts, purporting to act under the law, which were not within their powers and the plaintiff asked for a declaration that the lands were not liable to be acquired under the Land Redemption Ordinance and for an injunction restraining the 2nd defendant who was the acquiring authority from taking further steps to acquire the lands. The two defendants denied the allegations of illegality and in paragraph 6 of their joint answer they stated,

" Further answering these defendants state that the Court has no jurisdiction to hear and determine this action. "

The occasion to formulate issues did not arise as the action was dismissed for default of appearance. That the dismissal of the action was a bar to a fresh action against one or other of the parties on the same cause of action, assuming that the District Judge had jurisdiction to try case No. 3632 on its substantive merits, is plain enough. If the court had no jurisdiction to grant relief to the plaintiff as against the defendants in case No. 3632 I fail to see how the decree in that case can operate as *res judicata*, if the plaintiff afterwards seeks relief against the proper parties in the proper forum.

In my opinion the plea of *res judicata* fails substantially for the reason that the parties in the two actions are different. I cannot bring myself to hold that the defendants in case No. 3632 defended it as agents of the Crown. The complaint against them was that under colour of office they were doing or had done acts unwarranted by law. It was open to the Attorney-General to have got himself substituted in place of the Land Commissioner or the Assistant Government Agent. Had he done so his position in the present case would have been almost impregnable. I agree with the learned District Judge that the plea of *res judicata* fails.

In the result the appeal should be allowed with costs both here and below.

Appeal allowed.