Present: Lascelles C.J., Wood Renton and Pereira JJ. 1913.

SAMICHI *v.* PIERIS.

195—D. C. Kandy, 21,328.

Res judicata—*Seizure of money due to debtor under a contract—Claim by assignee of contract upheld—Subsequent seizure by same creditor of another sum of money due under same contract—Claim by the same claimant—Civil Procedure Code, ss. 207, 406—Appeal—Seizure of money under s. 232, Civil Procedure Code—Inquiry into claim preferred—No appeal lies against an order in the claim inquiry.*

A creditor seized a sum of money which had accrued due to his debtor under a contract. A third party claimed the money as the assignee of all the debtor's rights under that contract, and the creditor consented to the claim being upheld. Thereafter the same creditor seized a further sum of money which had accrued to the same debtor under the contract; the same claimant claimed the money under the same assignment.

Held (*per* LASCELLES C.J. and WOOD RENTON J.), that the right of the claimant to the money was *res adjudicata* between the parties, and that it was not open to the creditor to challenge in the subsequent proceedings the claimant's title.

Section 207 and similar sections of the Civil Procedure Code do not embody the whole law as to *res judicata* in Ceylon.

Even if we are restricted to section 207 of the Code, the expression "cause of action" contained in the explanation to that section cannot be restricted to the particular subject-matter claimed. The cause of action must be held to include the denial of the right to the relief which a litigant claims, and, inferentially, a denial of the title by which he claims it.

Per PEREIRA J., following the decision in *Palaniappa v. Gomis*,[1] that our law as to *res judicata* is to be found in section 207 of the Civil Procedure Code, and that although the provisions of that section may be supplemented by the English law, that law cannot be brought in to qualify those provisions, or to supersede any portion of the section, or to restrict or expand its scope or meaning. Therefore, whatever is laid down, as held or ordered, within the four corners of the decree in a case, cannot be debated again in a subsequent action between the same parties, but (according to the "explanation" attached to the section) any incidental or collateral matters that were actually put in issue, or might have been put in issue, in a case would be *res judicata* only where another action is attempted on the same cause of action.

An inquiry into a claim to money seized in the hands of a public officer under section 232 of the Civil Procedure Code is an inquiry under sections 242 to 245 of the Code, and the order on such inquiry is therefore not appealable; the remedy of the party against whom it is made being an action under section 247.

[1] *4 Bal. 21.*

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THE facts are set out as follows in the judgment of Wood Renton J.:—

The facts material to this appeal are these. Thomas de Silva, the appellant, Arbaham Pieris, the defendant, and Adrian Fonseka entered into a contract with the Principal Civil Medical Officer on June 27, 1911, to supply to the Government hospital at Dambulla certain articles of food from July 1, 1911, to June 30, 1912. By deed No. 1,424 of September 12, 1911, Pieris and Fonseka assigned to the appellant their rights under the contract. This assignment was effected in breach of a condition of the contract that it should not be assigned without the previous written consent of the Principal Civil Medical Officer. The plaintiff-respondent, Samitchi Appu, obtained judgment against Pieris in this case, and—I am taking the facts as they are now placed before us in the learned District Judge's reply, dated February 27, to a letter sent to him by direction of my brother Pereira and myself at the close of the first argument—seized, under section 232 of the Civil Procedure Code, what was then the unascertained sum due to Pieris under the contract above referred to in the hands of the Principal Civil Medical Officer. The Principal Civil Medical Officer paid the money into the Court of Requests, Colombo. The appellant claimed it by virtue of his assignment. The matter came on for investigation in the District Court of Colombo, and the respondent there formally consented to the appellant's claim being upheld. Subsequently a further sum of Rs. 553.38 accrued due to Pieris under the contract with the Principal Civil Medical Officer, and the latter paid it into the District Court of Kandy. The appellant claimed it once more under his assignment, fortified as the assignment had been by the respondent's consent to the claim being upheld in the previous proceedings in the District Court of Colombo. The respondent alleged, however, that he had consented to the claim being upheld in ignorance of the fact that the assignment by Pieris and Adrian Fonseka of their rights in favour of the appellant had been made in breach of an express prohibition contained in the contract itself. The appellant contended, on the other hand, that the matter was *res judicata*, and could not be re-opened so long as the consent order upholding the claim was enforced. The District Judge declined to accept this contention, and allowed the motion by the respondent that the sum in question should be paid over to him. The present appeal is brought from that order.

This case was referred to a Full Bench by Wood Renton J. and Pereira J.

H. A. Jayewardene, for the appellant.—The respondent cannot now contend that the appellant is not entitled to moneys accruing to the debtor under the contract. The same matter was in dispute in the previous claim inquiry between the same parties in the

Colombo District Court. The matter in dispute in both inquiries was whether the appellant had acquired any right to the moneys accruing under the contract. The fact that the sum of money claimed in the Colombo Court is not identical with the sum claimed in the present case does not affect the question. [Pereira J.—The law of *res judicata* in Ceylon and in India is part of the law of procedure and not of the law of evidence as in England. We have to interpret the sections of the Civil Procedure Code.] Section 207 of the Civil Procedure Code is not exhaustive. It only meets the case of a person having several titles and not putting forward all the titles in issue. Even in India it was held that the identity of subject-matter is not necessary (*Hukm Chand 42, 46*). [Pereira J.—In India the sections of the Procedure Code provide that the matter is *res judicata* under the present circumstances.] The general principles of the law of *res judicata* are relied on, and not the Indian section, by *Hukm Chand*. See also *11 Cal. L. J. 461, at page 468*. [Pereira J.—General principles cannot over-ride the terms of section 207.] Counsel cited *Dingiri Menika v. Punchi Mahatmaya*,[1] *Hukm Chand 49*, *Mohamed Cassim v. Sinne Lebbe Marikar et al.*,[2] *Palaniappa Chetty v. Saminathan Chetty*.[3]

Zoysa, for the respondent.—There is no appeal against the order of the District Judge. The procedure for claim inquiries applies to this matter; and there is no appeal against an order in a claim inquiry. See *Tikum Singh v. Sheo Ram Singh*.[4]

The order in the Colombo case cannot be pleaded as *res judicata*, as the respondent consented to the claim being upheld in that case, as he was ignorant of the fact that the assignment was invalid.

The cause of action in both inquiries is not the same. The Indian law is different from ours. Counsel cited 137-8—D. C. Kalutara, No. 4,709,[5] *Palaniappa v. Gomis*.[6]

Jayewardene, in reply.

Cur. adv. vult.

March 19, 1913. LASCELLES C.J.—

His Lordship set out the facts, and continued:—

The question is whether by reason of this order the claim now under consideration is *res adjudicata*. During the argument the point was raised, which I understand was taken in the previous argument, that an order under section 232 of the Civil Procedure Code was not appealable.

On this point we were referred to the Indian case of *Tikum Singh v. Sheo Ram Singh*.[4] This decision is not binding on us, but it contains an exposition of the scope of the Indian section corresponding to our section 232, which I think should be accepted as correct.

[1] *(1910) 13 N. L. R. 59.*
[2] *(1909) 12 N. L. R. 184, at page 186*
[3] *(1912) 15 N. L. R. 161.*
[4] *(1891) I. L. R. 19 Cal. 286.*
[5] *S. C. Min., Oct. 25, 1912.*
[6] *4 Bal. 21.*

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Section 232 is one of a group of sections which, under the heading "Mode of Seizure," provides for the seizure of property of different categories. The first part of section 232 describes the mode of seizing property deposited in Court. Then the proviso goes on to provide that "any question of title or priority arising between the judgment-creditor and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise, shall be determined by such Court."

This, I think, merely indicates the *forum* in which the inquiry is to be made; and does not mean that the procedure for the investigation of claims for this particular description of property is different from that which is prescribed for the investigation of claims in the case of all other descriptions of property when seized in question.

The sections headed "Claims to Property Seized" (sections 241-252) relate to all descriptions of property, and orders made on the investigation of claims are final, subject to the result of an action, if any, instituted under section 247. I am therefore of opinion that the appeal fails on this ground, and must be dismissed with costs.

The question, however, with regard to *res adjudicata* is important, and, after the very full argument which we have heard, I am reluctant to leave it without recording the conclusion at which I have arrived.

The point may be stated thus. A claim for a certain sum, under a deed of assignment, had been allowed by consent; a claim for a further sum is now made under the same deed. The question is whether the latter claim is barred by the order in the former claim, the parties being the same in both proceedings. It was conceded that an order made by consent of parties is, for purposes of estoppel by *res judicata*, not less conclusive than an order made after a contest. It was further conceded that by the law of England and by the law of India it is not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous proceedings, and that the true test is the identity of the matter in controversy. But it is contended that under section 207 of the Civil Procedure Code, or rather under the explanation to that section, the application of the operation of the rule in Ceylon is more restricted.

The current of judicial decision in Ceylon strongly supports the view that on this point there is no distinction between the law of Ceylon and that of England. (*Endris v. Adrian Appu*,[1] *Kantaiyer v. Ramu*,[2] *Dingiri Menika v. Punchi Mahatmaya*.[3])

I see no reason for accepting 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. The law of *res judicata* has its foundation in the civil law, and was part of the common law of Ceylon long

[1] *(1905) 11 N. L. R. 62.* [2] *(1909) 13 N. L. R. 161*

[3] *(1910) 13 N. L. R. 59.*

before Civil Procedure Codes were dreamt of. But even if these sections contain an exhaustive 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. It is said, in relation to the facts of the present case, that the "cause of action" in the former proceedings was the judgment-creditor's denial of the claimant's right to a certain number of rupees, and that the "cause of action" in the present case is his denial of the claimant's right to a different sum of rupees, and that the causes of action in the two proceedings are therefore different.

The expression "cause of action" has different meanings, as is shown by the not very helpful definitions in the Code. But I do not think that, when a question of *res judicata* arises, the term means merely the denial of a claim. The "action" was the claimant's claim to the money. It is surely no answer to the question "What was the 'cause' of the action?" to say "The judgment-creditor's denial of this claim." This carries the matter no further. It merely amounts to a statement that the claim was disputed. The true "cause of action," it seems to me, is the right in virtue of which this claim is made; the foundation of the claim which, in this case, is the right claimed under the assignment. This was the true cause on which the action was founded. On this construction no difficulty arises under the explanation to section 207. Lord Watson in *Chand Kaur v. Partap Singh* [1] stated with regard to this expression: "The cause of action has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

If the term "cause of action" be understood in this sense, section 207 presents no difficulty, and does not prevent the law of *res adjudicata* being applied in Ceylon in the same manner as in England and India. The cause of action, in my opinion, was the right which the claimant asserted in virtue of the assignment in his favour, and was one and the same in both proceedings. If the order had been appealable, I should have decided in favour of the appellant. As it is, I would dismiss the appeal with costs, on the ground that the order is not appealable.

WOOD RENTON J.—

His Lordship, after stating the facts, continued:—

The argument of the case has pursued a somewhat curious course. When it was first heard before my brother Pereira and myself, although Mr. St. Valentine Jayewardene informs us, I have no

[1] (*Hukm Chand on "Res judicata," p. 11.*

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doubt correctly, that the point that the order was not appealable was taken by him, the main question pressed upon us was whether or not the District Judge was right in holding that the respondent was not estopped from disputing the appellant's title by the consent order in the claim proceedings. It was with a view to clearing the ground for a determination of that issue that we sent the case back for a statement by the District Judge as to the exact relation between the two sums of money that were in issue respectively in the proceedings in the District Court of Colombo and in the present proceedings.

At the re-argument, however, before three Judges, Mr. Zoysa brought up again the question whether or not the case is one in which an appeal would lie. He put his argument in this way. Section 232 of the Civil Procedure Code merely prescribes the mode of seizure in such a case as this, and although the proviso to the section says that questions of title or priority arising between the judgment-creditor and any other person in regard to property deposited in Court or seized in the hands of a public officer shall be determined by the Court from which execution issued, such questions must be brought before that Court for determination in the manner indicated in sections 241 *et seq.* This construction of section 232 is supported by the decision of the High Court of Calcutta in *Tikum Singh v. Sheo Ram Singh* [1] under the corresponding section (272) of the old Indian Code of Civil Procedure, and on full consideration I think that it is sound.

This finding is in itself sufficient to dispose of the present appeal, but as the case was sent back to the District Court of Kandy for the purpose of enabling the question of *res judicata* to be argued, and as that question has now been elaborately argued before us, I think that we ought to express an opinion upon it. The facts may be hypothetically put as follows. The judgment-creditor seized a sum that has accrued due to his debtor under a contract. A third party claims it as the assignee of all the debtor's rights under that contract. The fact in the present case that the assignment had been executed in contravention of a provision of the contract is immaterial, since the party for whose benefit that prohibition existed had not sought to take advantage of it, and it could not have the effect of avoiding the assignment in favour of third parties. The judgment-creditor consents to the claim being upheld, and the money is released from seizure. A further sum of money accrues due to the same debtor under the same contract later on. It is seized by the same judgment-creditor. The same claimant sets up title under the same assignment. Can the execution-creditor challenge in the subsequent proceedings the claimant's title? To this question there can be, in my opinion, only one answer: he cannot. It is clear law that a judgment by consent has the full effect of a *res judicata* between the

[1] *(1891) I. L. R. 19 Cal. 286.*

parties (*In re South American & Mexican Co.*[1]). Its effect for this purpose is not weakened by any allegation that it has been entered into under a mistake of fact. If mistake is alleged, proceedings may be taken to set the judgment aside. In the absence of such proceedings it stands. All that the law of England or of India (*Hukm Chand, "Res judicata," pp. 43 et seq.;* and see *Lemm v. Mitchell* [2]) or of Ceylon requires for the purpose of constituting *res judicata* or estoppel by judgment is that the issue in question should have been distinctly raised between the same parties appearing respectively in the same capacity, and should have been directly and necessarily determined by the former proceedings. It is of no consequence that the matter is dealt with in the decree itself, or that the form of the subject-matter of the later proceedings is different from the form or the subject-matter of the earlier. In my judgment in D. C. (Int.) Kalutara, No. 4,836,[3] I have dealt fully with the English and the local authorities on this question, and have endeavoured to show that the case of *Barrs v. Jackson*,[4] as decided by Lord Lyndhurst L.C. in appeal, supports the view of the law which I have just stated. The case of *Regina v. Hutchings* [5] is no authority to the contrary. That decision is explained by the House of Lords in *Whitfield Corporation v. Cooke*,[6] and offers an admirable illustration of what is meant in the law of *res judicata* by an incidental issue to the determination of which the effect of *res judicata* will not attach. The only question that the Magistrates had to determine was whether or not certain expenses, amounting to £400, had in fact been incurred in the repair of a road and were due by an individual to the Corporation. The Magistrates went out of their way to inquire into, and to express an opinion upon, a question which they had no jurisdiction to entertain, namely, whether the road in question was a public street or not. Their views on this point were properly held on appeal to relate to an incidental issue alone, and not to have the effect of *res judicata* in subsequent proceedings in which the same question was raised. It is obvious, however, that totally different considerations arise where, as in *Barrs v. Jackson* [4] or in the present case, we are dealing with issues which, although they may not be directly touched upon by the decree, constitute the very ground on which a litigant claims, and on which alone he can obtain judgment.

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. But even if we are restricted to section 207 of the Code,

[1] *(1895) 1 Ch. 37.*
[2] *(1912) A. C. 400.*
[3] *(1913) S. C. Min., February 17, 1913.*
[4] *(1842 and 1845) 1 Y. & C. C. C. 585 and 1 Ph. 582.*
[5] *(1881) 6 Q. B. D. 300.*
[6] *(1904) A. C. 31.*

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I am quite unable to interpret the expression " cause of action," contained in the explanation to that section, as being restricted to the particular subject-matter claimed. The cause of action must be held to include the denial of the right to the relief which a litigant claims and, inferentially, a denial of the title by which he claims it. To permit in a country like this such issues as legitimacy, descent, and title under identical deeds of transfer, or rights arising under identical written contracts, to be re-agitated between the same parties appearing in the same capacity in any number of independent actions, so long as the form or the subject-matter of each of these actions was different, would be to involve the work of the Courts of first instance and of the Supreme Court in almost inextricable confusion, and to create most undesirable facilities for converting the administration of the law into an engine of oppression.

I would dismiss the appeal with costs.

PEREIRA J.—

I regret that I am obliged to write this judgment while on circuit, with only a few of my notebooks to refer to. The appeal is from an order of the District Judge disallowing a claim to a sum of Rs. 553.38 seized in execution of a writ. This sum was seized, at the instance of the plaintiff, in the hands of the Principal Civil Medical Officer, as money due by him to the defendant (execution-debtor) on a contract for the supply of provisions to the Dambulla hospital. The claimant (appellant) claimed this sum under and by virtue of an assignment (C1), whereby the defendant had assigned to him all moneys then due and thereafter to become due to him from the Principal Civil Medical Officer on the contract referred to above. The District Judge disallowed the claim on the ground that the assignment was invalid, inasmuch as it contravened a certain provision of the original contract. It appears from a letter written to us by the District Judge in reply to a question put to him that on a writ issued at the instance of the plaintiff by the District Court of Colombo a totally different sum of money, but a sum that had also become due on the same contract, had been seized, and that the same had been claimed by the claimant on the same assignment (C1), and that at the inquiry before the District Court of Colombo the plaintiff in the present case had consented to the claimant's claim being upheld, and that it had accordingly been upheld.

In the present appeal it was argued, on the one side, that the order of the District Court of Colombo was a *res judicata*, which did not permit of the question of the validity of the assignment C 1 being debated in the present case, and, on the other side, that the claimant had no right of appeal from the order in this case. On both these contentions I agree with the counsel for the plaintiff (respondent) in the views pressed by him. The order of the District Judge must, in my opinion, be regarded as an order under section 245 of the

Civil Procedure Code, and it is well established that no appeal lies from such an order, the remedy of the party aggrieved being an action under section 247 of the Code. There is no doubt an irregularity in the present case, namely, the claim does not appear to have been made before, and referred to Court by, the Fiscal in terms of section 241. If that irregularity is to be taken serious notice of, the claimant is bound to fail on that alone in this appeal, but assuming the claim to have been duly made, the inquiry should have proceeded as an inquiry under sections 242 to 245 of the Code. True, the mode of seizure in a case like the present is indicated in section 232, and the Court that has jurisdiction to make the inquiry in certain cases is also indicated in that section, but there is nothing in it to show that the inquiry itself is not to be the usual inquiry into a claim to property taken in execution under sections 242 to 245. The case cited by the respondent's counsel from the Indian Law Reports (*19 Cal. 286*) appears to be quite in point.

On the question of *res judicata*, I may say that, as I have had occasion to observe in a case or two before this, omitting, as unnecessary, reference to section 41 of the Evidence Ordinance, which deals with judgments of Courts in the exercise of probate and certain other special jurisdictions, the only reference in that Ordinance to the law of estoppel by judgment generally is in section 40. That section enacts that the existence of any judgment, order, or decree which by law prevents any Court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. This is identical with the provision of the Indian Evidence Act on the subject. The question is where " the law " referred to here as preventing " any Court from taking cognizance of a suit " is to be looked for. It is not in the Evidence Ordinance or the Indian Evidence Act. Ameer Ali and Woodroffe, in their work on the Law of Evidence applicable to British India, says (*p. 291, 1st ed.*) that English text writers deal with the subject of *res judicata* under the head of Evidence as it is a branch of the law of Estoppel, but the authors of the Indian Codes have regarded it as belonging more properly to the head of Procedure; and, in India, the law referred to above as preventing a Court from taking cognizance of a suit is to be found in sufficient fulness in section 13 of the Indian Code of Civil Procedure. Apparently, the intention of the authors of our Code was exactly the same. The law referred to above is not set forth in the Evidence Ordinance. It is only to be found in section 207 of the Civil Procedure Code, and, in saying so, I concur in the view taken by this Court in the case of *Palaniappa v. Gomis*.[1] There Wendt J. said: " Our law as to *res judicata* is to be found in section 207 of the Civil Procedure Code ..... The law enacted by the Indian Civil Procedure Code is not the same ..... The provision as to *res*

[1] *4 Bal. 21.*

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judicata embodied in section 13 are essentially different from our section 207." This being so, the Indian authorities cited in the course of the argument have no application at all to the question involved in the present appeal. I am prepared to concede that possibly our whole law as to *res judicata* is not to be found in section 207 of the Civil Procedure Code. It may be that, under the authority of section 100 of the Evidence Ordinance, this provision may be supplemented by the English law, but there is the authority of that very section of the Evidence Ordinance for saying that the English law cannot be brought in to qualify the provisions of section 207 of the Civil Procedure Code, or to supersede any portion of it, or to restrict or expand its scope and operation. What section 207 of the Civil Procedure Code enacts is that, primarily, all decrees shall be final between the parties. This is the substantive enactment in the section, meaning that whatever is laid down, as held or ordered, within the four corners of a decree, cannot be debated again in a subsequent action between the same parties. Then comes the explanation, which says that every right of property or to relief of any kind which can be claimed or put in issue between the parties to an action upon the cause of action for which the action is brought cannot afterwards be made the subject of action between the same parties for the same cause. These concluding words are important, and they must be given a meaning, and their only meaning appears to be that, as regards the incidental and collateral matters mentioned in the explanation, the decree would be *res judicata* only where another action is attempted on the same cause of action. This, I take it, is in strict accordance with what was laid down by Knight Bruce V.C. in the case of *Barrs v. Jackson*,[1] where it was held that a finding of fact in a suit in the Ecclesiastical Court for a grant of letters of administration, necessary to the decision and appearing on the face of the order, was not conclusive in proceedings between the same parties in a Court of Equity for distribution. The judgment in the case was, it may be mentioned, set aside in appeal, but, as observed by Lord Selborne L.C. in *The Queen v. Hutching*,[2] " on a ground not at all touching the principles contained in it." It may be that these principles were given by later judicial decisions a somewhat wider operation than was originally intended, but apparently the intention in the mind of the framer of our Civil Procedure Code was to adhere to them as far as practicable, and, if anything, to restrict their application. Such a course may have been necessary in view of our rules of procedure and the constitution and jurisdictions of the different Courts of the Island.

In the present case the cause of action in the proceeding before the District Court of Colombo was essentially different from the cause of action in the proceeding before the District Court of Kandy. I may say that I did not understand the appellant's counsel to

[1] *2 Sm. L. C., 7th ed., 807.*

[2] *(1881) 6 Q. B. D. 300, 304.*

contend that that was not so. In the former case what may be called the cause of action was the seizure by the plaintiff on a writ issued at his instance by the District Court of Colombo of a certain sum of money. This gave the right to the claimant to come to Court and make his claim. In the latter proceeding the cause of action was the seizure by the plaintiff on a writ issued at his instance by the District Court of Kandy of a certain other sum of money. True, both the sums were claimed by the defendant on the footing of one and the same document (assignment C 1), but the causes of action being essentially different, while by reason of the substantive provision of section 207 of the Civil Procedure Code the order or decree in the former case was *res judicata* with reference to the particular sum of money dealt with by it, the terms of the " explanation " appended to section 207 would not permit of its being pleaded as *res judicata* in the latter case with reference to the other matters taken cognizance of by the Court in the former.

For the above reasons I would dismiss the appeal with costs.

Appeal dismissed.

201—D. C. (Inty.) Kalutara, 4,836.

De Sampayo, K.C. (with him *Seneviratne*), for the added defendants, appellants.

Bawa, K.C., Acting S.-G. (with him *A. St. V. Jayewardene*), for plaintiff, respondent.

Feb. 18, 1913. WOOD RENTON J.—

This case and cases Nos. 199—D. C. (Interlocutory) Kalutara, No. 4,843, and No. 200—D. C. (Interlocutory) Kalutara, No. 4,760, are actions substantially between the same parties, which by consent have been tried together, for the partition of three lands, Demelakaddewatta, Mudaligahawatta, and Kosgahawatta, respectively. The judgment under appeal was delivered in No. 201—D. C. (Interlocutory) Kalutara, No. 4,836, and disposes of the subject-matter of the two other actions also. The material facts have been stated by the learned District Judge with clearness and care, and I do not propose to recapitulate them at length. The pedigree of the plaintiff-respondent is accepted by the added defendants-appellants so far as it goes, but they allege that it is incomplete, and that Samiel Fernando, the son of Dinis Fernando, the original owner of the lands in suit, besides the children Iso and Nadoris born to him by his first wife Maria, had by a second marriage a child Riso, through whom the appellants claim. The respondent says that Riso was not Maria's daughter. It is obvious that the question of the legitimacy of Riso lies at the root of the whole litigation between the parties to these cases. The respondent contends that appellants are precluded from asserting Riso's legitimacy by the decree in D. C. Kalutara, No. 1,503. That was an action for the partition of the land Kosgahawatta substantially between the same parties who are litigants here. The legitimacy of Riso was the subject of the first issue, and there, as here, it lay at the root of the whole dispute. The District Judge held that Riso was not the legitimate child of Samiel Fernando, and the Supreme Court expressly affirmed his decision on that point in appeal. The appellants' counsel admitted at the trial—and this

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admission was repeated before us at the argument in the Supreme Court—that the decree in D. C. Kalutara, No. 1,503, was *res judicata* as regards the land Kosgahawatta in case No. 200—D. C. (Interlocutory) Kalutara, No. 4,760, and that the appellants could not succeed in regard to that land unless they were in a position to establish, as they attempted to do, title by prescription. As regards Kosgahawatta, the burden of proof is clearly on the appellants. The District Judge holds that they have failed to discharge it, and I am not prepared to say that his decision on this point is wrong. In my opinion, the appeal in No. 200—D. C. (Interlocutory) Kalutara, No. 4,760, ought to be dismissed with costs.

The present case and case No. 199—D. C. (Interlocutory) Kalutara, No. 4,843, stand in a somewhat different position as regards the evidence of prescriptive title, and according to the argument of the appellants, as I understand it, as regards the plea of *res judicata* also. The lands are different from the subject-matter of case No. 200—D. C. (Interlocutory) Kalutara, No. 4,760, and if for that or for any other reason the plea of *res judicata* is inapplicable, the burden of establishing title by prescription will be upon the respondent, and not upon the appellants. The learned District Judge has considered the evidence of prescription from this point of view, and has come to the conclusion that the respondent has made out his case. Here, again, the District Judge has considered the evidence with great care, and I am not prepared to say that he is wrong. On the grounds that I have stated I would dismiss the appeals in this action and No. 199—D. C. (Interlocutory) Kalutara, No. 4,843, with costs.

If it had been necessary to decide the question, I should have held that the finding in D. C. Kalutara, No. 1,503, that Riso was not the legitimate daughter of Samiel Fernando, operated as *res judicata*, or as estoppel by judgment, against the appellants as regards the lands Demelakaddewatta and Mudaligahawatta as well as Kosgahawatta. The decree of title in each of these cases turned directly on the question whether Riso was Samiel's legitimate daughter or not. The decisions in *Dingiri Menika v. Punchi Mahatmaya et al.* (*1910, 13 N. L. R. 59*) and *Kantaiyer v. Ramu* (*1909, 13 N. L. R. 161*) are binding upon the Court, as at present constituted, on this question. The view of the law taken in these two decisions is, I venture to think, consistent, and, indeed, in accordance with English authority. The statement by Knight Bruce V.C. in *Barrs v. Jackson* (*1 Y. & C. 585*) of the principles of English law as to *res judicata* is unchallenged and unaffected by the reversal of his decision in appeal. The question, however, is what the law means when it says that only matters directly determined by the previous judgment are to be regarded as *res judicata*. The judgment of Lord Lyndhurst L.C. reversing the decision of Knight Bruce V.C. in *Barrs v. Jackson* (*1 Y. & C. 585*) makes this clear. The material facts may be stated in a few sentences. A suit was instituted in the Prerogative Court for administration to the estate of a Miss Smith. The defendant, Jackson, claimed a grant of administration as her next of kin. A rival claim was put forward by Mrs. Barrs. The Ecclesiastical Court held that Mr. Jackson was the next of kin, and granted letters of administration to him on that basis. Mrs. Barrs afterwards instituted in the Court of Chancery a suit claiming, as next of kin, the residuary estate of the intestate. Jackson pleaded that the sentence of the Ecclesiastical Court was *res judicata* as regards her claim in the Chancery action. Vice-Chancellor Knight Bruce held that it was not. But Lord Lyndhurst on appeal (*1845, 1 Ph. 582*) held that it was, on the ground that the judgment of the Ecclesiastical Court had turned upon the question which of the parties was next of kin to the intestate, and that that judgment was decisive of the same question in a subsequent suit in the Court of Chancery between the same parties for administration. The scope of the case *Barrs v. Jackson* (*1845, 1 Ph. 582*) is explained by Lord Penzance in *Spencer v. William* (*1891, L. R. 2 P. & D. 235–236*): "If two parties have once, before a Court of competent jurisdiction, litigated any question of fact, and that

question has been finally decided, it is not reasonable that either of them, in any other Court, should re-open it." I venture to think that the decision of *Barrs v. Jackson* (*1845, 1 Ph. 582*) in appeal supports the view of the law which I have just stated. In D. C. Kalutara, No. 1,503, the ground on which Riso's children relied in proof of title was their mother's legitimacy, just as Mrs. Barrs claimed administration as Miss Smith's next of kin. In the three actions with which we are concerned now, Riso's children rest their claim of title on the old basis, just as Mrs. Barrs did in the Chancery action. The question of Riso's legitimacy is the foundation of the appellants' title in all these proceedings. That question of fact has been decided against them in D. C. Kalutara, No. 1,503, and they cannot be allowed to re-open it, as against the same parties, in any other Court of law.

PEREIRA J.—

I agree to the order proposed by my brother Wood Renton, but I should like to add that, had it been necessary to decide the question as to *res judicata*, I would probably have held in favour of the appellants. I should hesitate to act contrary to a decision of a Bench of two Judges, and I would, as far as practicable, avoid doing so; but I must confess that the inclination of my mind is in the direction of the notion that a Bench of two Judges is not, by law, absolutely bound by the decision of another Bench similarly constituted. Considering our rules of procedure and the constitution of our Courts, I doubt that it can be said that the decision by a Court in the exercise of its ordinary civil jurisdiction on a more or less incidental issue in a case operates as *res judicata*. If it does, the fate of a most valuable estate, patrimony, or inheritance may often hang by the slender thread of a very trivial circumstance, namely, an action for an amount barely above the jurisdiction of our Courts of Requests. In one view it would appear that the whole of our law of Estoppel by judgment is contained in section 207 of the Civil Procedure Code. Omitting for the moment reference to section 41 of the Evidence Ordinance, which deals with judgments of Courts in the exercise of probate and certain other special jurisdictions, the only reference in the Ordinance to the law of Estoppel by judgment generally is in section 40. That section enacts that the existence of any judgment, order, or decree which by law prevents any Court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. This is identical with the provision of the Indian Evidence Act on the subject; but "the law" referred to here as preventing "any Court from taking cognizance of a suit," &c., is to be looked for at some place other than the Evidence Ordinance or the Indian Evidence Act. As observed by Ameer Ali and Woodroffe in their work on the law of Evidence applicable to British India (*p. 291, 1st ed.*), English text writers deal with the subject of *res judicata* under the head of Evidence, as it is a branch of the law of Estoppel; but the authors of the Indian Codes have regarded it as belonging more properly to the head of Procedure; and, in India, the law referred to above as preventing a Court from taking cognizance of a suit, &c., is to be found in sufficient fulness in section 13 of the old Indian Code of Civil Procedure. Our Civil Procedure Code, which is more or less a transcript of the Indian Code of Civil Procedure, was passed long anterior to our Evidence Ordinance, that is to say, at a time when, by virtue of Ordinance No. 3 of 1846, our law of Evidence was substantially the same as the English law on the subject, and hence, apparently, section 13 of the Indian Code was not copied into ours, nor was it added to it when the Evidence Ordinance was passed. But curiously, a short provision as to *res judicata* has, in fact, been inserted in section 207 of the Civil Procedure Code, and I doubt, therefore, that for our law of *res judicata* we can now look beyond section 207 of the Civil Procedure Code. There is no *casus omissus* here, that is to say—to use the words of section 100 of the Evidence Ordinance—"a question of evidence not provided for by this Ordinance or by any other law in force in the Island."

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As regards *Barrs v. Jackson* (*2 Sm. L. C., 7th ed., 307*), the decision in the case was no doubt reversed in appeal but, as observed by Lord Selborne in *The Queen v. Hutchings* (*6 Q. B. D. 300, 304*), "on a ground not at all touching the statement of principles contained in it." I have cited largely from the judgment in this case in my judgment in 137, 138—D. C. Kalutara, No. 4,709 (*S. C. Civil Minutes, circa October 25, 1912*), and, if words mean anything, it is clear from the judgment in *Barrs v. Jackson* that the decision on an incidental issue, however binding and conclusive it may be as to its immediate and direct object, namely, the object of aiding in the decision of the direct issue in the case, is not conclusive on questions arising on other causes of action. What Knight Bruce V.C. himself meant by an "incidental issue" is clear from the fact that what he held in the case was that the finding of fact in a suit in Ecclesiastical Court for a grant of letters of administration, necessary to the decision and appearing on the face of the order, was not conclusive in proceedings between the same parties in a Court of Equity for distribution. The reversal of the decision by Lord Lyndhurst L.C. proceeded largely on the ground of the Ecclesiastical Court being a Court of distribution, and on the inconvenience attending the existence of two different findings by two Courts of co-ordinate jurisdiction. As observed already, there is high authority for saying that the principles laid down by the Vice-Chancellor are "untouched by the reversal." Moreover, in view of the reversal, it has to be borne in mind that the order of the Ecclesiastical Court was a judgment *in rem* conferring on a person a legal character. Special considerations apply to such judgments and even in our Evidence Ordinance they are specially provided for by section 41. The same observations as above may be made with reference to the decision in *Priestman v. Thomas* (*1894, 9 P. D. 210*), referred to in my judgment in D. C. Kalutara, No. 4,709, mentioned above. In the present case we have to deal with the decision on an incidental issue by a Court in the exercise of its ordinary civil jurisdiction.

I am aware that there are cases in which Courts have shown a tendency to enlarge the sphere of direct issues, but the question arises how far those cases are applicable to us, in view of our procedure and rules as to stamping pleadings and documents.

I may add that under our procedure as to the framing of issues, the direct issue in a case is not necessarily an issue that might be actually framed. For instance, when a specific parcel of land is in dispute, the question is whether it belongs to the plaintiff or the defendant. That is the direct issue, but an issue will hardly ever be framed in such general terms. Incidental and collateral issues with reference to particular facts are framed, and the decision on these issues helps in the decision of the direct (though unframed) issue in the case.