1914.

Present : De Sampayo A.J.

PERERA *et al.* *v.* FERNANDO *et al.*

32—C. R. Negombo, 20,990.

Res judicata—*No formal decree entered in first action—Civil Procedure Code, ss. 188, 206, 207.*

Plaintiffs' action for declaration of title was dismissed in these terms. "Plaintiffs not being ready to proceed, I dismiss the plaintiffs' action with costs." No formal decree was drawn up in terms of section 188 of the Civil Procedure Code. Plaintiffs then brought the present action for declaration of title to the same land.

Held, the order made in the first action operated as *res judicata* between the parties.

When a Judge records and signs a plain and distinct order that he dismisses the plaintiff's action, the order is a sufficient formal expression of his adjudication upon the right claimed, and is a decree within the meaning of sections 206 and 207 of the Code.

The failure of the Court to do a mere ministerial act of this kind in time should not affect the parties, and when a formal decree is entered and signed, it should be taken to be operative as from the date of the judgment.

Amarasuriya v. Silva [1] doubted.

THE facts appear from the judgment.

A. St. V. Jayewardene, for plaintiffs, appellants.

F. M. de Saram, for defendants, respondents.

Cur. adv. vult.

March 24, 1914. DE SAMPAYO A.J.—

The only point I need consider on this appeal is that which relates to the plea of *res judicata* set up by the defendants. The plaintiffs have brought this action for declaration of title to a small strip of land alleged to be an encroachment made by the defendants on their land Gorakagahawatta. A previous action, No. 19,356 of the Court of Requests of Negombo, brought by the plaintiffs for the same cause of action, was dismissed by the Court, and the order of dismissal is pleaded as a bar to the present action. It appears that in the case No. 19,356 the plaintiffs were not ready on the day of trial and applied for a postponement which was refused. The Commissioner then recorded : "Plaintiffs not being ready to proceed, I dismiss the plaintiffs' action with costs." This order was duly signed, but no formal decree appears to have been drawn up under the provisions of section 188 of the Civil Procedure Code. I should have said that the order had all the requirements necessary for the purposes of *res*

[1] *(1905) 5 Tam. 55.*

judicata. But section 206 of the Civil Procedure Code enacts: " The decree ..... shall constitute the sole primary evidence of the decision or order passed by the Court "; and as " decree " is defined by section 5 as the formal expression of the adjudication by the Court, it is argued that only " a formal decree " drawn up under section 188 can be admitted as evidence of the Court's decision or order, and the judgment of Layard C.J. in *Amarasuriya v. Silva* [1] is relied on. I have considerable doubts as to the soundness of this reasoning. There are many instances of *res judicata*, such as findings on questions of title, inheritance, legitimacy, and other issues material to the final determination of an action, as to which no formal decree is and seldom can be drawn up. In the case relied on, the qualifying words in the definition clause of the Code do not appear to have been noticed. Section 5 says that the terms and expressions therein defined shall have the meaning assigned to them, " unless there is something in the subject or context repugnant thereto. " It seems to me that to give to the term " decree " in sections 206 and 207 the meaning contended for would be to make it repugnant to the subject of *res judicata* as accepted and interpreted by the authoritative decisions of this Court. Moreover, the definition in section 5, after all, does not say that " decree " shall mean the " formal decree " drawn up under section 188; it only says that it means " the formal expression of an adjudication upon any right claimed or defence set up in a civil Court, " and I humbly think that, when a Judge records and signs a plain and distinct order that he dismisses the plaintiff's action, as the Commissioner did in this case, the order is a sufficiently formal expression of his adjudication upon the right claimed, and is a " decree " within the meaning of sections 206 and 207 of the Code. There is no particular virtue in a separate document, and in my view it is sufficient if at the conclusion of the judgment the Court in formal language makes its order. In Woodroffe and Ameer Ali's *Civil Procedure* I find that the learned authors, in commenting on the word " formal " occurring in the similar definition of " decree " in the Indian Code, say: " The expression of the Court adjudication must be both deliberate and given in the manner provided in the Code. This word will, however, probably be not construed too strictly. " With great deference I think that *Amarasuriya v. Silva* [1] attributed a too restricted meaning to the term " decree " in connection with the subject of *res judicata*. I may add that I have had the case there in question sent for, and I find that the order is much more abbreviated and informal than that under consideration. It is, " Case dismissed, no costs "—a form of order which appears to be a mere note, and to be rather indicative of an intention to draw up a fuller and more formal decree thereafter, and which might well have failed to attract the approval of the Court as a sufficient decree for purposes of *res judicata*. In

[1] *(1905) 5 Tam. 55.*

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view of my opinion on this point, it is hardly necessary for me to discuss or decide the further point submitted by counsel for the respondent, that the drawing up of a decree is a formality which when complied with relates back to the date of the judgment, as provided in section 188, and that this has been done in this case, though after the decision appealed against. I should like to say, however, that the failure of the Court to do a mere ministerial act of this kind in time should not affect the parties, and that when a formal decree is entered and signed it should be taken to be operative as from the date of the judgment.

In my opinion the appeal fails, and should be dismissed with costs.

Appeal dismissed.