1946 *Present :* **Canekeratne J.**

HINNI APPU *et al.*, Appellants, *and* GUNARATNE Respondent.

119—C. R. Galle, 24,314.

Res judicata—*Action under section 247 of Civil Procedure Code brought by judgment-creditor against claimant and judgment-debtor—No conflict of interest between the defendants—Action brought subsequently by claimant against judgment-debtor regarding same property—Decree in 247 action cannot operate as* res judicata.

Where, in an action instituted by a judgment-creditor under section 247 of the Civil Procedure Code against the claimant of the property seized in execution, the plaintiff stated that he claimed no relief against the judgment-debtors who were made defendants and they filed no answer and took no active part in the litigation—

Held, that the dismissal of the action could not operate in the circumstances as *res judicata* in an action subsequently instituted by the claimant against one of the judgment-debtors for declaration of title in respect of the same property.

APPEAL from a judgment of the Commissioner of Requests, Galle.

C. V. Ranawake, for the defendants, appellants.

G. P. J. Kurukulasooriya (with him *Conrad Dias*), for the plaintiff, respondent.

Cur. adv. vult.

August 28, 1946. CANEKERATNE J.—

This is an action for declaration of title to a land called Lot B of Willekambara instituted by the plaintiff against the defendants ; according to the latter one Kanatege Siman, and not Kanattege Singhoappu, as the plaintiff alleged, was the original owner of the land and it passed by mesne conveyances to V. Gabrinehamy, the wife of the first defendant. Five days before the date of trial the plaintiff amended the plaint by pleading the judgment in C. R. Case No. 22,031 as *res judicata* in favour of the plaintiff.

The learned Commissioner after hearing evidence came to the conclusion that the judgment pleaded was *res judicata* as between plaintiff and the first defendant and gave judgment for the plaintiff.

One B. D. Samarasinghe (plaintiff in a partition action) appears to have obtained an order for costs against the first defendant and his wife Gabrinehamy ; when the right, title and interest of these two persons in Lot B of Willekambara was seized in execution of the writ at the instance of Samarasinghe, the plaintiff in the present case claimed the same. As the claim was upheld Samarasinghe instituted action No. 22,031 in terms of section 247 of the Code (Cap. 86) against the claimant (the present plaintiff) who was made the third defendant, the judgment-debtors, Gabrinehamy and her husband Hinniappu (first defendant in the present action) being made the first and second defendants. The plaintiff stated in the plaint that he claims no relief from the first and second defendants ; he pleaded that a cause of action has accrued to him to sue the defendants for a declaration that the first and second defendants are entitled to Lot B and that Lot B is liable to be seized under the writ.

The first and second defendants do not appear to have retained a proctor or to have filed answer. The third defendant filed answer claiming that Lot B is a portion of another land called Paragahawatta : he denied that it belongs to the first and second defendants. After trial the learned Commissioner dismissed the plaintiff's action.

It is contended by Counsel for the appellants that for the application of the rule of *res judicata* there must be a conflict of interest between the defendants and he refers to the decisions in *Fernando v. Fernando* [1], and in *Ramchandra Narayan (Original Defendant), Appellant v. Narayan Mahadev and another (Original Plaintiffs), Respondents* [2].

The contention of the respondent (which was supported by counsel's reference to the cases of *Senaratne v. Perera et al.*, [3] *Jayasundera v. Andris et al.*[4] and *Banda v. Banda and another* [5]) was that action No. 22,031 was a suit between the plaintiff and the first and second defendants on one side and the third defendant on the other and that there was a conflict of interest that was finally decided against the first and second defendants. I was, at first, taken up by his argument but further reflection has shown me that the real question in this case is whether the first defendant and his wife, Gabrinehamy, were in point of fact parties against whom a binding judgment could be entered in that action.

[1] *(1939) 41 N. L. R. 208.*
[2] *I. L. R. (1886) 11 Bombay 216.*
[3] *(1924) 26 N. L. R. 225.*
[4] *(1940) 41 N. L. R. 569.*
[5] *(1941) 42 N. L. R. 475.*

A judgment-creditor can make an application for the execution of the judgment : execution is effected by means of a writ or order addressed to the Fiscal by virtue of which he seizes the property of the debtor for the purpose of bringing it to sale ; a claim may, however, be preferred to the property seized. Sections 241 to 244 of the Code deal with claims. The object of section 241 is to give a claimant a speedy and summary remedy. The Court may make an order releasing the property from seizure (section 244), disallowing the claim (section 245), or continuing the seizure subject to a mortgage or lien (section 246). The party against whom the order is made can bring a regular action : unless such party institutes an action to establish the right which he claims to the property in dispute within a specified time the order made against him is conclusive (section 247). The only persons who can institute an action under section 247 are the execution-creditor, the claimant and a mortgagee or holder of a lien ; no such action can be brought by the judgment-debtor [1]. The decree-holder against whom the order is made (under section 214) may sue the successful claimant for a declaration of his right to seize and sell the property that had been released from seizure. To such an action the judgment-debtor is not a necessary party. This rule is subject to certain exceptions which are immaterial for present purposes [2].

A party seeking to enforce a claim would know that his right is the subject of active controversy between him and his opponent and it is his duty to present to Court all the grounds relating to the cause of action upon which he expects a judgment in his favour. For the judgment in an action on any point is conclusive as to that point in every subsequent action between persons who were parties to the former action under which they cannot canvass the same question again in another action although perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment, and was not urged.

On the other hand a judgment *in personam* is no evidence of the truth of the decision or of its grounds between strangers or a party and a stranger : the reasons for this rule are commonly stated to rest on the ground of *res inter alios acta* (or *judicata*) *alteri nocere non debet*, it being considered unjust that a man should be affected, and still more be bound, by proceedings in which he could not make a defence, cross-examine or appeal [3].

A person who is joined as a defendant in an action though no relief is claimed against him is merely a formal party to the proceedings. It may sometimes happen that a matter put in issue in an action by a plaintiff may not be in issue between him and such a defendant. The first defendant was not a necessary party to action No. 22,031 : as he knew that no claim was made against him and his wife he would ordinarily refrain from taking any steps to assert his rights in that action ; moreover he was

[1] *Kiriwatte v. Siribaddana et al.* (*1908*) *1 S. C. D. 81.*
Silva and another v. Goonewardana (*1892*) *1 S. C. R. 321.*
[2] *Panditta v. Dawoodbhoy* (*1938*) *40 N. L. R. 191.*
[3] *Phipson on Evidence* (*8th Ed.*) *419, 420.*

inops consilii and did not take any active part in the litigation. It is true he gave evidence at the trial but this is not of much importance for the first defendant's presence in the witness-box was due, as suggested by the appellant's Counsel, to the fact that he was called by the plaintiff.

In the circumstances it would be inequitable to hold that the first defendant is precluded from asserting his rights to the land by the existence of the judgment in the previous action.

The learned Commissioner seems to have directed all his attention to the question of *res judicata*. He does not consider the question of possession at all but at the close of his judgment he answers issue 5 thus—plaintiff has prescriptive possession. This affords very little justification for respondent's contention that he has succeeded on the question of prescription.

The appeal is allowed ; the plaintiff's action is dismissed with costs in both Courts but I reserve the right to the plaintiff, if he is so advised, to bring an action on the ground of prescriptive possession against the appellant, provided all costs of the present proceedings have been paid by the plaintiff.

Appeal allowed.