1932 *Present :* **Garvin S.P.J. and Dalton J.**

ANNAMALY CHETTY *v.* THORNHILL.

42—D. C. Ratnapura, 4,687.

Res judicata—*Dismissal of action for failure to register plaintiff's business name—Subsequent action on same subject matter—Finality of decree—Civil Procedure Code, s. 207.*

The plaintiff brought action No. 4,122 in the District Court of Ratnapura to recover money due to him for rice and cash supplied. The defendant denied liability and further pleaded that the plaintiff could not maintain his action as he had failed to register his business name. On January 17, 1927, the District Court entered judgment in favour of the plaintiff. The defendant appealed and the Supreme Court allowed the appeal and dismissed the plaintiff's action on the ground that he had failed to comply with the requirements of the Business Names Registration Ordinance, No. 6 of 1918.

Whilst the appeal was pending, plaintiff instituted the present action on June 2, 1927, upon the same cause of action. The District Court dismissed this action on the ground that it was barred by action No. 4,122.

This judgment was affirmed by the Supreme Court on March 13, 1928. On an appeal by the plaintiff to the Privy Council, the judgment of the Supreme Court was set aside and the case remitted to the District Court to be tried upon the merits.

Held, that the decree passed in case No. 4,122 was not a decree made in exercise of the Court's jurisdiction over the subject matter of the action but was only a declaration that a condition of its exercise had not been complied with by the plaintiff, as a result of which it was not able to exercise its jurisdiction over the action and its subject matter.

It was therefore not a final decree in the action within the meaning of section 207 of the Civil Procedure Code and did not operate as a bar to the present action.

Held further, that the order of the Privy Council remitting the case to be tried upon the merits cannot be construed as a direction that no objection in point of law to the maintenance of this action whether on the ground of *res judicata* or any other ground was to be excluded from consideration.

APPEAL from an order of the District Judge of Ratnapura holding that this action was not barred by dismissal of plaintiff's action No. 4,122 in the same Court against the defendant on the same cause of action.

The facts upon which the plea of *res judicata* was founded are fully stated in the headnote.

H. V. Perera, for defendant, appellant.—The cause of action is complete and is the same in both cases. Section 207 of the Code abolished the *non-suiting* of a plaintiff's action and every right of the plaintiff is made *res judicata.* Even when there is no adjudication on the merits, section 207 makes the matter *res judicata* although under the law a fresh action would not have been barred. The cause of action, however, must have existed at the time. The test of *res judicata* is whether a definite decision has been pronounced. The old difference between *non-suit* and *res judicata* was necessary owing to the very rigid rules of pleading. Now, however, section 406 gives a plaintiff the right to ask leave to withdraw and bring a fresh action if there is any formal defect in his action. If he does not choose to do so, he must suffer the consequences. The principle of our Code is one action on one cause of action. But there is no distinction between cases where the cause of action is complete at the institution of the first action and those in which the cause of action does not yet exist.

N. E. Weerasooria (with him *Gratiaen*), for plaintiff, respondent.—The Privy Council directed that the case should be heard on the merits. The plea of *res judicata* cannot therefore be raised. *Vide* order of His Majesty in Council in pursuance of the judgment. The order must be read in the context in which it was made. The Privy Council had both judgments of the Supreme Court before it. The order clearly disallows the plea of *res judicata.* If the action was not barred at its institution by *res judicata* it could not subsequently be so barred. There was no cause of action within the meaning of sections 34 and 207 at the date of the first action. Cause of action is defined in the Code. In view of the provisions of section 9 of Ordinance No. 3 of 1918, whatever rights plaintiff may have had do not come within the meaning of cause of action. The definition is a wrong for the redress of which an action

may be brought. But if the law says you cannot bring an action then there is no cause of action within the meaning of the definition. The earlier case was not an action. That is why it was dismissed. An action brought by a person under a disability and dismissed on that ground does not operate as *res judicata—(1889) 22 Q.B.D. 357; 3 Bombay 223; 18 Madras 466; 48 Calcutta 499; 16 N. L. R. 257; 13 N. L. R. 59.*

H. V. Perera, in reply. The Indian law of *res judicata* is entirely different from ours. Indian cases therefore will not apply.

October 10, 1932. GARVIN S.P.J.—

On January 27, 1932, the day fixed for the trial of this case ten issues were framed. The tenth issue was as follows :—" Does the decree of the Supreme Court dated October 28, 1927, entered of record in action No. 4,122 of this Court dismissing the plaintiff's action operate as a bar to this action ? " The parties submitted a written statement of the facts which they agreed were relevant to this issue and, after hearing argument, the District Judge made order on the issue leaving the remaining nine issues still to be decided. The order was adverse to the defendant and he has appealed.

The facts as agreed by the parties and as stated by them are as follows :—

On June 19, 1924, the plaintiff sued the defendant in action No. 4,122 for the recovery of a sum of money alleged to be due to him for rice and cash supplied between August, 1923, and June 14, 1924, as per account particulars filed with his plaint. The defendant denied liability and further pleaded that the plaintiff had no right of action as he had not registered his business name and that, therefore, the plaintiff's action should be dismissed.

Several issues of law and fact were framed and after a full trial of all such issues this Court entered decree in favour of the plaintiff on January 17, 1927. The defendant appealed to the Supreme Court. Pending the determination of the appeal, the plaintiff instituted the present action No. 4,687 of this Court on June 2, 1927, against the defendant. This action is in respect of the same claim as the action No. 4,122 ; the sum claimed is the same as in action No. 4,122 with the addition of further interest.

On October 28, 1927, the Supreme Court allowed the defendant's appeal and entered decree dismissing the plaintiff's action on the ground that he had no right of action because of his failure to comply with the requirements of the Business Names Registration Ordinance. The Supreme Court expressed no opinion on the other issues.

To this statement it is necessary to add that the present action No. 4,687 first came up for trial in the month of August, 1927, when upon the defendant's plea that the action was barred, the following issues were framed and decided :—

(1) Is this action barred by the action No. 4,122 of this Court and the final decree entered of record therein ?

(2) Is there a decree that can operate as a bar to the action in D. C., 4,122 ?

The District Judge upheld the defendant's plea and dismissed the action. Upon appeal by the plaintiff to the Supreme Court the judgment of the District Court was affirmed on March 13, 1928. An appeal was then taken by the plaintiff to His Majesty's Privy Council which was successful. Their Lordships expressed the opinion that the appeal should be allowed and that the decrees of the District Court and the Supreme Court should be recalled and "that the action should be remitted to the District Court of Ratnapura to proceed as accords".

In the order of His Majesty in Council dated June 29, 1931, which embodies the reports of the Lords of the Committee it is directed that the action be "remitted to the said District Court to be tried upon the merits". The learned District Judge in the order made by him upon issue 10 framed at the second trial refers to these words and evidently interprets them as a direction to him to try and determine the question of the right of the plaintiff to recover upon his claim to the exclusion of a plea in bar of the nature of that which is embodied in the issue. The words "trial on the merits" appear not only in the order of His Majesty in Council to which I have referred, but also in the order of this Court remitting the case with the order of the Privy Council to the Court below, but the question for us is whether the words referred to were intended to deprive the defendant of the right to plead in bar of the plaintiff's action that, since, the order of the District Court affirmed by the Supreme Court subsequently reviewed by the Privy Council the matter has become *res adjudicata* by reason of the judgment of the Supreme Court in case No. 4,122.

The decree now pleaded as a bar to the maintenance of the present action though entered after the order reversed on appeal to the Privy Council had, as a matter of fact, been entered before that appeal was heard and the judgment of their Lordships of the Privy Council shows that at the time they remitted the case to be heard and determined "as accords", they were aware of that circumstance. But there is no indication in the judgment of their Lordships that they considered or intended to decide that the decree of the Supreme Court in case No. 4,122 was not to be pleaded as a bar to the present suit or that such decree did not constitute the matter in issue between the parties *res adjudicata*. On the contrary, to quote from the judgment, "the only question for their Lordships' decision is whether on June 2, 1927, the appellant was barred from instituting the present suit because he then held the decree of the District Judge in his favour in action 4,122, though the respondent's appeal therefrom was then pending". Their Lordships proceeded to answer the question and held that the finality of the decree was qualified by the appeal and the decree was not therefore final in the sense that it will form *res adjudicata* between the same parties. That decree has been superseded by the decree of the Supreme Court which is now final. In the absence of a clearer indication of such an intention, I do not think we can construe the order of the Privy Council as a direction that no objection in point of law to the maintenance of this action whether on the ground that the matter in issue has become *res adjudicata* or is barred on any other ground was to be excluded from consideration.

The judgment of the Privy Council decided that at the date of its institution the then existing decree of the District Court was not a bar to this suit. The position of the defendant is that the matter has since become *res adjudicata* by reason of the decree of the Supreme Court in case No. 4,122. What the Supreme Court held was that the plaintiff was carrying on business under a business name, that the claim made by him arose out of a contract entered into by him in connection with the business so carried on, that he had failed to register his business name under the provision of the Business Names Ordinance, No. 6 of 1918, and that his claim was not therefore enforceable by action while he was in default. It did not pronounce upon the merits of the claim. The effect of the judgment is that the plaintiff was not entitled to an adjudication on his right to the relief he claimed so long as he remained in default.

It is contended, nevertheless, that the Supreme Court having by its decree dismissed the plaintiff's action every right to relief on the cause of action for which the action was brought has become *res adjudicata* and cannot be made the subject of a second action on the same cause of action. Counsel frankly admitted that if the question were to be determined by the general rules of the law of *res adjudicata* his objection would not be sustainable. But he contends that here in Ceylon we have a statutory rule in accordance with which upon the entry of a decree dismissing a plaintiff's action no matter upon what ground—except for want of jurisdiction—every right claimed or claimable in respect of the cause of action for which the action was brought becomes a *res adjudicata* and therefore operates as a bar to a second action based on the same cause of action. The provision of the law upon which Counsel rests this contention is section 207 of the Civil Procedure Code and the argument was reinforced by reference to other sections of the Code of which the more important are sections 33, 34, 402, 403, 406, and 418.

Section 33 is a general direction that every regular action should be so framed as to afford ground for a final decision upon the subjects in dispute "and so as to prevent further litigation concerning them". Section 34 requires a plaintiff to include in his action the whole of the claim he is entitled to make in respect of the cause of action. It further declares that where 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. Similarly, if entitled to more than one remedy in respect of the same cause of action he must sue for all of them upon pain of being left without remedy.

The object of these provisions is clearly to prevent a multiplicity of actions.

In section 406 there is an indication that it is the policy of the Code that an action once instituted must be prosecuted until it is determined by a judgment upon the matter in dispute and that a plaintiff who withdraws from an action or abandons part of his claim will not be permitted to bring a fresh action for the same matter or in respect of the same part, unless he does so with the permission of the Court which

may be granted, where it appears (*a*) that the action must fail by reason of some formal defect or (*b*) that there are sufficient grounds for permitting the plaintiff to withdraw from the action or to abandon part of his claim.

An indication of the same policy is to be found in sections 402 and 403 which provide for the entry of an order of abatement when an action is not diligently prosecuted and provides further that when an action abates no fresh action shall be brought on the same cause of action. In such a case the Court is empowered to set aside its order if the plaintiff, within such time as under all the circumstances may be deemed reasonable, satisfies the Court that he was prevented by any sufficient cause from continuing the action.

Lastly there is section 207 upon which the plea taken in this case is founded and is as follows :—

> 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.

Every decision or order of a Court subject to appeal where an appeal is allowed is binding and conclusive on the parties upon the points determined.

It is urged however that the final decree in an action within the meaning of the "Explanation" appended to section 207 has been given a special effect, viz., that notwithstanding that the judgment upon which the decree is based amounts to a refusal on the part of the Court to adjudicate on the right of the plaintiff to the relief he claims, the right to the relief claimed and every right to any relief which could have been claimed became on the passing of that decree a *res adjudicata.*

As a mere matter of construction it is impossible to exclude the decree of the Supreme Court in case No. 4,122 from the provisions of sections 207. It is a decree ; it is no longer appealable and is therefore final between the parties within the meaning of section 207. It is equally difficult to say that it is not the "final decree in the action" for it finally determined the action by directing that it be dismissed. If it is the "final decree in the action" within the meaning of the explanation it must be given the effect which this provision says is to follow on the passing of such a decree.

Prior to the enactment of the Civil Procedure Code the dismissal of the plaintiff's claim was frequently the result of a *non-suit.* But a *non-suit* was not a definitive judgment on the right of the plaintiff to the relief he claimed and was not a bar to the institution of a second action on the same cause of action. Indeed, when the dismissal of an action was pleaded as a bar to a second action the Court closely scrutinized the proceeding of the earlier action to ascertain whether the

dismissal was a definitive decision that the plaintiff was not entitled to the relief claimed or whether the order only amounted to a *non-suit.* In *Banakiyanage Roddi v. Francisku Fernando Obeyesekera*[1] this Court held that where after hearing evidence on both sides the Judge dismissed the plaintiff's case giving as his reason that he did not feel justified in giving the plaintiff judgment on the evidence produced, especially as he could not say that he believed the plaintiff's claim to be true, the dismissal only operated as a *non-suit.* This is probably an extreme case but it serves to show how great a change was brought about when by section 207 of the Code the legislature enacted "that no plaintiff shall hereafter be non-suited". Except in so far as the Code expressly empowers it to do so, *e.g.,* section 406, a Court may not give a plaintiff whose action fails leave to bring a second action on the same cause of action, and a decree dismissing an action may no longer be treated as a *non-suit;* it is, subject to appeal, the final decree in the action and final and binding on the parties. The decree of the Supreme Court in No. 4,122 is the final decree in that action. How is it possible then to refuse to give it the effect which the explanation to section 207 gives to such a decree? Where, as in this instance, the dismissal does not proceed upon an adjudication as to the merits of the plaintiff's claim the effect given to the decree by section 207 and the explanation is undoubtedly artificial. But it is urged that no matter how artificial an effect may be given to such a decree, it is an effect which the legislature has chosen to give it in accordance with the policy manifested throughout the Code that every action must be prosecuted until it is determined by a decision which is to be final. The remedy of a person who finds that his action may fail because of some formal defect is, it is urged, to ask that he be permitted to withdraw from the action with leave to bring a fresh action.

In just such a case as this where an objection was taken that the plaintiff had not registered his business name, Bertram C.J., when remitting the case for further inquiry added with reference to an argument that upon the dismissal of the action the matter would become *res judicata,* "I have no doubt that, in the event of the Court finding on investigation that both partners were in default in respect of the action, it would accede on reasonable terms to any application that the plaintiffs may make for leave to withdraw from the action and to commence a fresh one"—*Jamal Mohideen & Co. v. Meera Saibo*[2].

In *Karuppen Chetty v. Harrison & Crossfield, Ltd.;*[3] where the point for consideration was whether an objection on the ground that the provisions of the Business Names Ordinance had not been complied with can be taken at any stage of an action prior to judgment, Bertram C.J., held that it might, remarking that it was the duty of the Court to watch over the enforcement of the Ordinance and give effect to it *ex mero motu* should it come to its notice that the provisions of the Ordinance have not been complied with. Incidentally, he stated with reference to the dismissal of an action for failure of the plaintiff to comply with the provision of that Ordinance, "I do not think that in such a case any special

[1] *3 S. C. C. 13.*

[2] *(1920) 22 N. L. R. 268.*

[3] *(1922) 24 N. L. R. 317*

leave would be required to bring a fresh action where an action has been dismissed". This expression of opinion is *obiter* but it is to be noted that in dismissing the plaintiff's appeal the Chief Justice added that it was to be "without prejudice to the plaintiff's right to bring a fresh action."

It is now well recognized that section 207 and the explanation appended to it does not contain the whole of our law of *res adjudicata*—vide *Samitchy Appu v. Pieris*[1]. The bar created by that section is limited to the case of a second action upon the same cause of action. Had the law in Ceylon been in all respects the same as in England the question under consideration is easily settled and the objection would be disallowed on the ground that the Court did not adjudicate upon the matter of the plaintiff's claim.

But the bar to a second suit created by section 207 operates even where there has been no adjudication as to the merits in the earlier action. The dismissal of an action under the provisions of section 418 for failure on the part of the plaintiff to give security for the defendant's costs has been held to be the final decree in the action within the meaning of the explanation to section 207 and as such to bar a second action on the same cause of action—vide *Palaniappa Chetty v. Gomes et al.*[2] Similarly a decree of dismissal for default of appearance operates as a bar to a second action.

If therefore the decree in No. 4,122 is to be held not to bar the present action it can only be on the ground that, though it is the final decree in that action, it is not "the final decree in the action" within the meaning and contemplation of the explanation to section 207. It must be assumed that the final decree in contemplation is the decree of a Court of competent jurisdiction, for competency of jurisdiction is essential to the doctrine of *res adjudicata*. The expression "final decree in the action" cannot thus be held to contemplate or include a decree of dismissal for want of jurisdiction which is merely a declaration by the Court of its own want of jurisdiction. Inasmuch, therefore, as the decree contemplated is the decree of a Court of competent jurisdiction it must also be taken that the decree is one made by the Court in exercise of its jurisdiction to hear and determine the action.

It seems to me that before a decree can by reason of section 207 operate as a bar to the institution of a second action upon the same cause of action it must be—

(1) the decree of a Court of competent jurisdiction
(2) made by the Court in exercise of its jurisdiction to hear and determine the action, and must be
(3) the final decree in the action.

Presumably it need not necessarily be a decree which embodies a judicial decision upon the merits of the plaintiff's claim and may be a decree made without trial or adjudication on the merits, where the Court in exercise of its jurisdiction takes cognizance of the action and dismisses it where it is empowered to do so without entering into the merits as, for example, when the plaintiff fails to comply with an order to deposit the defendant's costs.

[1] *3 C. A. C. 30.*

[2] *(1908) 11 N. L. R. 322.*

The ordinary jurisdiction of the District Court of Ratnapura in which the action No. 4,122 was instituted extended to the parties as well as to the subject matter of the action. The plaintiff averred that that Court had jurisdiction to give him the relief claimed upon the cause of action pleaded. If then the matter was within the general jurisdiction of the Court can it be urged that that jurisdiction was ousted by the provisions of section 9 of the Business Names Ordinance, No. 6 of 1918, which rendered the claim unenforceable by action ? It is in the nature of a condition imposed upon a person carrying on business under a business name with which he must comply before he can enforce by action a claim upon a contract made in connection with his business. The provision is one which Bertram C.J. thought a Court of law should enforce *ex mero motu* when it came to its notice that the plaintiff had failed to comply with it. Had a Court in ignorance of any such infringement proceeded after trial or without objection to determine the claim on its merits it could not be successfully urged that its decree was not the decree of a Court of competent jurisdiction and did not therefore operate as *res adjudicata.* The requirement of registration of a business name operates as a condition upon which the exercise of a Court's jurisdiction may be invoked ; possibly as a condition of the exercise of its jurisdiction. " But the competency of a Court's jurisdiction over a suit is not affected . . . . by the conditions or mode of its exercise . . . . " *Hukm Chand on* Res Judicata, *section 181, p. 449.*

In this instance the Court found that the plaintiff had failed to register his business name, and the judgment of the Supreme Court pleaded in bar of the present action is a finding that the plaintiff is not entitled to ask a Court to entertain the action and exercise jurisdiction in view of the existence of a condition which prevents the exercise by it of its ordinary jurisdiction. The Court which passed the decree is a Court of competent jurisdiction but the decree is not a decree made in exercise of its jurisdiction over the subject matter of the action but amounts to a declaration that a condition of its exercise has not been complied with by the plaintiff, as a result of which it is not able to exercise its jurisdiction over the action and its subject matter. In this respect it differs from a case in which the Court in exercise of its jurisdiction over the action takes cognizance of the matter and then without trial refuses the plaintiff relief and dismisses his action in pursuance of a special power to do so vested in it by the Code. The decree in case No. 4,122 is not in my opinion a decree passed in the exercise of the Court's jurisdiction over the subject matter of the action and is not the " final decree in the action " within the meaning of the explanation appended to section 207 of the Civil Procedure Code.

The argument that the plaintiff's remedy was to apply for permission to withdraw with leave to bring a fresh action in accordance with section 406 of the Code has, I think, been sufficiently answered. I would merely add that an action brought by a plaintiff in respect of a claim which is rendered unenforceable by reason of his failure to register his business name is not merely defective in form : it is an action of which a Court may not take cognizance once it becomes aware of the failure to register.

The issue numbered 10 must therefore be answered in the negative and the case remitted for trial of the remaining issues. This appeal is accordingly dismissed with costs.

DALTON J.—

The statement of facts agreed upon by the plaintiff and defendant prior to the District Judge making his order, from which this appeal is taken by the defendant, is in the following paragraphs.

On June 19, 1924, the plaintiff used the defendant in action 4,122 for the recovery of a sum of money alleged to be due to him for rice and cash supplied between August, 1923, and June 14, 1924, in accordance with an account of particulars filed with this plaint. The defendant denied liability and further pleaded that the plaintiff had no right of action as he had not registered his business name, and that therefore plaintiff's action should be dismissed.

Several issues of law and fact were framed, and after a full trial of all such issues the District Court entered decree in favour of the plaintiff on January 17, 1927. The defendant appealed to the Supreme Court and on October 28, 1927, the Supreme Court allowed the appeal, decree being entered dismissing the plaintiff's action on the ground that he had no right of action because of his failure to comply with the requirements of the Business Names Registration Ordinance. No opinion was expressed on the other issues.

Whilst that appeal was pending, the plaintiff instituted the present action No. 4,687 on June 2, 1927, against the defendant. This action is in respect of the same claim as action No. 4,122, the sum claimed being the same with the addition of further interest.

The defendant filed his written answer in No. 4,687 pleading *inter alia* that as a matter of law action No. 4,122 and the decree entered of record was a bar to this second action. On August 31, 1927, the District Judge upheld defendant's plea. The plaintiff appealed from that decision, and on March 13, 1928, the Supreme Court dismissed his appeal. He thereupon appealed to the Privy Council, and his appeal was allowed. The only question for the decision of the Privy Council was whether on June 2, 1927, plaintiff was debarred from instituting the present action (No. 4,687) because of the decree in his favour in action No. 4,122. This question was answered in the negative, on the ground that an appeal was pending at the time, and that no decree from which an appeal lies and has in fact been taken is final as between the parties so as to form *res judicata*. The Privy Council therefore allowed the appeal of the plaintiff and sent the case back to be heard, as the order states, on the merits.

This order of the Privy Council is dated May 19, 1931, at which date there was no appeal pending in action No. 4,122. That appeal was finally heard and decided on October 21, 1927, as their Lordships' judgment sets out. They were therefore fully cognizant of the fact that there was no appeal pending in action No. 4,122 after that date. They set out, however, that the sole ground for dismissing the appeal in action No. 4,122 was the plaintiff's failure to comply with the requirements of the Registration of Business Names Ordinance. Although

no question arose before the Privy Council as to whether the decree in action No. 4,122 was a final decree after October 21, 1927, so as to form *res judicata,* I think one may reasonably infer from the facts stated by their Lordships in their judgment and from their order in 1931 sending the case back to be heard on the merits, they never contemplated the possibility of any plea as is now entered by the defendant being raised to prevent a trial on the merits, or if raised being sustainable in law.

In a recent case before the Privy Council, *The Cheseborough Manufacturing Co., Consolidated v. Abdul Kudhoos* (November 22, 1929, not reported) it is true an undertaking was required by their Lordships, before dismissing the appeal, that respondent would undertake not to meet any proceedings under the proper Ordinance for the rectification of the Trade Mark Register by any plea of *res judicata,* but that undertaking was required under very special circumstances. Petitioner there had sought in the District Court to expunge a trade mark from the Register proceeding under an Ordinance that had been repealed. The District Court allowed the petition, but on appeal to the Supreme Court the order of the District Judge was set aside on October 17, 1928. Petitioner thereupon appealed to the Privy Council, and it was not ascertained, until then, that the proceedings had been taken under a law no longer in force. Under the circumstances, without hearing the appeal on the merits their Lordships dismissed the appeal on receiving the undertaking from respondent's counsel, to which I have referred in respect of the decree of October 17, 1928.

When the case went back to be heard in accordance with the order of May 19, 1928, the defendant raised the issue that the decree dated October 21, 1927, in action No. 4,122 dismissing plaintiff's action operated as a bar to this action No. 4,687. The learned District Judge dealt with this as a preliminary issue of law, and answered it in the negative. From that order the defendant has now appealed to this Court. The District Judge held that the issue had already been answered by the Privy Council in their judgment of May 31, 1931. The question to be answered there, however, was whether on June 2, 1927, the appellant was barred from instituting the present suit. The question was answered in the negative, on the ground that, at that date, there was no final decree since the appeal was still pending. The question for decision now is whether, the decree being final, it operates as a bar to plaintiff's action.

Counsel for appellant relies upon the provisions of section 207 of the Civil Procedure Code. The terms of the section itself, to my mind, offer no difficulty, but Mr. Perera relies on what he states are the explicit terms of the explanation to the section. The explanation is certainly very wide, but on the other hand there is ample authority for the proposition that the whole of our law of *res judicata* is not to be found in sections 34, 207, and 406 of the Code, *Samichi v. Pieris*[1]. Lascelles C.J. states that the current of legal decision in Ceylon strongly supports the view that on this point there is no distinction between the law of Ceylon and that of England. The views given expression to both by

[1] *16 N. L. R. 257.*

Lascelles C.J. and Wood Renton J. in that case on the subject are incompatible with the narrow and restricted view of the terms of section 207 and the explanation added to it which we are now asked to accept.

It is, however, in my opinion, possible to deal with this appeal on the following short ground. The payment of the amount claimed by the plaintiff in the action No. 4,122 was not a right which could be claimed between the parties to an action, within the meaning of the words to the explanation of section 207, at the time that action was instituted. Section 9 of the Registration of Business Names Ordinance, 1918, provides that the rights of a person in default of complying with the requirements of that Ordinance shall not be enforceable at any time whilst he is in default by action or other legal proceedings. Whilst the plaintiff was therefore in default, his claim could not be put in issue by him between the parties, nor had the Court any power to adjudicate upon it. In *Jamal Mohideen & Co. v. Meera Saibo et al.*[1] Bertram C.J. construes section 9 as enacting that the defaulter shall not be entitled to bring any action to enforce his rights during the time he is in default. The Supreme Court held on October 28, 1927, that plaintiff had no right of action because of his default, and for that reason alone his action was dismissed. That order, in my opinion, can be no bar, under the provisions of section 207, to his action No. 4,687, he being no longer in default. For this reason I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

[1] *22 N. L. R. 268.*