

Present: The Hon. Mr. A. G. Lascelles and Mr. Justice Middleton.

1906.
July, 6.

PIERIS v. PIERIS et al.

D. C., Kalutara, 3,140.

Dismissal of claim as improperly made—Res judicata—Civil Procedure Code, s. 247.

The dismissal of a claim on the ground that it was improperly made is not an order falling under sections 244, 245, or 246 of the Civil Procedure Code; and the claimant in such a case is not obliged to bring an action under section 247 of the Civil Procedure Code to establish his right to the property claimed.

THE plaintiff, having obtained a mortgage decree, seized the property mortgaged in execution through the Fiscal. The first defendant claimed an undivided three-fourths share of the property. The District Judge dismissed his claim, holding that his claim could be preferred to mortgaged property. The claimant (first defendant) did not institute an action under section 247 of the Civil Procedure Code. The property having been sold in execution to the Fiscal, the plaintiff purchased it and instituted the present action against the first defendant and others for a declaration of title. The first defendant set up title in himself to certain shares in the property. The District Judge (C. R. Cumberland, Esq.) held that the first defendant was estopped from setting up title to any share of the land by reason of the order in the claim proceedings. The first defendant appealed.

Pieris, for appellant.—The order of the District Judge is not an order under sections 244, 245, or 246, and so is not conclusive; and an action under section 247 need not be brought to have such order set aside. The order amounted only to a rejection of the claim.

J. Jayewardene, for respondent.—Whatever the grounds of dismissal may be, the appellant was bound to bring an action under section 247. If the order did not come under sections 244, 245, or 246, it was appealable, *Murugappa Chetty v. Samarasekere* (1), and an appeal having been taken, the order is binding.

Pieris, in reply.—If an appeal lies, as was held in *Murugappa Chetty v. Samarasekere* (1), the order is clearly not one falling under sections 244, 245, or 246.

Cur. adv. vult.

1906. 6th July, 1906. LASCELLES A.C.J.—
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The question is whether the first defendant is estopped by the decision in the claim proceedings from setting up title to the land in dispute.

Upon reference to the claim proceedings it appears that there was no adjudication on the claim.

The Commissioner of Requests was of opinion that, inasmuch as the property in question was seized under a mortgage decree, he had no jurisdiction to entertain the claim. If the property, as appears to have been the case, was seized by the Fiscal in the ordinary course of execution, the Commissioner had jurisdiction to entertain claim proceedings, although a mortgage decree had been entered in the case, *Murugappa Chetty v. Samarasekere* (1). But it is clear that, whether right or wrong, the decision of the Commissioner of Requests does not amount to an order under sections 244, 245, or 246 of the Civil Procedure Code, so as to bind the first defendant under section 247, nor is it such an adjudication as would, on general principles, amount to an estoppel. I would set aside the judgment, and remit the case for trial. The costs of appeal, I think, should abide the result of the case.

MIDDLETON J.—I agree.
