1902.
January 16.

SILVA *v.* SILVA.

D. C., Galle, 5,273.

Plea of res judicata—*Decree against administrator—His duty to judgment-creditors of intestate.*

A. a creditor of B who had died intestate, obtained judgment against his administrator and caused certain properties of the estestate to be seized in execution of his decree. C's claim to them being upheld, A sued him to have the properties declarded as part of the intestate's estate and made executable. C pleaded in bar a decree entered in his favour in a previous suit between him and A, whereby the lands in question were declared to be the property of the defendant.

Held, that the District Judge was wrong in upholding this decree as *res judicata* between the parties. It had no bearing on the present claim of the plaintiff, which was to have it declared that these lands are part of the intestate's estate.

When a debt is established against the estate of a deceased person and judgment given against his administrator, it is his duty to pay such debt by selling a sufficient portion of the estate, and not to allow the judgment-creditor to take out execution against the estate.

PLAINTIFF raised this action to have certain property declared liable to be sold in execution of the decree in his favour in suit No. 5,096.

It appeared that one Thiberis de Silva became indebted to the plaintiff on a promissory note and on a lease in a certain sum of money and died intestate; that the plaintiff sued the administrator

of T. de Silva in suit No. 5,096 for the amount due to him and recovered judgment in June, 1898; that before instituting the suit No. 5,096 the heirs of the deceased signed a deed in favour of plaintiff purporting to convey certain lands in settlement of the debt due; that plaintiff did not accept it, as he found that the grantors had no title; that plaintiff caused certain properties to be seized under his decree, but they were claimed by the defendant; and that his claim was upheld. The plaintiff now sued the defendant under section 247 of the Civil Procedure Code, praying that those lands may be made executable for his debt as part of the intestate's estate.

Defendant pleaded that he was not bound by the testamentary proceedings had in suit No. 3,024 (in which the District Court appointed an administrator to the intestate's estate), nor by the decree in suit No. 5,096 (in which plaintiff received judgment against such administrator), and he pleaded in bar a decree entered in his favour in suit No. 4,750 against the plaintiff, whereby the shares of the lands now claimed by plaintiff were declared to be the property of defendant.

The District Judge (Mr. F. J. de Livera) dismissed the plaintiff's action by the following judgment:—

"In D. C., 4,750, the present defendant complained of being kept out of possession by the present plaintiff and another person since December, 1896, and prayed for a declaration of title. Present plaintiff pleaded in that case that certain heirs of P. Thiberis had by deed 17,227, dated 28th November, 1895, conveyed to him three-ninths of the property, but he restricted his claim to whatever shares those heirs were lawfully entitled to, and he further pleaded that, in order to recover the amount due to him on the promissory note and lease referred to in the first and second paragraphs of this judgment, he had taken steps to have the Secretary of this Court appointed administrator of P. Thiberis's estate.

"Rightly or wrongly judgment was entered in D. C., 4,750, on 27th November, 1897, in present defendant's favour for the shares claimed by him against plaintiff, the Court holding as follows:—

"'It is not open to the defendant to dispute plaintiff's title, so long as they set up no superior title in themselves or superior title in others under whose authority they claim a right to possess.'"

Plaintiff appealed.

Sampayo (with *Pieris*), for appellant.

Bawa, for respondent.

1902. *January 16.*

16th January, 1902. BONSER, C.J.—

I think this appeal must succeed. The District Judge seems to have mistaken the law as to administration.

The plaintiff was a creditor of one Thiberis who died intestate. Administration was granted to the Secretary of the District Court. Plaintiff brought an action against the administrator for his debt, and in the action he established his debt and got judgment. He thereupon sought, in execution of the judgment, to seize a certain part of the intestate's estate. A person put in a claim and the claim was allowed. He has now brought this action under section 247 to have it declared that this property is executable for his debt as being a part of the intestate's estate.

The District Judge has held that he cannot maintain this action, because before the administrator was appointed there was litigation between himself and the claimant, the claimant having brought an action to have it declared that he was entitled as an heir to this property, and the plaintiff set up a conveyance from some other of the heirs. The judgment in that action was given in favour of the claimant. The District Judge held that that judgment is binding upon him, and that therefore he cannot maintain the present action.

But the plaintiff is not seeking to set up a title in himself in the present action. All he is claiming is that this property is a part of the intestate's estate. It seems to me that the former action has nothing to do with this. I must say that I do not understand why, in the present case, the administrator, when judgment went against him, and this debt was established against the estate, did not take measures, by selling and realizing sufficient of the estate, to pay this debt. It is the duty of the administrator to pay the debts and wind up the estate, and not to allow private parties to take out execution against the estate.

WENDT, J.—I am of the same opinion and have nothing to add