

SAMARASINHA v. KURUKULASURIYA.

1900.

November 30.

1901.

D. C., Galle, 5,349.

February 14. Res judicata—Action by mortgagee against the executor of mortgagor—Judgment against executor for money due—Fresh action against devisees of mortgagor's last will for mortgage decree—Plea of defendant.

Specific devisees under a will are privies to judgments affecting the land devised to them and pronounced in an action to which the executor of the will was a party.

As, under section 641 of the Civil Procedure Code, an executor is the only necessary party to an action to realise the mortgage, a judgment refusing a mortgage decree against the executor of the mortgage-debtor may be pleaded as *res judicata* in a hypothecary action brought by the mortgagee against the devisees of the last will of the debtor.

○ NE Weerasuriya and his wife made a last will in 1887, bequeathing certain property to certain persons to be enjoyed by them after the life interest granted to the surviving spouse had fallen in. After the death of his wife, Weerasuriya hypothecated

by his bond, dated 19th July, 1892, to plaintiff the property which formed the subject of the devise as aforesaid. On the 1st July, 1893, the mortgagor died. In the following year, the mortgagee raised the action No. 2,848 against the executor of the deceased debtor praying that the money which belonged to him be made executable for the payment of the debt. The District Judge refused a mortgage decree on the ground that the mortgagor had only a life interest in the property mortgaged, and entered in favour of the plaintiff a money decree condemning the executor to pay the amount claimed out of the assets of the mortgagor's estate.

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On appeal, the Supreme Court affirmed this decision.

Some time afterwards, when the devisees came into possession of the property bequeathed to them, the plaintiff instituted the present suit against them, praying that the half share of the deceased debtor in the property in question be bound and held executable for the mortgage debt.

The devisees pleaded, *inter alia*, the judgment against their testator's executor in bar of the plaintiff's claim. On the District Judge over-ruling this plea, the plaintiff appealed.

The case was argued in appeal before the Chief Justice and Mr. Justice Lawrie on the 30th November, 1900, and at their request re-argued on the 14th February, 1901.

Wendt, for appellant.—The suit No. 2,848 was brought by plaintiff against Samaraweera, to whom probate of Weerasuriya's will had been granted by the District Court on 24th November, 1893. Plaintiff's prayer for a mortgage decree in that case was dismissed. As the executor represented all interests under the will, the decree in that case was binding on the plaintiff, although the present defendants were not parties to it. That decree is *res judicata*. Till the validity of this plea is settled, it is needless to consider the right of the surviving spouse to alienate property devised under the joint will.

Van Langenberg, for respondent, heard *contra*.—[BONSER, C.J.—Under sections 640 and 641 of the Civil Procedure Code, was not the executor the only necessary party to the suit No. 2,848?] Yes.

14th February, 1901. BONSER, C.J.—

This is an action brought by the mortgagee of one Weerasuriya. The mortgage is dated the 19th July, 1892, whereby the mortgagor hypothecated certain immovable property to secure the mortgage deed and interest.

1900. The mortgagor died on the 1st July, 1893. He had, by a
November 30. will made jointly with his spouse, who predeceased him, devised
1901. this property to the defendants in this action, to be enjoyed by
February 14. them after the life interest given to the surviving spouse.
BONSER, C.J. Probate to the joint will was granted to the executor therein
named. The mortgage was subsequent to the death of the mort-
gagor's spouse.

In 1894, the mortgagee brought an action in the District Court of Galle against the executor to realize the mortgage, and have it declared that the moiety which belonged to the mortgagor in this property was bound and executable for the payment of the mortgage debt. The District Judge held that, as the mortgagor had only a life interest in the property mortgaged, the plaintiff was not entitled to a mortgage decree, but only to a money decree to be paid by the defendants out of the assets of the Mortgagor's intestate estate.

A decree was drawn up in accordance with that judgment giving the mortgagee a simple money decree. He appealed against that to this Court, and the decree was affirmed with slight variations, which it is unnecessary to mention. Not content with this decision, the mortgagee sought to execute his decree as against this property and got the Fiscal to seize it. The specific devisees having by that time been put in possession of the property, came forward and claimed it. This was in August, 1898. Thereupon the mortgagee consented to the property being released by the Fiscal.

This action was commenced on the 27th January, 1899, and is brought against the specific devisees under the joint will. It recites the mortgage and the money decree, and seeks a declaration against them that the half share of the mortgaged property is bound and executable for the mortgage debt. It is in the form of what is known as an hypothecary action—an action brought against a person (other than the mortgagor) who is in possession of the mortgaged property seeking to realize the mortgage as against him. They have pleaded the decree in the former action, and they say that the plaintiff, the mortgagee, is concluded by that decree, and cannot again raise the question as to the validity of the mortgage, and that inasmuch as it was held in that case that the mortgagor had no title to mortgage, that concludes the question once and for all.

I am of opinion that that contention should be upheld. At the time the action was brought the only necessary party to the action to realize the mortgage under sections 640 and 641 of the Civil Procedure Code was the executor of the mortgagor. He

represented all interests under the will, and, in my opinion, the decree was binding upon the mortgagee, and he is not at liberty to litigate this question anew.

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BROWNE, A.J.—I agree.

BONSER, C.J.

LAWRIE, J.—

It may be that something might be said against the decision of the District Court of Galle, affirmed by this Court.

It may be that, if the case had been fully argued, and if recent decisions to the Court of Cape Colony had been cited, the decision might have been different, but it is *res judicata* between the parties and their privies.

I have no hesitation in holding that the special devisees under a will are privies to judgments affecting the land devised, pronounced in actions to which the executor of the will is a party, either plaintiff or defendant.

I would uphold the plea of *res judicata*.
