

1908.
July 14.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice.

KARUNAWARDANA v. WIJESURIYA *et al.*

C. R., Galle, 4,564.

Res judicata—Action on mortgage bond by administratrix—Dismissal because letters insufficiently stamped—Subsequent action on the same bond—Plea in bar.

The plaintiff, as administratrix, sued the defendants on a mortgage bond; the action was dismissed on the ground that the letters of administration were not duly stamped. The plaintiff thereupon got the letters duly stamped and instituted this action on the same bond. The defendants pleaded the judgment in the first action as *res judicata*.

Held, that the plea was bad, inasmuch as the first action was dismissed for want of title on the part of the plaintiff to sue, and such dismissal did not operate as *res judicata*.

A PPEAL from a judgment of the Commissioner of Requests, Galle.

A. St. V. Jayewardene, for the defendants, appellants.

E. W. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

July 14, 1908. HUTCHINSON C.J.—

1908.
July 14.

The plaintiff sues in this action, as administratrix of the estate of the late Andris de Silva, Constable Arachchi, on a mortgage bond granted to him by Don Simon de Silva, now deceased; the defendants are sued as heirs of the mortgagor. She had sued the same defendants on the same cause of action in a former case in the same Court; that action was dismissed, the reason for the dismissal being that the plaintiff's letters of administration were not duly stamped. In the present action the defendants set up the plea of *res judicata*, pleading the decree dismissing the former action in bar of this action. The Commissioner over-ruled this defence, he held that the parties are not the same, because the plaintiff in the former action was not the administratrix, inasmuch as her letters were not then duly stamped. And he gave judgment for the plaintiff in accordance with her prayer.

The defendants appeal from that judgment. There was an issue agreed upon, "whether the defendants adiated the estate of the deceased mortgagor;" but no evidence was taken, and the Commissioner made no reference to it, and nothing has been said about it in the petition of appeal or on the argument. The only question is, whether the claim is *res judicata*.

The appellants contend that the plaintiff in the former action sued as administratrix, and that she was the administratrix; that her action failed because the grant to her was not duly stamped, but that she could have cured that defect by getting it duly stamped at any time before judgment, or she could have applied to the Court under section 406 of the Code for leave to withdraw that action and bring a fresh action; that this was like a case of a plaintiff suing on a deed or promissory note, whose action is dismissed because at the date of trial and judgment the deed or note was not and could not be put in evidence because it was not duly stamped.

The law as to *res judicata* in Ceylon is contained in section 207 of the Civil Procedure Code. The "explanation" to that section says that every right to relief of any kind which can be claimed or 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 is actually so claimed, set up, or put in issue or not, becomes on the passing the final decree a *res judicata*, which cannot afterwards be made the subject of action for the same cause between the same parties. Several Indian cases were quoted by the respondent's counsel. The Indian Law on the subject is contained in section 13 of the Indian Civil Procedure Code; this enacts that "no Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently

1908. raised and has been heard and finally decided by such Court." I
July 14. do not think that there is any substantial difference between the
HUTCHINSON two enactments.

C.J.

I do not think that this is like the case of a claim on a bond which is in existence, but which, because it is not stamped or for some other reason, the plaintiff fails to put in evidence. There the plaintiff's right to sue is complete, but his action is dismissed for want of evidence which he might have adduced. This is like a case of a claim for a debt which is not due at the time the action is tried; the dismissal of the action would not be *res judicata* when a second action was brought after the debt became due. Here the plaintiff was not entitled to maintain her first action at the time of the trial of that action; she sued in a representative character, and she had no title to sue then. Now she has a title.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

