PERERA *v.* EKANAIKE.

1897.
September 9.

D. C., Chilaw, 24,352.

Judgment obtained by fraud or passed by mistake—Setting it aside—Procedure to be adopted.

A judgment obtained by fraud or passed under a mistake may be set aside either by a regular action or, possibly, by application by way of summary procedure as regulated by the Civil Procedure Code. It cannot be done by mere motion supported by affidavits with notice to the decree-holder.

THE facts of the case appear in the judgment of WITHERS, J.

Chitty, for appellant.

Dornhorst, for respondent.

9th September, 1897. WITHERS, J.—

This is an action by one person for the recovery of a considerable sum of money against another person appointed under section 642 of the Code to represent the estate of a deceased mortgagor. This official was appointed, under the chapter for the administration of estates, the administrator of all deceased's property, including the premises in question. A writ was taken out in execution of the judgment in this case, and under that writ certain

1897. *September 9.* WITHERS, J.

properties were seized as being part of the deceased mortgagor's estate. The widow of the deceased mortgagor, who it seems has taken possession of her husband's estate, claimed before the Fiscal one-half of the property which came to her on the death of her husband. The claim was referred to the Court, and the matter of the claim has not yet been decided. It was adjourned to give the defendant an opportunity of having the judgment in execution set aside. Accordingly her proctor moved the Court to have the judgment set aside on notice to the decree-holder, and he supported the application by an affidavit of his client. The affidavit stated the facts of the steps in this case in regard to the appointment of the official administrator, and contained statements to the effect that after 1884, when the case was taken off the roll because it had become dormant, the matters in dispute were adjusted by the deceased mortgagor and the deceased plaintiff. The adjustment, it is said, was effected by the transfer of property to the original plaintiff which made up for any loss which the plaintiff might have sustained under the bond with the original defendant. Whether the widow of the late plaintiff knew of this settlement of the case is not, I think, stated by the defendant in her affidavit; but no mention of it was made to the Court either by the substituted plaintiff or the widow, the defendant's official administrator. It goes without saying that if the Court had been satisfied that the original debt had been satisfied, that the original debt had been discharged, judgment would not have gone against the deceased mortgagor's estate. This appears to us to be an attempt to set aside a judgment of consent between the present plaintiff and the present defendant on the ground either that the judgment was obtained by fraud—the fraud being that plaintiff, well knowing the facts of the settlement on or after 1884, concealed that fact from the Court, and so obtained a judgment which otherwise she would never have obtained—or on the ground that these facts through ignorance of the present parties had been kept back from the Judge who passed the judgment under a mistake and in ignorance of facts which had he known he would not have passed the judgment in question.

Now, I do not think that the proceedings taken out by the claimant to set aside the judgment in this case were the right proceedings. They certainly should have been taken, it seems to us, by action regular or summary. The more formal course would have been by regular action. It may be possible to come into the case by summary action, and if that is done, it must be done in the manner required by the Code. There must be a petition and an affidavit. The petition must clearly set out facts which disclose

fraud on the parties plaintiff, or an ignorance of facts in consequence of which there was mistake on the part of the Judge. That must be served on the opposite side, who would then have an opportunity, if so advised, of meeting that affidavit with a counter affidavit. Then issues could be settled and decided ; but that was not the course adopted by the would-be appellant. She attempted to take much too short a cut to her end, and has failed. I do not wish to prejudge her case, but looking at it on the present materials there is no ground for setting aside this judgment by reason of fraud or mistake. For anything less, such as an irregularity, if any there be, in the appointment of the defendant under section 642 of the Code to defend this action, that judgment must stand until set aside in appeal or in revision ; if set aside in revision, it must be done by a proper application in this Court, supported by a proper affidavit on notice to the other side. At least we ought to require this here.

I think the Judge was right in refusing to set aside the order in the case. The case will go back for the claim inquiry to be continued and decided.

BROWNE, A.J.—I agree.