May 7, 1909 ***Present:*** Mr. Justice Wendt and Mr. Justice Middleton.

SIVASUBRAMANIAM *v.* THAMOTHERAMPILLAI.

D. C., Jaffna, 4,045.

Judgment against administrator on a note—Application by heir to set aside judgment on the ground of administrator's fraud and collusion—Proper procedure indicated—Separate action—Judicial settlement.

Plaintiff obtained judgment against the administrator of the deceased maker of a note. Subsequently the widow of the maker filed an affidavit suggesting that the note was a forgery, and applied to be added as a party to the case, and moved that the judgment be set aside.

Held, that the widow, if she thought that the administrator had committed a breach of his trust by permitting judgment to go by default, should have brought a separate action against the administrator or should have surcharged the amount of the judgment in the judicial settlement of the administrator's accounts.

APPEAL from a judgment of the District Judge of Jaffna (W. R. B. Sanders, Esq.). The facts material to this report appear in the judgment of Wendt J.

Kanagasabai (with him *Wadsworth*), for the added party appellant.

Sampayo, K.C. (with him *Balasingham*), for the plaintiff, respondent.

May 7, 1909. WENDT J.— *May 7, 1909*

In this case the plaintiff, as endorsee of a promissory note, obtained judgment against his father, the administrator of the maker, in February, 1905. The costs were taxed the following April, but no further steps were taken. More than two years afterwards the widow of the maker filed an affidavit suggesting that the note was a forgery, and applied to be added as a party in terms of section 18 of the Civil Procedure Code and to have the judgment set aside. An order *nisi* issued upon this application, and the plaintiff's counsel on the returnable day stated that he had no objection to the widow being allowed to intervene. The District Judge accordingly allowed her to intervene. There is no record showing that she was made an added party.

It appears to me that these proceedings are altogether irregular. The action had been regularly disposed of between the proper parties and a final judgment had been entered. I should have thought that if the widow or the heirs considered that the administrator had committed a breach of his trust by permitting judgment to go by default, they would have had their remedy against him by a separate action, or would have been entitled in the judicial settlement of his accounts to have the payment of the judgment surcharged. We were informed by the appellant's counsel that a judgment of this Court existed, which decided this very point in favour of his client. It has, however, not been produced, and I am disposed to think that the circumstances there before the Court must have been very different from those of the present case. Passing this objection by, we have heard the merits argued.

[His Lordship then discussed the merits and dismissed the appeal.]

MIDDLETON J.—

I agree. I have nothing to add.

Appeal dismissed.