SILVA *v.* FERNANDO *et al.*

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C. R., Kurunegala, 4,171.

Action on mortgage bond—Liability of heirs in possession—Civil Procedure Code, s. 642—Capacity of minors to adiate an inheritance—Guardian ad litem.

Where a deceased mortgagor has left an estate under Rs. 1,000 in value, the mortgagee may sue the mortgagor's heirs who have adiated the inheritance or are in possession of the estate in an action not merely hypothecary but, if necessary, to obtain payment out of the rest of the intestate's assets, or he may under section 642 of the Civil Proocedure Code bring a hypothecary action against the mortgaged property only.

Minors cannot be regarded as adiating heirs or parties in possession. The retention of an intestate's property by a guardian *ad litem* is not adiation or possession of such property of the minors represented by him, but such adiation or possession on the part of the minors may take place through a guardian appointed for all purposes over their persons and property before institution of an action.

THE facts of the case appear sufficiently in the judgment.

Van Langenberg, for appellant.

Sampayo and *Travers-Drapes*, for respondent.

24th August, 1897. BROWNE, A.J.—

Plaintiff sues upon a mortgage bond dated 15th July, 1889. The mortgagor died about May, 1895, leaving an estate of under Rs. 1,000 in value, and three children surviving him. On the 5th August, 1896, the Court appointed as guardian *ad litem* over all the children, as minors, the husband of the eldest child, who by marriage was no longer a minor, for the purpose of

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representing them in an action to be instituted on the mortgage, and plaintiff on 3rd September, 1896, instituted this action against them by their guardian, praying for a decree against them for the amount of the debt, with execution against the mortgaged property and, if insufficient, the other property of the intestate.

The guardian for the minors pleaded payment, but at the trial he was allowed to contend that the action was not maintainable because it was not in conformity with chapter 46 of the Civil Procedure Code. The Commissioner upheld the objection, for that the action should have been brought in the manner prescribed by section 642. Now, on the one hand, this Court has (1,124 D. C., Kalutara, *1 N. L. R. 346* ; 9,510, D. C., Kandy, *S. C. M., 15th July, 1897*) treated an action under section 642 as limited to the purposes of an hypothecary action against the mortgaged property only, and on the other hand, Mr. Van Laungenberg has pointed out that the proviso of section 642 is permissive only, and does not abolish the old form of action against adiating heirs of an intestate who has died leaving property altogether less than Rs. 1,000 in value, against whom plaintiff, a mortgagee, should be allowed action to the extent of the assets they received and still hold, should the mortgage when realized not satisfy the claim.

This case is distinguishable from 472, D. C., Chilaw, *2 S. C. R. 110*. There plaintiff sought only a money decree and did not aver the inheritance was under Rs. 1,000. Here plaintiff seeks a mortgage decree, and has so averred as to the value. But the objection remains that minors cannot be regarded to be adiating heirs or parties in possession. If it were shown that without plaintiff's intervention a guardian for all purposes over their persons and property had been appointed ere institution of the action, and that he had entered into office and taken charge of their estate, the action might have been maintainable against them not merely as only hypothecary against the mortgage, but to obtain payment out of the rest of the intestate's assets, if need there were. But the guardian *ad litem* is concerned only with the procedure of the action and not with the holding of property for the children, and any retention of the intestate's property—by him or other adult—is by them simply as parties in possession, intromitters upon their own liability, and not affecting or representing minors.

The mortgagee therefore must sue those actual adult parties in possession as indicated in *6 S. C. R. 13* and *2 S. C. R. 110* if he desires to get such a full decree ; if he will be content with a decree against the mortgage only, he may proceed as section 642. *proviso*, indicates.

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I find, however, that in proceedings preliminary to the institution of this action and taken expressly for such purpose, all the respondents were present and consented thereto. The Court should, on the application being made, have recognized the ruling that minors cannot adiate, and should have appointed the husband of the eldest girl to represent that estate under section 642 if he were willing thereto.

In view of this and of the only plea taken, I set aside the dismissal, and remit the action with liberty to the plaintiff to apply to have this person so appointed, the plaint amended, and summons issued unless the person shall enter appearance in his new capacity and abide by the plea already taken by him. If the plaintiff shall so apply, there will be no costs of the hearing in the lower court of this appeal. If he shall not so apply, his action must stand dismissed with costs. I do this to avoid, so far as is possible, unnecessary cost to the creditor and minor heirs of the intestate mortgagor.