

SOYSA *v.* ALWIS *et al.**D. C., Colombo, M 5.*

1895.

Sept. 6, 10.

Civil Procedure Code, s. 642—Application of mortgagee to have deceased mortgagor's estate represented—Estate under Rs. 1,000—Death of mortgagor before Code came into operation.

Under the proviso of section 642 of the Civil Procedure Code, it is competent for the District Court, upon an application made in respect of a mortgage of less value than Rs. 1,000, to appoint a person to represent the deceased mortgagor's estate for the purposes of the action intended to be raised for the recovery of the mortgage debt.

The proviso stands independently of the testamentary chapters of the Code, and applies to cases where the deceased had died before as well as after the Code came into operation.

THE executrix of one Jeronis Pieris, to whom one R. D. Thomas had mortgaged some lands in order to secure a loan of Rs. 500 and interest, moved the District Court that the widow of the deceased mortgagor be appointed to represent his estate so as to enable her, the executrix, to sue upon the bond.

The Acting District Judge (Mr. Templer) disallowed the motion, as the mortgagor appeared to have died before the Code came into operation.

On appeal, *Bawa* appeared for the executrix.

10th September, 1895. WITHERS, J.—

I think the present case is distinguishable from the case cited before the learned District Judge and relied on by him, viz., *Nagappen v. Maimanchy*, 9 S. C. C. 197. That case, which concerned a mortgaged estate worth over Rs. 1,000, decided that the mortgagee himself could not be appointed administrator of his mortgagor's estate and effects under section 642 of the Civil Procedure Code, and confirmed a previous ruling that the administration clauses of the Code apply only when the intestate shall have died after the passing of the Code.

Section 642 relates to two different states of things. If the mortgaged property of a person dying intestate amounts to Rs. 1,000, the mortgagee cannot bring a hypothecary action unless he has

1895. **BROWNE, J.** procured the appointment of an administrator to the estate and effects of the deceased mortgagor under the provisions of chapter XXXVIII. of the Code. The administration may be a general or a limited one, as under the provisions of section 539. If the mortgaged property is under the value of Rs. 1,000, the mortgagee who desires to enforce his hypothec may apply to the Court to appoint some person to represent the estate of the deceased for all the purposes of the action.

In the first case the mortgagee is compelled to apply under the provisions of chapter XXXVIII., which, on account of the express language contained in it, was held not to apply to estates where the deceased had died previous to the Code coming into operation. See *Muttupillai v. Sellamma*, 9 S. C. C. 179. But in this case the procedure is given under the chapter without reference to the testamentary chapters, and may be considered apart by itself. It is not apparent that any right is affected by this procedure, and there is no indication that it will not apply to cases where the deceased had died before the Code came into operation. Indeed, this chapter is intended to apply to cases where the mortgagor is dead (see section 641). I think we ought to give effect to the new procedure, wherever it is possible to do so, for I should have thought the object of a Procedure Code—unless otherwise expressed—was to deal with past as well as present procedure.

For these reasons I hold it competent for the Judge, if it appears to him necessary or desirable, to appoint a person to represent the deceased's mortgagor's estate for the purposes of this action. This is a matter for his judicial discretion. Of course he cannot do so if there is an executor or administrator already appointed, or if the property mortgaged is not less than Rs. 1,000.

BROWNE, J.—

The decision in 9 S. C. C. 197 was upon an application made under the first part of section 642, and is applicable thereto only, and not to the proviso thereof under which the present application is made for the enforcement of a bond secured by a mortgage of less than Rs. 1,000 in value. I am glad there is no obstacle by precedent to the new procedure whereby the old proceedings in such a necessity against all the heirs may be abrogated by the simpler expedient here made, and that we can follow the precedent of the decision of LAWRIE, J. (1,422, C. R., Kalutara, S. C. M., 14th May, 1895), who upheld (though not after argument of this point) the right of a Court of Requests to appoint a representative to the estate of the mortgagors who had died thirteen years previously.