1895.
January 29.

MUDIANSE *v.* MUDIANSE.

D. C., Kandy, 7,643.

Small estates—Liability of heirs-at-law—Necessary averments to indicate their liability—Prescription—Possession of land mortgaged in lieu of interest—Informal agreement for such possession—Proof of such possession in bar of prescription—Ordinance No. 7 of 1840, s. 6.

Per WITHERS and BROWNE, J.J.—Before heirs-at-law of a small estate can be sued for a debt against the assets of such estate, it must be averred and proved that they possessed themselves of the estate for the purpose of administration. The averment must contain details as to the nature and value of the property of the deceased, and as to the asset or assets the heirs-at-law have possessed themselves of for the purpose of administration.

Plaintiff sued in 1893 on a mortgage bond executed in 1877. No interest in money had ever been paid on the bond, but in bar of prescription plaintiff averred possession by him of the land mortgaged in lieu of interest on a parol agreement with the debtor—

Held, that such an agreement, not being notarial, was of no force or avail in law.

Held further by WITHERS and BROWNE, J.J. (LAWRIE, J., *dissentiente*), that possession under such agreement could not be pleaded or proved in bar of prescription.

Per LAWRIE, J.—Plaintiff having possessed his debtor's land and taken its produce may plead such possession and enjoyment of produce as a series of payments of interest (acquiesced in by his debtor), which prevent the bond from being prescribed.

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THE facts of the case sufficiently appear in the judgments.

Dornhorst, for defendant, appellant.

Wendt, for plaintiff, respondent.

Cur. adv. vult.

29th January, 1895. BROWNE, A.J.—

Two questions arise for consideration, whether the plaint sufficiently discloses a cause of action, and whether the plaintiff can in 1893 maintain this action on his bond of 1877.

The plaint, as finally amended, averred the execution and terms of the bond for Rs. 300, payable on demand with 12½ per cent. interest; that by an agreement (it did not say whether notarial or not) made in 1880 plaintiff entered into and held thereafter till action possession of the mortgage land with the consent of the mortgagor and the defendants, and had cultivated it and taken the produce in lieu of interest on the said sum; that the mortgagor died intestate leaving as his heirs-at-law his children, the defendants, who became entitled to all his property, and that there was no necessity for administration; and "that the defendants "by heirship, possession, and interest represent the estate of the "said deceased Dingirala." This last averment was apparently intended to satisfy the requirements of the decision in *6 S. C. C. 13*, the wording of which it exactly followed.

I agree in the contention for the defence that the plaint did not sufficiently disclose a cause of action. In the first place, there is no averment to be found that any sum at all is due for either principal or interest, and if any, what amount. I do not know whether it was intended to aver that the paddy was taken in lieu of all interest due from date of the bond in 1877, or from the date of the alleged agreement of 1880 only. And, secondly, I agree with my brother Withers that it is not sufficient to aver the ultimate conclusions of the salient features of establishing sufficient representation to small estates which the Court is asked to conclude to be existent, but that these should be averred in detail, of what are the relationship and the interest, and what is the nature and value of the property which could be possessed, and who possessed the same. As to this last, it must be remembered that each heir is liable to the extent, and that only, of the value of assets received by him (*6 S. C. C. 14* and *7 S. C. C. 4*), and the action here prayed a personal decree against the defendants as well as a mortgage decree, each of which might be enforced if the mortgage realized, say, only Rs. 100 in execution, and the children conjointly, or in separate holdings, possessed other assets of the father of the value of Rs. 500.

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On the second point, I hold still further that the plaint is insufficient in form as well as that the action fails. To discharge the onus which section 44, Civil Procedure Code, casts on a plaintiff in the position of the present respondent, it was needful he should aver that the giving and taking of any kind in an exact equivalent for any coin was done by agreement, and that such agreement was a valid one, *i.e.*, that the variation in this respect of the notarial mortgage was itself notarial. By the form of his plaint plaintiff acknowledges it would not suffice he should aver merely that he had entered into possession and taken the crops and had credited them, and was willing they should be credited as against all claim for interest due under the bond. His taking of interest from his unwilling debtor would not prove the recognition of the continuing subsistence of the obligation which a voluntary payment evidences with the effect of prolonging the duration of the obligation; and so the plaintiff himself averred agreement and consent. But as soon as the plaint did not specifically aver nor even schedule any notarial agreement of 1880, the requirement of section 44 was to my mind not complied with; and even if the plaint were not imperfect thereby, the proof that the necessary agreement was merely oral causes the necessary averment to fail. I agree that the action should be dismissed. I am not satisfied (assuming it be open to me to consider it) with the proof of plaintiff's possession. I would again point to the omission to schedule in the plaint the tax receipts as section 51 requires. They were the most material part of plaintiff's evidence, and had defendant been thus formally notified that they would be used against him, he might have been prepared to sustain by proof his averments that plaintiff at first made the payments as his agent, and then fraudulently possessed himself of the vouchers to use them. I therefore do not regret that the decision should be the dismissal of this stale claim.

WITHERS, J.—

This is an action, in substance rather than in form, to obtain against the heirs-at-law of the estate of a man dying intestate (the estate being a small one, under the value of Rs. 500) a declaration that the deceased died indebted to the plaintiff in a certain sum of money, and a decree that certain property, specially mortgaged by the deceased to secure the debt, be sold in satisfaction of it.

It is alleged by the plaintiff that the debtor died intestate about seven years ago, leaving him surviving, as his heirs-at-law, his children, the defendants, who became entitled to all his property, and that the defendants by heirship, possession, and

interest represent the estate of the deceased debtor. As to the property specially mortgaged, it is averred in the plaint that by an agreement entered into between the plaintiff and the deceased debtor in 1880 the plaintiff entered into possession of the mortgaged property, and has been since 1880, and still is, in possession thereof, with the consent of the deceased debtor and defendants, cultivating and taking the produce of same in lieu of interest on the principal sum which the deceased debtor obliged himself to pay by bond dated the 8th December, 1877.

It was made a point of law in the answer, and pressed upon us in appeal, that the plaint discloses no cause of action against the defendant.

In my opinion this is a good defence. Before the heirs-at-law of a small estate can be sued for a debt against the assets of that estate, it must be averred and proved that they possessed themselves of the estate for the purpose of administration. But such an averment is incomplete if so nakedly stated as the present one. The plaintiff must indicate what asset or assets an heir-at-law has possessed himself of for the purpose of administration: *non constat* in this case, that the debtor left any property behind him other than the mortgaged property, which the plaintiff says *he* is in possession of.

From the staleness of this claim I should be disposed to infer that the defendants had no assets of any sort in their hands. Be that as it may, I think the plaint is so defective as to disclose no cause of action.

It was further contended that the issue raised as to the prescription of the mortgage bond should have been decided in favour of the defendant. The bond is dated 18th December, 1877. The obligor therein binds himself to pay a sum of Rs. 300, on demand, with interest thereon till payment in full, at the rate of 12½ cents per Rs. 10 per month. It is admitted that no part of the principal has been paid, in any sense of the word, and that no part of the interest in money has ever been paid; so then the bond, on the face of it, is prescribed, and no action can be maintained on it under the provisions of section 6 of Ordinance No. 22 of 1871.

Plaintiff, however, pretends to release his bond from the provisions of that section by virtue of the agreement set up in the third paragraph of this plaint, which I have already recited.

I conceive it to be good law that the breach of even a notarial contract for payment of interest in money may be satisfied by delivery and acceptance of goods, or other consideration equivalent to money in satisfaction of the interest.

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I consider that proposition to be good law because the effect of such payment does not contradict or vary the notarial contract, but satisfies the breach of it. That is not the case here. It is not alleged or proved that so much of interest due under the bond was discharged by delivery and acceptance of an equivalent of the sum due.

What is alleged is that three years after the execution of the bond the plaintiff, by agreement with the debtor, entered into possession of the property, of which he was to take the fruits in lieu of the interest in money payable under the bond.

Now, to my mind such an agreement went to establish an interest in or encumbrance on land, and was of no force or avail in law, inasmuch as it was not notarial. This agreement was no doubt not used here to enforce such an interest or encumbrance. It was used to prove an agreement to substitute one sort of payment for another; but the provision of section 6 of Ordinance No. 7 of 1840 prohibits the use, to my mind, of this agreement for even a collateral purpose.

The conclusion I come to is that the judgment is wrong, and that the action should be dismissed with costs.

LAWRIE, A.C.J.—

I have the misfortune to dissent from the judgments just delivered. I agree with the learned District Judge that the plaintiff has proved that in 1877 Dingirala executed the mortgage bond sued on, that about three years afterwards Dingirala being unable to pay in money the interest stipulated in the bond, the mortgagee entered into possession of the field mortgaged and had the use and occupation of it for the next twelve or thirteen years, until shortly before the institution of this action.

Dingirala died some years ago, survived by three children, of whom two were minors at the date of action.

The interest stipulated in the bond is 12½ per cent. per annum. It is admitted that that interest in money was never paid. Was it relevant to aver that although no money payment was made and received, there was an equivalent in the possession by the creditor of the land, and a reception by him of fruits which he was in equity bound (and which he is willing) to attribute as payment of interest?

I am of opinion that that averment was relevant, and that, as the proof has been considered by the District Judge sufficient, there has been payment of interest which satisfies the requirements of the Ordinance, and takes the bond out of prescription.

I do not lay stress on the alleged agreement between the plaintiff and Dingirala that the former should possess in lieu of interest. I am of the opinion that such an agreement was (if made) of no binding effect, because it was not evidenced by a notarial deed. I take the case as one in which the plaintiff has failed to prove how he got into possession: it is the fact of his having taken the fruits of his debtor's land which impresses me. He would have been bound to have given credit to his debtor for these fruits if he had sued for interest, and I am unable to see that he is not able to plead that possession and reception as a series of payments of interest (acquiesced in by his debtor) which prevent the bond from being prescribed.

The plaintiff asks for a judgment and decree against the defendants (the children of the mortgagor) personally and for a mortgage decree. The plaint contains no averments on which the defendants can be made personally liable; this was conceded by Mr. Wendt for the plaintiff.

To obtain a mortgage decree the proper course would have been (as the estate is under Rs. 1,000) for the learned Judge to have appointed a representative of the estate under the latter part of section 642; but as the Judge did not consider that to be necessary, this action for a hypothecary decree was, I think, rightly brought against the owners of the land mortgaged. The defendants admit that they are the owners,—they succeeded to the field on their father's death. In any action by the mortgagee for the realization of the mortgage these new owners must necessarily be made parties. They may not have made themselves liable for their father's debt, but their own land could not be sold for that debt without making them defendants, and so giving them the option of redeeming. I am, for that reason, of opinion that the decree should be re-formed and be limited to a hypothecary decree, and that so much of it as makes the defendants liable personally should be deleted.

I would make the defendants to pay so much of the costs of the plaintiff as were caused by their unsuccessful and, I think, unwarranted defence that their father did not make the mortgage bond. I would give no costs in appeal because success has here been divided.