1900.
July 17.

PUNCHI KIRA *v.* SANGU *et al.*

C. R., Galagedara, 1,052.

Hypothecary action—Civil Procedure Code, ss. 640–642.

A hypothecary action is not properly constituted unless the mortgagor, if he is alive, is a party. If he is dead, his executor or administrator must be made a party, or some person appointed by the Court to represent his estate.

Per BONSER, C.J.—At the time of the passing of this Code the law was that the mortgagee was entitled to two actions upon the mortgage bond: a personal action against the mortgagor for the debt, and secondly, the *actio quasi Serviana*, commonly called an hypothecary action, against the land to have the land sold for the purpose of realizing the debt; and when the mortgagor was in possession of immovable property he might bring both the personal and the hypothecary action simultaneously and join them in one libel. If the property was in the hands of a third person—if, for instance, the mortgagor had sold the land—then the mortgagee had the choice of suing the debtor by the personal action, or the person in possession of the property by the hypothecary action, and he could sue them in any order he pleased.

But section 640 of the Civil Procedure Code plainly intended to alter that procedure. It took away the right of suing a third person in possession of the property by the hypothecary action without joining the mortgagor for it, and provided that in every hypothecary action the mortgagor must be joined as a defendant, whether he is in possession or not of the property mortgaged at the time of the action.

Scope of sections 641 and 642 explained.

THE plaintiff sued the defendants for the recovery of a sum of Rs. 140 due on a mortgage bond dated 18th December, 1878, executed in his favour by one Hawadia, deceased, who was the father of the first, second, and third defendants; and the plaintiff claimed a further sum of Rs. 50 as damages in consequence of the fourth and fifth defendants having forcibly ousted the plaintiff from the mortagaged field, of which the plaintiff alleged he was in possession. The defendants denied the execution of the mortgaged bond and the plaintiff's possession of the mortgaged field and pleaded prescription. The Commissioner entered judgment for the plaintiff, holding that the bond was executed by Hawadia; that as the plaintiff was a usufructuary mortgagee the bond was not prescribed; that Rs. 140 were due as principal from the first, second, and third defendants, as heirs of Hawadia; and that Rs. 50 were due from all the defendants as damages arising from the ouster.

The decree entered in the case was as follows:—" It is ordered " and decreed that the plaintiff do recover from the defendants the " sum of Rs. 190. It is further ordered that the defendants do pay " to the plaintiff the costs of this action Rs. 32.25, and it is further

" decreed that the property mortgaged to the plaintiff, &c., be " declared bound and executable," &c.

1900. July 17.

The defendants appealed.

Maartenz, for appellants.—The irregularity in procedure in this case is fatal. No representative has been appointed to represent the estate of the deceased mortgagor as required by section 642 of the Civil Procedure Code. The action is not maintainable, because the mortgagee plaintiff has failed to apply to the Court to appoint an administrator to the estate of the deceased mortgagor, nor has the Court been moved to appoint some person to represent the estate for the purpose of the present action. The case of *Kannappa Pattiriani v. Canapathi Pulle* (D. C., Batticaloa, 1,798), decided on 28th November, 1898, is on all fours with the present case.

H. Jayawardena, for respondent.—The appointment of a representative is not absolutely necessary. It is a matter left to the discretion of the Court. *Silva v. Fernando* (*3 N. L. R. 15*). No objection was taken in the Court below to the want of representation; and Mr. Justice LAWRIE pointed out in *Mudianse v. Mudianse* (*2 N. L. R. 91*) that where the defendants succeeded to their father's estate, on his death they were liable for their father's debt so far as his estate went, but their own land could not be sold for such debt. His lordship therefore deleted so much of the decree passed in that case as made the defendants liable personally and limited the decree to a hypothecary decree.

In *Adagappa Chetty v. Beebee* the practice of suing the heirs of a deceased debtor was recognized (*6 S. C. C. 13*).

Section 642 of the Civil Procedure Code has been construed by the Supreme Court to mean that the old remedy of suing the heirs in possession still exists. That section only makes it optional either to sue the heirs in possession or to get a person appointed to represent the estate of the deceased mortgagor. [BONSER, C.J.—Under the old law two actions were competent: a personal action and the *actio quasi Serviana*, commonly called the hypothecary action, and both actions might be joined in the same libel.] Before bringing the hypothecary action against a third party a decree must be obtained against the mortgagor. Section 642 says " the Court *may*.....appoint some person.....:." So that it is not obligatory to have one appointed before instituting the action.

BONSER, C.J.—

This is a troublesome case, owing to the way in which it has been presented in the Court below, and also owing to the careless way in which the decree of the Court was drawn up.

1900.
July 17.

BONSER, C.J.

It appears that a man called Hawadiya was the owner of a certain field, and on or about the 18th December, 1878, he mortgaged it to the plaintiff for Rs. 140, mortgaging to him " 14 lahas and 1 measure paddy sowing extent out of the upper part of Paduange-kumbura " to secure that amount, and it was agreed that the plaintiff should take the produce in lieu of interest. Many years ago Hawadiya died intestate leaving three children by the first bed (the first, second, and third defendants) and one son, Kuda, by a second marriage, who was dead at the date of the action. No administration was taken out to the estate of the mortgagor, and the plaintiff asserted that he had ever since his mortgage been in possession of the mortgaged property and taking the produce. This was contested by the defendants, but the Commissioner found that issue in favour of the plaintiff, and held that the mortgage bond was not prescribed as the defendants contended. The fourth and fifth defendants were joined as having intruded on this land and prevented the plaintiff from realizing the produce. The statement of the plaintiff as regards them is this: " That the fourth and " fifth defendants are joined in this action, inasmuch as they " wrongfully prevented the plaintiff from cultivating the said land " during the yala season of 1897, and still continued to cultivate " and appropriate the produce thereof to the damage of the plaintiff " of Rs. 50." It appears to be the fact that the fourth and fifth defendants claim to be owners of this land, and had a conveyance dated in 1875 from the children of the original mortgagor. The plaintiff was aware of this sale when he filed his plaint, and he admitted, when he gave his evidence, that he had taken a mortgage from these defendants of this very property for Rs. 50, and he further admitted that the money paid by the fourth and fifth defendants for this land was used by the heirs of the deceased mortgagor in payment of the debt due to himself from the mortgagor, so that it was not very ingenuous of him to make it appear in the plaint that they were strangers who had come in and interfered with his possession.

The second and third defendants are dead. The decree, disregarding that fact, orders them to pay the mortgage money, and also makes them pay damages of Rs. 50, which were awarded against the fourth and fifth defendants for their wrongful act in interfering with the plaintiff's possession. The decree appears to be hopelessly wrong. It also appears on the face of the decree that there are persons not parties to the action who are interested in the land, for it directs the sale of the mortgaged property, " reserving the rights of those having an interest in the property, but who are not parties to the action."

1900.
July 17
BONSER, C.J.

Objection has been taken that the suit is improperly constituted, and that the plaintiff has not complied with the procedure laid down in chapter XLVI. of the Civil Procedure Code, and in my opinion that objection is a good one. Chapter XLVI. is not very skilfully drawn, but I think if it is carefully read its meaning is reasonably clear. At the time of the passing of this Code the law was that the mortgagee was entitled to two actions upon the mortgage bond, viz., a personal action against the mortgagor for the debt; and the *actio quasi Serviana*, commonly called an hypothecary action, against the land to have the land sold for the purpose of realizing the debt; and when the mortgagor was in possession of the mortgaged property he might bring both the personal and the hypothecary action simultaneously and join them in one libel. If the property was in the possession of a third person—if, for instance, the mortgagor had sold the land—then the mortgagee had the choice of suing the debtor by the personal action, or the person in possession of the property by the hypothecary action, and he could sue them in any order he pleased. But chapter XLVI. plainly intended to alter that porcedure. It took away the right of suing a third person in possession of the property by the hypothecary action without joining the mortgagor, for it provided that in every hypothecary action the mortgagor must be joined as a defendant, whether he is in possession or not of the property mortgaged at the time of the action. That seems to me to be the meaning of section 640, although, if construed literally, it would seem to require every mortgagee to sue his mortgagor whether he wished to recover the debt or not.

Then section 641 provides for the case where the mortgagor is dead, declaring that in such a case the mortgagee shall be entitled to sue the executor or administrator of the mortgagor. That section seems to me clearly to point to the fact that these sections are dealing with hypothecary actions, that is to say, actions which have for their object to realize the mortgage by a sale of the land, for it does not require a statutory enactment to inform us that, in a case of a personal action against a mortgagor, a mortgagee is entitled to sue the mortgagor's executor or administrator after his death.

Section 642 goes on to provide that, where there is no executor or administrator, the mortgagee must have an administrator appointed before he can commence his action, if the property mortgaged is of the value of Rs. 1,000 or upwards, and it goes on to provide that, where the property mortgaged is less than Rs. 1,000 in value and there is no executor or administrator, it shall not be necessary for the mortgagee to get an administrator appointed,

1900.
July 17.

BONSER, C.J.

but that he may apply to the Court to appoint some one to represent the deceased mortgagor's estate for the purposes of the action; and that in that case, if the Court thinks it desirable that such a person should be appointed and appoints him, any decree made in the hypothecary action is to bind the mortgagor's estate in the same manner as, and in all respects as, if a duly constituted administrator of the deceased mortgagor were a party. It was not obligatory on the Court to appoint such a person. It may well be that the Court may decline and say that, although the mortgaged property is of very small value, yet the whole estate is of such value that it is desirable to have an administrator appointed.

It was suggested that the discretion left to the Court to appoint a person to represent the mortgagor was intended to allow the heirs of the deceased who had adiated the inheritance to be sued as representing the deceased's estate for the purposes of such an action; but it seems to me that that is rather a farfetched suggestion and does not fit in with the general policy of these sections, and I see that in a case reported in *6 S. C. C. 13* my predecessor held that when a person dies intestate an administrator must be appointed, and he doubted whether an inestate's heirs could properly be sued, except in so far as they may have rendered themselves liable as executors *de son tort* by intermeddling with the estate. I share the same doubt. However that may be, an hypothecary action is not properly constituted unless the mortgagor, if he is alive, is a party. If he is dead his executor or administrator must be made a party, or some person appointed by the Court to represent his estate.

The record and decree are in a state of such confusion in the present case that, with every desire to save expense to the parties, I cannot see my way through the labyrinth.

The appeal is allowed, but this will not prevent the mortgagee from bringing a properly constituted suit.

I wish to add that the present case is on all fours with the case of *Kannappa Pattiriani v. Canapathi Pulle* (D. C., Batticaloa, 1,798). which was decided by my brother WITHERS and myself on the 8th November, 1898, and I follow that decision.