1900.
December 6, and 1901.
February 14.

PUNCHIRALA *v.* APPUHAMY.

D. C., Kandy, 11,584.

Registration of deeds—Unregistered mortgage bond of intestate—Registered deed of sale by administrator—Priority—Registration Ordinance No. 14 of 1891—Civil Procedure Code, s. 547—Proof of title to property through intestate.

The registration of letters of administration or of grant of probate does not avoid an unregistered mortgage or sale by the intestate; but if after taking out letters of probate, the administrator or executor sells or mortgages any property dealt with by the intestate and gets the deed registered prior to that given by the intestate, the former deed would take priority over the latter.

If a person desires to prove title to property through an intestate, he must prove either that administration has been taken out to the intestate and that the administrator has conveyed the intestate's estate to him or to his predecessor in title; or that the intestate's estate was of less value than Rs. 1,000, so that administration was not necessary.

THE principal issue in this case was whether plaintiff's title was superior to that of the defendant. The transfers under which the plaintiff claimed were registered, while the deed on

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which the defendant relied was not registered. The facts, as found by the District Judge were as follows: One Sumangala Unnanse granted a usufructuary mortgage on the 6th March, 1870. in favour of one Punchirala and died in 1879. On the 28th May, 1895, Punchirala assigned the mortgage bond, which was not registered, to the defendants. On the 10th and 20th January, 1896, certain persons claiming to be the heirs of Sumangala transferred the lands to one Piyadassi Unnanse, who transferred them to the plaintiff on the 29th January, 1896. These transfers were registered. The plaintiff instituted this action to obtain a declaration of title and to eject the defendants.

On the plaintiff's death, the administrator of this estate was substituted plaintiff.

The District Judge, Mr. J. H. de Saram, gave judgment in favour of the substituted plaintiff, declaring him entitled to the lands in question, but the Court disallowed his prayer for ejectment, because there was no offer on his part to redeem the mortgage.

The plaintiff appealed.

The case was argued on the 6th December, 1900, before Bonser, C.J., and Lawrie, J.

Wendt, for appellants.

Van Langenberg, for respondents.

Cur. adv. vult.

14th February, 1901. LAWRIE, J.—

The lands in question belonged to Sumangala Unnanse. He mortgaged them in 1870 to the defendants, with possession in lieu of interest.

He died twenty-five years ago, and for at least 17 years his nephews and nieces, who were his next of kin, did not take steps to administer his estate, nor to clothe themselves with title to redeem the mortgage.

These next of kin sold the land in 1896, and in 1897 the purchaser brought this action against the mortgagee in possession for declaration of title and for ejectment.

The learned District Judge held that the plaintiff was the owner of the land, but that the defendants were entitled to retain possession until the mortgage-debt was discharged.

This was an equitable decision in which, I think, the plaintiff should have acquiesced, but he appealed on the ground that the mortgage of 1870 was not registered and was unavailing and void as against the subsequent transfers duly registered.

Before the plaintiff could avail himself of strict law, he had to show that he, in strict law, had a good title, and in that he has

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failed. The transfers to his predecessor in title and to himself and this action by him were in 1896 and 1897, some years after the passing of the Civil Procedure Codes. This action cannot be maintained; it falls under the 547th section.

This is not a case where the heirs entered on an inheritance and became the owners by succession and by possession, for here they have not been in possession since their ancestor's death. The action was clearly for the recovery of the property of the deceased Sumangala, not for recovery of property of the vendor to the plaintiff. The action is not maintainable, and it must be dismissed. By trying to get too much the plaintiff has lost everything.

If I had been of the opinion that the plaintiffs had title, I would not have been able to agree with the law as stated by the learned District Judge, who held that because the transfer and the mortgage were not from the same person they did not convey and create adverse interests. He relied on a decision of this Court in D. C., Kandy, 746 (30th August, 1889). I do not think that decision is in point. There the purchaser from the administrator was held to have got nothing first—because the land had not passed to the administrator, it having been already transferred to others; and second, because the sale by the administrator was fraudulent.

Here the competition is between a mortgage by a land owner and a sale by his heirs. The question what are adverse interests was considered by the Collective Court in D. C., Galle, No. 994 (*2 C. L. R. 158*). Burnside, C.J., dissented from the majority, being of the opinion that the decisions established this only, that a deed prior in registration voids a deed prior in date by the same party and of the same estate, they being both deeds which it is said embrace the identical estate, and consequently deal with adverse interests. He considered adverse interests to be interests which cannot exist together, where one would be a fraud on the other.

But that view was not taken by the rest of the Court. I will not quote my own judgment; Mr. Justice Withers said: "The instrument first registered, though last in date, which purports to dispose of the right, title, and interest of the party affected, shall, if for value and without taint of fraud, prevail over all prior unregistered instruments affecting the same immovable property, whether they purport to dispose of the same interests or carve a small estate out of a fee simple, and shall, like Aaron's rod, swallow them up with all their charges, encumbrances, leases, and interests whatsoever affecting the property. I understand that

to be a correct statement of our law. There remains the question,— must these adverse interests be created by the same person? I see no reason why they must. The deeds creating adverse interests must, of course, be executed by persons who have title. The purchaser from a man's administrators or executors cannot be in a worse position than a purchaser from the man himself. If he, by a subsequent deed duly registered, could defeat a prior unregistered deed granted by himself, surely his heirs or administrators could defeat a prior deed executed by the deceased. In the latter case the suspicion of fraud would not exist—a man must know that he had already sold or mortgaged and should not execute a subsequent deed giving an adverse interest without reserving the rights of the prior purchaser or mortgagee, but administrators may be ignorant of what their predecessors had done, and may in good faith give a deed creating an adverse interest.

The objection was taken that administrators do not acquire title on valuable consideration; that is true, and I think the registration of letters of administration or of a grant of probate would not void an unregistered mortgage or sale by the intestate. But having taken letters the administrator may sell or mortgage, and if the sale or mortgage by him be registered prior to that given by the intestate, it seems to me that the priority given by the Registration Ordinance to registered deeds must be given.

I would dismiss the action with costs.

BONSER, C.J.—

I agree, but will add a few words first as to the effect of section 547 of the Civil Procedure Code, which appears to me not to have received the attention of the Courts or of the profession generally which its importance demands.

It seems to me that if a person desires to prove title to property, and finds it necessary to deduce a title to that property, either from or through a former owner who has died intestate, he must prove one of two things: either that administration has been taken out to the intestate, and that the administrator has conveyed the intestate's estate to him or to his predecessor in title; or that the intestate's estate was of less value than Rs. 1,000, so that administration was unnecessary. In the present case I agree that it is clear that the plaintiff cannot make out a title to his property without proving a descent of the property from Sumangala Unnanse, who died intestate. It is clear that Sumangala Unnanse's estate was worth more than Rs. 1,000, and that no administration was ever taken out to that estate.

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Then, as regards the question of registration. I entirely agree with my learned brother as to the effect of the Registration Ordinance, and I dissent from the opinion expressed in the case, which the learned District Judge of Kandy referred to in his judgment, which was the opinion of one only of the two Judges who decided that case, namely, the opinion that where you have a conveyance from an intestate and a subsequent conveyance from his administrator, those two conveyances do not proceed from the same source, and that therefore the Registration Ordinance does not apply. It seems to me that so to hold would reduce the registration to a mere trap for purchasers, and render it impossible for anyone safely to take a title from an administrator. A purchaser from an administrator would go to the Registration Office and would search against the intestate, and would find no deed by the intestate affecting the property by the administrator registered. He would then complete his purchase. The effect of the opinion I have referred to would be that, if after taking all these precautions, a deed were produced which had been executed by the intestate but not registered, it would take priority over a registered conveyance by the administrator. It seems to me that there is no ground whatever for the view that the intestate and his administrator are not the same source of title. The administrator represents, and his estate is in law identical with that of, his intestate. It seems to me that there is no question as to the applicability of the Registration Ordinance to a case of this kind.