1971 *Present :* **G. P. A. Silva, S.P.J., and Samerawickrame, J.**

D. R. FERNANDO, Appellant, *and* K. A. MAGLIN HAMINE, Respondent

S. C. 417/68 (F)—D. C. Colombo, 399/R.E.

Civil Procedure Code—Sections 338, 341, 394 (2), 398, 547—Husband and wife living in separation—Death of husband—Appointment of the wife as legal representative of the deceased husband—Validity —Expression " next of kin "—It includes a widow who is an intestate heir—Rent Restriction Act.

Where husband and wife have been living in separation because of cruelty on the part of the husband, and the wife has been in receipt of maintenance for herself as ordered in a maintenance case, the wife is nevertheless entitled to assert her rights to the assets of the husband upon the husband's death. Accordingly, on the death of the husband, the wife may be substituted as legal representative in execution proceedings against the husband in respect of a decree entered for his ejectment from rent-controlled premises.

The expression " next of kin " in section 394 (2) of the Civil Procedure Code includes a widow who is an intestate heir under the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

APPEAL from a judgment of the District Court, Colombo.

G. P. J. Kurukulasuriya, with *Mrs. N. Dambawinna*, for the petitioner-appellant.

D. R. P. Goonetilleke, for the plaintiff-respondent.

Cur. adv. vult.

May 19, 1971. G. P. A. SILVA, S.P.J.—

On the 5th of July, 1965, the plaintiff-respondent in this case sued one D. W. M. Fernando (since deceased) for arrears of rent and ejectment from premises No. 203, Galle Road, Wellawatte, in which the defendant carried on a business in groceries and sundries which was duly registered in his name under the Business Names Ordinance in April, 1961. The premises in question came within the purview of the Rent Control Act and, the rent having fallen into arrears for over a month after it became due, the plaintiff on or about 30th March, 1964, gave notice to the defendant to quit and deliver vacant possession of the said premises at the end of 30th June, 1964. The defendant however continued in unlawful occupation of the premises, and, at the time action was instituted, the arrears of rent amounted to Rs. 3,043·10. Although the defendant in his answer took up the position that he obtained the premises on rent from one Gamage Jane Perera (whose executrix the plaintiff was) and that he was unaware as to the person who was entitled to receive the rents after her death, at the trial on 28th June, 1966, he consented to judgment in a sum of Rs. 6,087·40, ejectment and further damages at Rs. 138·35 per month from 1st June, 1966. The amount due however was to be paid in instalments and it was agreed that, if the defendant made the instalment payments without any default up to 30th June, 1968, satisfaction of decree would be entered and the defendant would be allowed to continue in occupation of the premises in suit on a fresh contract of tenancy as from 1st July, 1968. It is important here to note that the defendant stated to court that he had no subtenants and undertook not to sub-let the premises and agreed that if he sublet the premises or any part thereof, writ was to issue after notice and inquiry.

On 4th July, 1967, the plaintiff filed papers under section 398 of the Civil Procedure Code, stating that the defendant in the case died on 31st May, 1967, and applied for substitution of P. Sumanawathie, the deceased defendant's wife, as the legal representative in order to enable him to take out writ and to take the other necessary legal steps in the case. Considering the stage that this case had reached it seems to me that the application to court should have been made under section 341 of the Civil Procedure Code. She was however substituted and on an application being made by the plaintiff a writ of ejectment was issued against her on 2nd December, 1967.

On 5th December, 1967, the petitioner-appellant, a brother of the deceased defendant, moved the court to stay execution of decree on the ground that the decree could not be enforced by virtue of section 4 of the Rent Restriction (Amendment) Act No. 12 of 1966 and stated that he was a dependant of the defendant and had been managing and carrying on the business of the defendant during the latter's lifetime and had continued to do so after his death, that he had adiated the inheritance and that he was therefore entitled to the tenancy of the premises by virtue of section 18 of the Rent Restriction Act. He also averred that the substituted defendant-respondent, the widow of the defendant, had deserted the defendant taking with her their only child about five years prior to the death of the defendant and that she was receiving maintenance by virtue of an order of court in case No. 31946, Magistrate's Court, Colombo. He therefore contended that she did not adiate the inheritance and that the substitution as defendant on the death of her husband was bad in law. The learned District Judge having inquired into this petition dismissed it holding that the substitution of the widow was legally correct, that the petitioner, although a brother of the defendant, was not a member of his household and was therefore disentitled to the tenancy on the death of his brother and further that the deceased defendant's tenancy had been terminated by a valid notice to quit and also by the entering of a decree and his being allowed to remain in the premises was a personal right which could not be passed on to another. The present appeal is from this order.

I shall first deal with the question of the correctness of the substitution of the widow in place of the deceased defendant. It is common ground that the widow was, for some years during the lifetime of the husband, living in separation with this child and that she was in receipt of maintenance for herself and her child from somewhere in 1963, that is, for about four years at the time of his death. It is important to note that the ground of separation was cruelty on the part of the deceased defendant and the proceedings in the maintenance case show that at the inquiry the defendant only stated that he intended to file a divorce case and consented to pay maintenance without prejudice to his rights in the divorce action. There is no evidence however that such a divorce case was filed by the defendant. The evidence at the inquiry into the present application which the learned District Judge presumably accepted was

to the effect that the widow went to the premises in question on the death of the husband to take over the assets but that she was not allowed to do so by the petitioner and that she had made a complaint to the Police to that effect. In these circumstances, if she was prevented by the appellant from asserting her rights, I cannot say that the learned District Judge misdirected himself in holding that the substitution of the widow as the legal representative on the death of her husband in execution proceedings was correct in law. The mere fact of the wife having lived in separation from the husband did not disentitle her and the child from succeeding to any of his rights just as she and the child born to her by the deceased would, upon his death, have been entitled to any properties left by him. This position is further strengthened by the fact that she was living away from him on the ground of alleged cruelty, that she was receiving maintenance on an order of court made after due inquiry and that she had attempted to assert her rights to his assets upon his death.

The learned counsel for the appellant contended that the widow, not being a blood relation of the husband, does not fall within the category of "next of kin" referred to in section 394 (2) of the Civil Procedure Code. Although the term "next of kin" would ordinarily refer to the nearest blood relations of a deceased person, substitution for whom is under consideration by the court, I do not think that the term would generally exclude the spouse of a deceased person. In a system of law such as ours where the spouse of a deceased person has a prior claim to succeed to the latter's intestate property, according to the Matrimonial Rights and Inheritance Ordinance, the surviving spouse should in my view be regarded as "next of kin" if not in preference to, at least on equal terms with the nearest blood relations.

There is another reason which persuades me to take a view unfavourable to the appellant. The petitioner-appellant's evidence that he was carrying on business in the said premises with the deceased brother did not impress the learned District Judge nor, I must say, does it impress me. Apart from his mere statement that he so carried on business, he admitted that he was not a partner; the Certificate of Registration of the business contained only the name of the original defendant; the appellant was living at Ratmalana while the deceased lived in the premises in question; the appellant was not a man of means and had no other employment and was paid about Rs. 5/- a day for assisting the deceased in the business. Perhaps more important than all this is the fact that when the deceased consented to judgment in this case he stated that he had no sub-tenants and undertook not to sublet the premises but was silent as to whether he had a brother carrying on business with him, when he had an opportunity to inform the court of this fact if indeed that was the position. This evidence, in my view, did not help to dislodge the rights that the widow had on the death of her husband nor to establish any right to the tenancy of the premises on his part, even if such a right could have accrued to anybody at all, having regard to the stage that the tenancy

case had reached at the time that the defendant died. It is also significant that, although the defendant died on 31st May, 1967, the appellant, if the right contended for in fact accrued to him, did not take any steps in court to have himself substituted until December, 1967, particularly when he should have known that instalment payments were due to be paid every month in default of which writ could have issued in terms of the decree. Considered from this angle too, therefore, the substitution of the widow as the legal representative of the original defendant was properly done for the purpose of execution proceedings.

In these circumstances, it is unnecessary to deal with the questions of law that may have arisen had the appellant been one who came within the purview of section 18 of the Rent Restriction Act.

The appeal is accordingly dismissed with costs.

SAMERAWICKRAME, J.—

I agree with the judgment of G. P. A. Silva, S.P.J., but I desire to deal with a point raised by learned counsel for the appellant. He submitted that a widow is not a blood relation of the husband and therefore does not fall within the class of next of kin in Section 394 (2) of the Civil Procedure Code. There is no doubt that the proper and primary meaning of " next of kin " is the nearest in proximity of blood living at the death of the person whose next of kin are spoken of—vide *Elmsley v. Young*,[1] 2 My. & K. 781, and *Withy v. Mangles*,[2] 10 L.J. Ch. 391. The term may however be also used in a sense which would include a spouse. As far back as 1807, Lord Eldon in *Garrick v. Canden*[3], 14 Ves. 372 at 382, said, " it is competent to and required from the Court to look through the whole will; and to see, whether from the whole an intention is manifested to include the wife amongst those who are to be taken more strictly as next of kin : a description *prima facie* excluding her ".

In *Bailey v. Wright*,[4] 18 Ves. 236 at 238, it was said by the Master of the Rolls, " The question before the Court is not, whether the husband can in any case or for any purpose be, as he has sometimes been called, the next of kin of his wife ; but whether, according to the true construction of this settlement, it was intended that the husband should take under that denomination. In the cases, where the husband has been spoken of as next of kin of his wife, the only thing in question was his right to administer ; and that right has frequently been called his right as next of kin ".

In *In re Gilligan*[5] (1950) Probate page 32 it was held that " next of kin " in the Wills Act, 1837 (7 Will. 4, and I Viet. c. 26) s. 18 was intended to include a widow.

[1] *2 My. & K. 781.*
[2] *10 L. J. Ch. 391.*
[3] *14 Ves. 372 at 382.*
[4] *18 Ves. 236 at 238.*
[5] *(1950) Probate 32.*

In the Roman Dutch Law the term " next of kin " appears to have been sometimes regarded as synonymous with heirs *ab intestato*. The reason for this may have been that the closest blood relations or next of kin succeeded on an intestacy. Van Leeuwen in Roman Dutch Law (Kotze's trans) Volume I page 385 says, " It is a common opinion that by the expression nearest relations is meant not the very nearest to the exclusion of others, but all those who together succeed by law *ab intestato*, because the words, those of the family, of the house, of the blood, and the like, are considered to mean the nearest relations ; and under the terms nearest relations without distinction are reckoned those who are such by succession *ab intestato* and not those nearest in degree ". Grotius : Introduction to Dutch Jurisprudence, 2–18–22, is—: " Friends or relatives or heirs by blood mentioned by last will are understood to be meant in the same succession as they would inherit according to the law of the land, unless there was any manifest token of a contrary intention ".

In 1876, before the Civil Procedure Code was enacted, by the Matrimonial Rights and Inheritance Ordinance a widow became an intestate heir in respect of half share of her husband's estate. In *Samaradivàkara v. De Saram*[1], 14 N. L. R. 321, the Privy Council considered a fideicommissary provision under which property devolved on the " lawful heirs " of the devisees. It was held that the widow would take. Lord De Villiers said, " The question still remains whether the first plaintiff, as the surviving spouse of Edwin, is entitled to any share in the properties bequeathed to him. Under the Roman-Dutch law she would not have been one of his heirs *ab intestato*, but the 26th section of the Ceylon Ordinance No. 15 of 1876 enacts that ' when any person shall die intestate as to any of his or her property leaving a spouse surviving, the surviving spouse shall inherit one-half of the property of such person '. It is clear from the 25th and subsequent sections that the object of that portion of the Ordinance was to regulate the course of intestate succession, and to fix the share to which the heirs *ab intestato* should be respectively entitled ".

The term " next of kin " may, in a particular context, be used to include a widow who is an intestate heir. The relevant part of s. 394 (2) provides, *inter alia*, for legal representatives to represent a plaintiff or defendant to an action who has died leaving an estate which is less than Rs. 2,500 in value and is exempted from administration. A widow who is an intestate heir in respect of a half share under Act 15 of 1876 appears eminently to be a suitable person along with the other heirs to be legal representatives in place of such a dead party. *Prima facie*, therefore, " next of kin " in the provision should be given a meaning which would include her.

There is another approach which supports this interpretation. In the Roman-Dutch law there were no executors or administrators and the heir represented an intestate in every way. He could file action to enforce

[1] *(1911) 14 N. L. R. 321.*

a right of his intestate. After the introduction of executors and administrators the administration of the estate of a deceased was vested in them and it was only an executor or administrator who could institute an action in respect of a right of the intestate. The position has been set out in the judgment of Clarence, J. in *Loku Appu v. Banda.*[1] 7 S.C.C. page 3, thus :—" The administrator appointed by a court of justice to represent the estate of a deceased person has, it hardly needs to be said, no place in Roman-Dutch Law. He is an importation from England. By the Charter of 1801 the Supreme Court was empowered to grant probates and letters of administration. By the Charter of 1833 the same power was committed to the district court, in whom, under the Ordinance No. 11 of 1868, it still resides. It has been held by this Court that the general effect of this is to abrogate the old Roman-Dutch Law as to representation of deceased persons, and to substitute the English Law concerning executors and administrators, with this difference, that the administrator here, unlike the administrator in England, takes everything, including what in England could be called real property. See *Staples v. De Saram,* Creasy's Rep. 34 and 28,256 D.C. Galle, Vanderstraaten, 273 ".

The decision in the case of *Loku Appu v. Banda* (supra) which was that of a Full Court was that where intestate estates are small it is not necessary to take out administration and that in such cases the heirs of the intestate had been recognised by a long series of judicial decision of the Courts as being the representatives of the intestate estate and were the proper persons to sue and be sued. Numerous actions have been filed by and against heirs of an intestate where the estate was small in respect of certain claims such as recovery of land or debts.

Whether it was by way of recognition of the existing position of the heirs of intestate estates that are small or otherwise the provisions of the Civil Procedure Code have recognised that administration is not necessary in the case of estates under Rs. 1,000/- in value before 1930 and under Rs. 2,500/- after that year—vide s. 547 of the Civil Procedure Code. Again, where a party to an action dies leaving an intestate estate of such small value ss. 338 and 394 (2) permit persons other than executors or administrators to be substituted in his place, namely, next of kin who have adiated the inheritance.

By reason of a long cursus before the enactment of the Civil Procedure Code and by reason of the fact that s. 547 does not require administration in respect of estates of small value heirs to such intestate estates have and do institute actions to enforce certain rights of the deceased. The widow as an intestate heir under the provisions of Ordinance 15 of 1876, would join in instituting such action along with other intestate heirs. Accordingly where a party to an action dies leaving an estate of small value and it becomes necessary to substitute the " next of kin who have adiated the inheritance ", in place of the intestate, there does not seem

[1] *(1885) 7 S. C. C. 3.*

to be any reason why the widow along with the other intestate heirs should not be joined as legal representatives of the deceased as they would be entitled to file an action in respect of a right of the deceased intestate.

I am therefore of the view that " next of kin " in Section 394 (2) of the Civil Procedure Code includes a widow who is an intestate heir under Ordinance No. 15 of 1876.

Appeal dismissed.