1920.

Present : De Sampayo J.

SILVA *v.* LOKUMAHATMAYA.

101—C. R. Ratnapura, 16,522.

Civil Procedure Code, s. 338—Mortgage—Death of mortgagor after decree —Execution against heirs of mortgagor who have adiated the inheritance—" Estate below the value of Rs. 1,000 " means nett estate.

The expression " estate below the value of Rs. 1,000 " in section 338 of the Civil Procedure Code means a nett estate after the deduction of secured debts.

THE facts are set out in the judgment.

E. G. P. Jayatileke, for plaintiff, appellant.

R. L. Pereira, for defendant, respondent.

September 2, 1920. DE SAMPAYO J.—

A point of procedure of some practical importance arises for decision on the following state of facts. One Andrishamy, being the owner of a half share of the land Pahalawatta and a fourth share of the land Acharigewatta, mortgaged the same to defendant, who sued him on the mortgage in action No. 13,158, C. R. Ratnapura,

and obtained a mortgage decree on January 15, 1914. Before the decree could be executed, Andrishamy died intestate on March 25, 1914, leaving as his heirs his three children, Kapuruhamy, Anohamy, and Sedrishamy. On the application of the plaintiff in the mortgage action, these persons were on July 9, 1914, substituted as defendants in the room of the deceased Andrishamy. Execution was then issued, and the mortgaged property was sold on September 3, 1914, and was purchased by the defendant, and two Fiscal's transfers dated September 18, 1916, were by orders of Court duly issued to defendant as purchaser, and were registered on November 7, 1916. The title of the defendant would so far appear to be *primâ facie* good and valid. But the effect of certain administration proceedings has now to be considered. After the substitution of Andrishamy's children and the issue of writ, Kapuruhamy, the eldest son of Andrishamy, applied for administration to the estate of the latter in testamentary suit No. 644, D. C. Ratnapura, and obtained letters on October 2, 1914, and he with leave of Court had the said shares of land sold over again by public auction on September 8, 1917, when the plaintiff in this action became purchaser, and the administrator executed a conveyance in his favour on September 10, 1917. These proceedings on the part of the administrator are somewhat extraordinary, seeing that he was one of the substituted defendants in the mortgage action and was aware of the execution sale in that action and the purchase of the property by the defendant. The plaintiff must also have been aware of these facts, because he was the administrator's proctor's clerk. It is difficult to avoid the impression that some sharp practice has been resorted to in this matter. It appears moreover that when the property was advertised for sale in the testamentary suit, the defendant petitioned the Court and objected to the sale, as he had already become owner of the property by purchase at the sale under the mortgage decree. But the administrator's proctor applied for leave to sell "subject to the claim" of defendant, as, it was said, the Court did not warrant the title, and the District Judge somewhat incautiously allowed the application. The result is unfortunate, for the plaintiff has brought this action to eject the defendant and has questioned the validity of the sale to the defendant on the ground that the substitution of the heirs of Andrishamy in the mortgage action was irregular, and that in view of the value of Andrishamy's estate execution could have been issued only against his executor or administrator. This is the point of law to be decided in this case.

Section 341 of the Civil Procedure Code provides that "if the judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it by petition, to which the legal representative of the deceased shall be made respondent, to execute the same against the legal representative of deceased." Section 338 declares that "for the purposes of

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this chapter (*i.e.*, the chapter in which section 341 occurs) the term 'legal representative' shall mean an executor or administrator, or in the case of an estate below the value of Rs. 1,000, the next of kin who have adiated the inheritance." Now, the three children of Andrishamy were his next of kin, and they had adiated the inheritance. The only question then is, whether the estate of Andrishamy was below the value of Rs. 1,000 within the meaning of the section. The inventory filed in the testamentary case valued the property left by the deceased at Rs. 2,045, and the mortgage debts due by him were stated to be Rs. 1,620. In an amended inventory the debts were stated to be Rs. 2,700, but whether all the debts disclosed in the amended inventory were mortgage debts does not appear. In any case, it is clear that the mortgage debts reduced the true value of the estate to less than Rs. 1,000. In these circumstances, was it or was it not "the case of an estate below the value of Rs. 1,000" as contemplated by section 338? It is section 547 which has the effect of compelling administration of estates above the value of Rs. 1,000, and that section clearly has only a fiscal purpose in view. That being so, how does the law provide for the valuing of an estate for the purposes of the revenue? Part III. of the schedule of the Stamp Ordinance, No. 22 of 1909, which regulates the duties in testamentary proceedings and on probates and letters of administration, has the following proviso: "Provided that in determining the value of the estate the amount of the debts due by the deceased under mortgage or notarial bonds shall be deducted and also the value of any property to which the deceased was entitled or in possession of as trustee for any other person or persons and not beneficially," and that part of the schedule expressly exempts from stamp duty all estates below the value of Rs. 1,000 as so determined. Estates below that value may, indeed, be administered, if the parties interested choose, but it is not obligatory to take out letters to such estates. I think that the expression "estate below the value of Rs. 1,000" in section 338 of the Civil Procedure Code has the same meaning as in the Stamp Ordinance. Otherwise, estates which do not ordinarily require to be administered must be administered merely for the purpose of recovering a judgment debt due by the deceased. I do not think that such a construction is reasonable. In this connection it is noticeable that the section provides, not for the case where the *property* of the deceased is below the value of Rs. 1,000, but for the case where the *estate* of the deceased is below that value. The *estate* must be taken to be the nett estate after the deduction of secured debts, and where something less than Rs. 1,000 is left to be distributed among the next of kin, the section evidently means to provide that they need not be driven to further expense and obliged to take out administration, but that execution may at once issue against them for the recovery of a judgment debt due by the deceased by sale of

the property in their hands. In this point of view I think that the steps taken in the mortgage action for the issue of execution were in order, and the sale in execution was unexceptionable so far as that point is concerned.

That being so, the appeal fails, and is dismissed, with costs.

Appeal dismissed.