1937 *Present :* **Moseley J. and Fernando A.J.**

DIAS *v.* DE SILVA.

189—D. C. Galle, 34,124.

Merger—Action on mortgage bond—Assignment of bond to son of mortgagor —Re-assignment to mortgagee—Merger of creditor and debtor—Roman-Dutch law.

The principle of the Roman-Dutch law that a debt is extinguished when the title of the creditor and debtor becomes united in the same person by operation of law does not apply in Ceylon.

APPEAL from a judgment of the District Judge of Galle.

N. E. Weerasooria (with him *H. A. Wijemanne*), for second defendant, appellant.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*), for plaintiff, respondent.

Cur. adv. vult.

June 10, 1937. FERNANDO A.J.—

The plaintiff instituted this action to recover the sum of Rs. 3,500 as principal, and Rs. 3,500 as interest due on mortgage bond dated July, 1925, executed by Louis Appu who died on December 15, 1926, leaving two children Charles Silva and Mai Nona. Charles Silva himself died leaving a child Ariyapola for whom Henry Dias the administrator of the estate of Charles Silva had been appointed guardian *ad litem*. The plaintiff instituted this action against the administrator of Charles Silva's estate, and the guardian *ad litem* of Ariyapola to recover the amount due on the mortgage bond.

It would appear that in 1931, the plaintiff assigned the bond to the said Charles Silva, and Charles Silva re-assigned the bond to the plaintiff on October 7, 1934.

Counsel for the appellant contended that the administrator of Charles Silva's estate had not been properly appointed, inasmuch as the proper stamp on the value of the mortgaged property had not been affixed to the letters of administration. No doubt where a person is appointed administrator of the estate of the debtor on a mortgage bond merely for the purpose of recovering the money due on the mortgage bond, it has been held that duty should be paid on the value of the mortgage action, but at the same time where a person is administrator of the estate of another, the stamp duty would be governed by the value of the estate as administered, and if it is found that the immovable property belonging to the estate is subject to a mortgage, then the amount of the mortgage debt is set off against the value of the estate, and the stamp duty is payable according to the nett value of the estate. In such cases the question whether stamp duty had been properly paid or not would depend not on the value of the mortgaged property, or on the value of the mortgage,

but on the nett value of the estate. I do not think, therefore, that there is much substance in the contention with regard to the stamp duty on the letters of administration.

It was also argued that the mortgage bond was of no effect because Charles Silva was at one time the debtor as well as the assignee of the mortgage bond. The argument is that on Louis Appu's death, his heirs were his two children Charles Silva and Mai Nona, and when in 1931, the plaintiff assigned the bond to Charles Silva, Charles Silva became the creditor as well as the debtor on that bond. It is no doubt clear that where the same person is debtor and creditor, the debt ceases to exist by the principle of law termed Merger or *Confusio*, but this principle will only apply in a case where the creditor does become the debtor by operation of law. Under the old Roman-Dutch law the heir of a deceased person succeeded to his assets and to his liabilities, but that does not apply under our law. As Walter Pereira states in the *Laws of Ceylon (2nd ed.), p. 460,* " by the Charter of 1833, District Courts in Ceylon were given the power to appoint administrators to the estates of deceased persons and to grant probates of Wills to executors named therein, and it has been held by this Court that it was implied by the Charter that the whole of the English law as to executors and administrators was to be observed in Ceylon. The testamentary heir under the Roman-Dutch law has thus been completely superseded by the executor or administrator '*cum testamento annexo*' under the English law, the result being that the application of the term 'heir' to any person taking under a will would be misleading. While under the old state of things, those who took under wills were the heir or heirs and legatees, there is no such distinction to be observed now, and all who take under wills would now properly fall under the designation of 'devisees'. Some of the practical consequences of this supersession are as follows:—No devisee, universal or otherwise, under a will incurs, by accepting the devise, liability to pay the debts of the testator, and the processes known as the Act of Deliberation and Benefit of Inventory referred to above have thus become unnecessary.

" When the heir adiated the inheritance ", he says at page 460, " he was clothed with the whole legal *persona* of the deceased. He possessed his property and became liable for his debts and obligations to the extent of even beyond the value of the estate. The testamentary heir was allowed certain safeguards against personal loss. The first of these was termed the Act of Deliberation, and the second, Letters of Benefit of Inventory which secured for him complete immunity from all liability beyond the value of the actual assets of the estate."

Dealing with the question of Merger or *Confusio*, Nathan in *Common Law of South Africa, vol. II., at p. 652,* states that merger where one person inherits from another, takes place in all the foregoing cases only where one has not obtained the benefit of inventory, that is, where one is a universal successor without the benefit of inventory. He who is heir pure and simple according to the Roman-Dutch law acquires all rights and liabilities of the deceased and, in case of succession to his creditor or debtor, is understood as paying himself or as receiving payment for himself, but the benefit of inventory absolves one from liability for

all the liabilities of the estate, and makes one liable only to the amount inventorised. Persons who adiate and accept benefits under a will without obtaining the benefit of inventory will fall under the rules as to merger which have been stated above. It would follow, therefore, that in Ceylon where the benefit of inventory is no longer necessary and where even a testamentary heir does not become liable for all the debts of the deceased, the principle of merger will have no application.

I see no reason, therefore, to interfere with the finding of the learned District Judge who held in favour of the plaintiff and entered judgment for the plaintiff as prayed for with costs. That order is affirmed and this appeal is dismissed with costs.

MOSELEY J.—I agree.

Appeal dismissed.