

1897.
 May 20.

SAMARANAIKE v. SAMARAWEERA.

D. C., Galle, 2,847.

Action on mortgage bond—Sale by mortgagor of mortgaged land—Nature of decree.

Where a mortgagor has sold to a third party the land mortgaged, the mortgagee, in a suit against the mortgagor only, is not entitled to a decree for the sale of the land in execution, but to a money decree only for the debt due on the bond.

THE facts of the case appear in the judgment of LAWRIE, A.C.J.

Peiris, for appellant.

Van Langenberg, for respondent.

20th May, 1897. LAWRIE, A.C.J.—

The deceased Alexander Theodore Weerasuriya and his wife executed a joint will dealing with all the property in communion and giving to the survivor a life rent of the lands. After his wife's death Weerasuriya purchased Madangahawatta and executed a mortgage over it and over Moragastuduawawatta, of which he had a life rent under the joint will. After his death the executor in the will took probate, and was also appointed administrator of the estate of Weerasuriya acquired after the joint will with regard to which he had died intestate. His debts were considerable, and the executor-administrator sold the lands which belonged to his deceased, and we are told that some money is in deposit. The mortgagee brought action on the mortgage against the executor, and after some litigation, which it is not necessary to refer to, the learned District Judge gave judgment against the executor for the amount due on the mortgage to be paid out of the assets of the mortgagor's intestate estate, and in default of payment he ordered that Madangahawatta be sold and the proceeds applied to, in, and towards the payment of the sum claimed. Now, it seems to me, that as Madangahawatta has been sold by the executor-administrator the Court has no power in this action to order that land to be again sold, and that so much of the decree as directs the sale should be deleted. It may be that the mortgagor has a right to get a hypothecary decree in an action against the present owner, who is no party to this suit. In such a hypothecary action the order to sell would properly be made in the present suit. All that the plaintiff can get as against this defendant is a money decree for the debt due. No costs of this appeal.

WITHERS, J.—

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I agree in the modification proposed by my brother in this judgment.

That part of the decree ordering the re-sale of the property must be deleted. It has already been sold and the proceeds brought into Court—so we are informed.

