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DONA MARIA *v.* DON PAULES DE SILVA.

D. C., Colombo, 715.

Husband and wife—Marriage in community—Death of husband—Right of widow to one-half of the property held in community—Necessity of administering whole estate.

Per BURNSIDE, C.J. (LAWRIE, J., dissenting).—Though by the Roman-Dutch Law the surviving wife acquires a right to one-half of the property held in community during the marriage, yet convenience and the necessity of avoiding multiplicity of suits demand that the whole estate of the deceased should, in the first instance, vest in the administratrix for disposal among the persons legally entitled to specific shares therein.

THE facts of the case are as follows : Eusebias Perera and Dona Maria having been married in community in 1866, the former took on lease on the 23rd March, 1882, an undivided half share of an allotment of land containing plumbago pits from one Tikira, who was entitled to that share, while the other half belonged to the defendant. The lease was to take effect from the 17th January, 1885, and was to run for eight years from that date. Eusebias Perera died on 16th December, 1884, and his widow, Dona Maria, took administration to the whole of the estate on 3rd September, 1885, and raised the present action praying (1) that she be declared entitled to a moiety of the value of the net produce of plumbago won and appropriated by the defendant from the pits on the land from the 17th January, 1885, to the institution of the plaint (21st January, 1891) ; (2) for an account of the plumbago dug out and quarried from the said pits, and of all expenditure in respect thereof ; and (3) for interest and costs.

In his answer, the defendant pleaded *inter alia* that on the death of the plaintiff's husband one-half of his leasehold (which was an undivided half share) vested in her as his widow, and the other half on their children, and that the grant of administration to the plaintiff was in respect of the children's half only, inasmuch as the plaintiff's half had already vested in her on the death of her husband, when the community of property was determined ; that plaintiff therefore, as administratrix, could only call upon the defendant to account for one-fourth of the net proceeds of the plumbago, and not for one-half as in the plaint set forth.

The learned District Judge (Mr. Owen Morgan) overruled the defendant's objection in the following judgment :—

"The question is whether the plaintiff, in taking out adminis-
"tration to her deceased husband's estate, was bound to deal with
"the *whole* of the estate or only *half*. It is clear that on the death

"of plaintiff's husband the community of property ceased, and half "the estate devolved by operation of law on the plaintiff, as the "deceased's widow. But it is to be noted that the whole estate is "liable for the debts contracted during the subsistence of the com- "munity, and if administration is not taken to the whole estate, it "would be impossible to pay and satisfy such debts from the "whole estate.

"The children are entitled, without any distinction, to a share "equal to that of the widow's, and if administration is taken to "only one-half of the estate, all the debts contracted during the "marriage will have to be paid out of the children's share, and "that share will be greatly diminished.

"Again, it is difficult to divide the estate and allot one-half to "the widow till the value of the whole estate is ascertained. This "can only be done after payment of all the debts due by the estate, "and the recovery of all moneys and other property from the "debtors of the estate.

"I am of opinion, that though one-half of the estate devolved "on the widow on the death of her husband, yet that that half "cannot be divided or separated and given to the widow till the "whole estate is administered.

"The objection raised by the defendant is over-ruled with "costs."

The defendant appealed.

Layard, A.-G., with *Wendt*, for appellant.

Dornhorst, with *De Saram*, for respondent.

14th February, 1893. BURNSIDE, C.J.—

In my opinion the judgment of the learned District Judge of Colombo is eminently sound, and should be affirmed. Undoubtedly by the Roman-Dutch Law the surviving wife acquired a right to one-half of the property held in community during the marriage, but this general proposition is materially qualified by the fact that the surviving wife's estate thus acquired is liable in all respects to the payments of the debts of the husband, as is the husband's half of it; and also there was this further qualification that, in case the property was naturally indivisible, it would be to the value only of such property to which the widow's right extended. We have already held that the right of the executor to the immovable property of the deceased is, for the purpose of administration, co-extensive with his right to personal property for the payment of debts. The Roman-Dutch Law, as a mere matter of procedure, rendered the wife liable to be sued in respect of the liability of her share of the intestate estate. Our

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statute law has engrafted on the Roman-Dutch Law the law of administration, providing for the appointment of administrators for the purpose of securing a responsible person liable at law for the due disposal of intestates' estates, both among creditors and next of kin ; and it seems to me that we are only walking abreast with the law as it now exists, in holding that the whole estate of the deceased should, in the first instance, vest in the administrator for disposal among the persons legally entitled to individual shares of it. It certainly would be a gross anomaly if the administrator, although subject to be sued for the deceased's debts, could not realize the property liable for them. Looking at the decision *primæ impressionis*, its convenience, the avoidance of multiplicity of suits and divided administration, which the English law abhors, I cannot doubt that the ruling of the District Judge is sound, and should be accepted.

This very case proves the soundness of the position. The widow is always preferred in granting administration, and if the contention of the defendant were allowed to prevail, the property of her intestate would be subjected to the expense of several suits by and against the same individual in different capacities—the wife as surviving spouse and the wife as administratrix. This alone would seem to be a good reason to reject the defendant's contention. It is not therefore necessary to refer to the contention of the plaintiff that, even if the defendant's objection were well founded, it would only be matter of misjoinder to be rectified by amendment.

The judgment is affirmed with costs in both Courts.

LAWRIE, J.—

I would sustain the order in the special circumstances of the case.

The plaintiff obtained administration of the intestate estate of her deceased husband, Eusebias Perera. I understand that it was stated by the widow, in the affidavit of the extent and value of the estate, and in the appraisement and in the inventory, that the deceased was the sole lessee under a lease which did not commence until some months after his death. It is by no means certain that this lease in favour of a man and his heirs, executors, administrators, and assigns, of which he had no enjoyment or possession during his life, fell under the community. His widow has not chosen to claim any rights under it, and in the absence of any other claim it seems to me that the right of the administratrix of the lessee to administer it is undoubted. I dissent from the general proposition that the administrator of a deceased

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spouse who was married in community (the other spouse surviving) has right to administer the whole estate which was in communion. On the death of either spouse the other has right to half of the property lately the subject of the marriage community. All that the heirs or legatees of the deceased have right to is the one-half to which the deceased was entitled. The executor of one spouse cannot realize the whole property for the purpose of paying legacies or for distribution among the heirs of the deceased; and if an executor cannot do so, neither can an administrator.

In my opinion, it is well-fixed law that the administrator or executor can administer and realize only such estate as the deceased had testing powers over. Here, however, we have to deal with an estate which was not in possession of the spouses at the date of the death, an estate which the surviving spouse who has taken out administration has been content to treat as the exclusive property of her deceased husband. I shall not decide that the widow has right to half when she herself does not claim it. I regard her dealing with the interest created by the lease as practically a renunciation of any right which she had or might have claimed in it, because she has deliberately chosen to treat it as her husband's property.

I see no reason to disturb the order.

Affirmed.