CAROLIS APPUHAMY *v.* JAMES APPUHAMY.

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C. R., Matara, 4,524.

Husband and wife—Right of surviving spouse to sell property to pay the debts of the marriage community—Voluntary payment of debt—Absence of necessity for sale—Onus of proof.

D A, having married G H in community of property, died in 1882, leaving his mother and two daughters C and A as his heirs, and certain debts unpaid.

In 1891, the widow G H conjointly with C and one J, who kept A as his mistress, sold a land belonging to the joint estate to the first defendant.

In 1897 J and A (having been duly married in 1895) conveyed one-fourth of this land to the plaintiff.

In an action *rei vindicatio* brought by the plaintiff against the first defendant and A and J (second and third defendants)—

Held, that upon proof of A's title to the one-fourth of the land through her intestate father, the onus shifted to the first defendant to prove that the sale to him by G H (the widow) was for payment of her deceased husband's debts, and that in failure of such proof and of any evidence of authority from A to J in 1891 to sell the land to the first defendant, the plaintiff was entitled to succeed in his action.

Held further, that where a surviving spouse has sold property to pay the debts of the community, and a child claims to have the deed of sale set aside, it is incumbent on the child to prove that he did not get his proper share of the inheritance.

THE plaintiff in this case prayed for a declaration of title to an undivided one-fourth of a certain land, which originally belonged to one Gimara Haminey, who had inherited

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it from her parents. About 1860 she married one Don Andris who died in 1882 leaving certain debts unpaid. His heirs were his mother and two children, Adriana and Ceciliana. The widow undertook to pay the debt and sold the entire land to first defendant by deed dated 13th September, 1891, in which the vendors appeared to be the widow, her daughter Ceciliana, and one Don Juanis, who at that time was keeping the other daughter Adriana as his mistress.

In 1895 Juanis married Adriana, and on the 3rd September, 1897, he and his wife conveyed one-fourth of this land to the plaintiff.

At the trial Juanis denied that he was party to the deed of 13th September, 1891, but the District Judge disbelieved him on the strength of the evidence of the notary that he did sign that deed. The Commissioner was further of opinion that " the widow " had constituted herself an administratrix of her husband s " estate, and the sale by her to pay her husband's debts was a sale " out and out, and reserved nothing for the children; and that " neither Juanis nor his wife Adriana can go behind that deed; " and that the sale to the plaintiff by Juanis and Adriana is a " fraudulent one intended to prejudice the first defendant."

The Commissioner, therefore, dismissed the plaintiff's action.

Plaintiff appealed.

Bawa, for plaintiff, appellant. *Cur. adv. vult.*

26th November, 1900. BROWNE, A.J.—

This is a novel would-be application in an extended form of the doctrine in *Edirmannesingam's Case* (*Vand. 264*) of the right of a surviving spouse to sell property to pay the debts of the community. In any such case the procedure is that the child who claims to set aside the deed by the surviving parent to the purchaser must first prove that he or she has not got the proper share (23,338, D. C., Matara, *S. C. M. 3rd November, 1871;* 31,076, D. C., Matara, *5 S. C. C. 70;* 250, C. R., Colombo, *Wendt, 343*, overruling the doctrine in *Vand. 266*, that the primary onus lay on the purchaser), which onus the child will sufficiently discharge by showing that the sale deprives him or her of some part which would have descended (*5 S. C. C. 163*).

Here the property came by inheritance to the mother. Her husband died. She and one daughter and third defendant, who then was keeping the other daughter, second defendant, but not married to her, conveyed the land in claim to first defendant in 1891; and their case is, that they did so to pay the debts of the mother's father, who had died about 1879. They say it was a

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debt of the community which the spouses who inherited the assets of the original debtor were liable to pay.

Assuming there was full proof of this, I would hesitate so to expand the doctrine in question, and that of an heir being liable for the debts of his ancestor to the extent of the assets which he has received, into the voluntary payment by a surviving spouse of the debts twelve years after the ancestor's death. I would consider that at the very least there should be strict proof as to the ancestor's liabilities and assets showing that there was financial necessity for or justification of the voluntary act.

Here any such alienation by the mother with her daughter and third defendant in 1891 would operate to the prejudice of second defendant, and so the onus of proof by plaintiff of his vendor, second defendant's right was sufficiently sustained under *5 S. C. C. 163.*

The onus then shifted to the first defendant to prove that the sale to him was for payment of debts. The conveyance to him had no such recital of fact, and this mother-vendor and he have not at all proved any such administrative necessity. Third defendant had no right to sell his mistress's (as she then was) share. I would decline to admit as sufficient evidence that she assented to his doing so. It should be proved that under some exigency she *authorized* his doing it for her, and, in the absence of notarial authority, such evidence should be received with extreme caution. I must hold that second defendant still had right to convey to plaintiff, and set aside the dismissal and enter decree for plaintiff as prayed with all costs.