PRINS *v.* PIERIS.

1901.
February 15.

D. C., Colombo, 12,115.

Creditor and debtor—Death of debtor—Action against his widow as executrix de son tort *on deceased's mortgage bond—Sale by Fiscal in execution—Purchase by mortgagé-creditor—Acquiescence of widow—Subsequent conveyance by widow to her children—Action* rei vindicatio *by children's vendee—Validity of Fiscal's conveyance to creditor.*

A debtor having died intestate, leaving him surviving his widow and children, his creditor recovered judgment against the widow as executrix *de son tort*, and at the sale in execution became the purchaser of the property. He entered into possession and greatly improved it.

Several years afterwards, when certain of the minor children of the mortgage-debtor arrived at their majority, the widow purported to transfer certain shares of the property to them, and they purported to sell such shares to plaintiff.

In an action *rei vindicatio* raised by the plaintiff against the heirs of the mortgage purchaser, who were in possession of the property,—

Held, per BONSER, C.J.—That the mortgagee's action against the widow was rightly brought against her, whether she be treated as executrix *de son tort* or as the surviving partner in the community; that it was too late in the day to argue that the English Law of executor *de son tort* was not in force in Ceylon; that it was the duty of the widow to pay the debts of the community by selling, if necessary, the property of the community; that as the property sold was admitted by the plaintiff to have been "duly" seized by the Fiscal, it must be presumed to have been in her possession; and as the widow had not disputed the mortgage-creditor's action against her, but even admitted, in the account rendered by her to the Court as administratrix, that this creditor's debt had been satisfied by the sale of the property in question, she must be held to have acquiesced in the sale, and could not thereafter make a good conveyance to her children.

ACTION *rei vindicatio* in regard to three fourteenth shares of a tea estate called Elbedde. The facts of the case, as found by the additional District Judge, were these:—

In 1872 one Carolis Perera bought this land from the Crown and planted it with coffee by means of money borrowed from the father of the defendants, Mr. Jeronis Pieris. In 1879, when Carolis Perera died, there were six mortgages on the property amounting in the aggregate to Rs. 100,000. He left a widow (who had been married in community) and seven children. While her application for letters of administration was pending in Court, Mr. Jeronis Pieris put his bonds in suit against the widow as executrix *de son tort*, obtained a mortgage decree, had the estate sold by the Fiscal, and became the purchaser of it for Rs. 70,000 in February, 1880. He entered into possession and converted the old coffee estate into a flourishing tea estate. Neither he, nor after his death his sons, the present defendants, were disturbed in possession till the

1901.
February 15.

present action was raised on the 31st December, 1898, on the footing of a deed of transfer which the widow purported to make on the 10th April, 1896, in favour of her three youngest children of three-fourteenths of the estate, and a deed of sale executed on the same day by the three children in favour of the plaintiff for a consideration of Rs. 167.

The question at issue was whether or not Mr. Jeronis Pieris, who held the Fiscal's conveyance, obtained a valid title to the three fourteenth shares which the children, who were not represented in the mortgage suit, purported to sell to the plaintiff.

The Additional District Judge dismissed plaintiff's case in these terms:—

"It being admitted that Rs. 100,000 and interest were due to Mr. Jeronis Pieris by the community, it follows that by whatever name the decree in Mr. Pieris's favour may be described, the whole of the common estate in possession of the widow was liable thereunder for payment of the debt.

"It is well settled law that a surviving spouse can sell or encumber property belonging to the community for the purpose of paying off debts of the community, and although the children are no parties to such sale or encumbrance they are bound by it. In the present case the sale was not a private sale by the widow, but a forced sale against her by order of Court, and surely a public sale so held cannot be said to be of less force than a private one, which undoubtedly would have been valid.

"The surviving parent is not only entitled to alienate property for the payment of debts, but is also the person to collect the debts due to the community. It follows, therefore, that he is also the proper person to be sued for a mortgage debt incurred during the community.

"If then this land was sold upon a decree so obtained against the survivor, surely the children are bound by it, although they were no parties to it. The children were only entitled to a moiety of the free residue after the common debts had been paid, and this land was sold for the payment of such a debt.

"I think the strongest reason for upholding the Fiscal's sale is this. The widow obtained letters of administration in due course, and her children acquiesced therein, and must be presumed to have ratified her acts and omissions. Two months after the Fiscal's sale, namely, in April, 1880, she accounted to the Court in the administration case that the debt to Mr. Pieris had been paid off by the sale of this estate and another unencumbered estate.

"Till April, 1896, when the plaintiff seems to have got hold of the woman, neither she nor her children ever thought of

questioning the full validity of the Fiscal's sale of sixteen years previously. Even if the Fiscal had done what he was not entitled to do, the administratrix has clearly ratified her act by her tacit assent thereto, and this she had the power to do. The children who acquiesced in the act of the administratrix and took no steps to recover their shares, if they thought they had been illegally dispossessed, must be presumed to have ratified the sale (*vide* S. C. judgment in D. C., Batticaloa, No. 1,735, decided 25th October, 1898).

" Both law and equity are against the plaintiff in this case. Before an old transaction like this can be opened up the plaintiff must first show that the children in whose shoes he now stands did not get their proper shares out of their father's estate (*5 S. C. C. 70*). This he studiously abstains from doing, and her admissions show conclusively that the debt for which this particular estate was sold was far in excess of its value, so that there was no free residue left thereout which their children can lay claim to.

" I hold that the Fiscal's sale was binding on the plaintiff's three vendors, and that Mr. Pieris obtained under his conveyance title to the whole estate, including the children's interests.

" The plaintiff's action is dismissed with costs."

Plaintiff appealed.

Walter Pereira (with him *H. A. Jayawardena*), for appellant.— The widow was sued as executrix *de son tort* by Jeronis Pieris. She could not be executrix *de son tort* because, having been married in community of property, she was entitled to continue in possession. She could not be said to have intermeddled with the estate. The judgment against her binds her personally as regards the half share she was entitled to. It does not bind the children. In *Obina v. Usifu* (*7 S. C. C. 180*), where a widow of a deceased mortgagee was sued as executrix *de son tort*, and the plaint prayed for a mortgage decree against the property hypothecated for the mortgage debt, it was held that a mortgage decree could not be obtained except in a suit to which the legal representatives of the deceased were parties (*Oriental Bank v. Boustead, 6 S. C. C. 2; Silva v. Wattuhamy, 3 S. C. R. 164*). Jeronis Pieris, as mortgagee, should have taken out letters of administration as a creditor for realizing his security, if he found the widow was not going to take out letters herself. But the fact was, the widow's application for letters was pending in Court when he came in with his plaint and obtained judgment against her as executrix *de son tort*. The idea of executor *de son tort* is foreign to our law. In the Charter of 1833, section 27, District Courts are empowered to control executors and administrators, but neither in that enactment

1901.
February 15.

nor in our Rules and Orders is any sanction given to an action against an executor *de son tort*. Plaintiff's vendors were born in 1868, 1870, and 1873, respectively, and came of age in 1889, 1891, and 1894, and their action was brought on 31st December, 1898, and summons issued 13th January, 1899, so that their claims were not prescribed, as the claims of the other children of the intestate have been. The judgment of the District Court in the mortgage suit against their mother does not prevent them from transferring their interest to plaintiff.

Layard (with him *Wendt*), for defendants, respondent.—If the widow was not an executrix *de son tort*, but was in lawful possession of the estate by right of community of property, then the mortgage action was rightly brought against her. Plaintiff admits that the estate in question was duly seized and sold, and that means that she was in lawful possession. And the widow has admitted in the administration suit raised at her instance that the community owed Rs. 100,000 to defendant's father, and that defendant was satisfied by the sale of the Elbedde estate. She did not inventorize this property as one belonging to her or the children. The Fiscal's conveyance to the defendant's father shows an order of Court confirming the sale, and the order was dated 1881, after the widow had taken out letters of administration. Plaintiff comes into Court with a conveyance in his favour obtained sixteen years afterwards and wants three-fourteenths of the estate free of all liability. It is not shown that the children have not got their shares of the inheritance. A surviving spouse can alienate the common estate for the purpose of paying debts leviable against the estate (*3 S. C. R. 164*). If a survivor can do so by a private sale, a judicial sale ordered for payment of an admitted debt is also good (D. C., Kegalla, No. $\frac{148}{557}$, decided on 6th August, 1896; and D. C., Batticaloa, No. 1,735, decided on 25th October, 1898).

Walter Pereira replied.

BONSER, C.J.—

The District Judge began his judgment by characterizing this as a speculative action. I think he might have used even stronger language. The property claimed by the plaintiff in this action is three fourteenth shares of an estate in the Central Province, which shares he values at Rs. 30,000. He also claims Rs. 6,857 by way of mesne profits. Now, he became entitled to these shares, according to his own account, by a conveyance which was executed to him on the 10th April, 1896, by three persons, respectively named Suaris Perera, Dananothee Perera, and Yanavathee Perera, who

conveyed these shares to him for the consideration of Rs. 167. It appears that the estate belonged to the father of the conveying parties, one Carolis Perera, who cultivated it as a coffee estate. He had borrowed large sums of money for the purposes of that estate from one Jeronis Pieris, amounting in all to Rs. 100,000, and he had given six mortgages to secure the moneys borrowed and interest. Carolis died intestate on 18th August, 1879, without having repaid any of these moneys, leaving a widow and seven children, all of whom were infants. Shortly after his death, Jeronis Pieris commenced an action against the widow on the footing that she had rendered herself executrix *de son tort* to the deceased intestate's estate, and was in possession of this property. On the 8th December, 1879, he obtained judgment for the Rs. 100,000 to be recovered out of the estate and effects of the said Carolis Perera. Apparently the widow did not dispute the action. Then it is admitted by the parties that, by the writ issued in that action, this estate was duly seized and sold by the Fiscal on the 7th February, 1880. The mortgagee became the purchaser at Rs. 70,000, and was allowed that sum in reduction of his judgment. Then, some time in the end of the year 1879—the precise date does not appear—letters of administration were granted to the widow to the estate and effects of her deceased husband, and she filed an account as administratrix, in which she stated that a mortgage debt of Rs. 100,000, due to Jeronis Pieris, had been satisfied by the sale of this estate, the subject of the present action, and another estate. Every one seems to have acquiesced in this settlement, and the mortgagee converted it into a flourishing tea estate, now said to be of the value of a quarter million rupees. The three persons who conveyed to plaintiff attained their age of 21 in 1889, 1891, and 1894, respectively.

In 1896 the plaintiff, who is said to have had some former connection with the legal profession, seems to have got hold of these parties and to have persuaded them to part with their supposed interest in this property for this sum of Rs. 167; and to carry out his scheme, his widow was induced to execute a conveyance on the 10th April, 1896, conveying to these children three fourteenth shares of this estate (as the parties were married in community of property, on the death of the father each of the seven children would be entitled to one-fourteenth), and on the same day and at the same time these three children executed a conveyance of the shares which had just been vested in them to the plaintiff.

The plaintiff impeaches the title of the defendants, who derive title from the original mortgagee, Jeronis Pieris, on the ground

1901.
February 15.
BONSER, C.J.

that the decree in the Fiscal's sale was not binding on these infant children, and reliance was placed on a case *Obina v. Usifu* (*7 S. C. C. 180*), where it was held by this Court that in such a case, where the widow of a deceased mortgagor was sued as executrix *de son tort*, a mortgage decree could not pass, but merely judgment against her, binding the estate of the deceased in her hands. But it was admitted in this case that the estate of the deceased Carolis was in the hands of his widow at the time of the action brought. It is also one of the admissions by the plaintiff at the trial, that the seizure by the Fiscal was a " due " seizure, and it could only be a " due " seizure if the property was in her hands.

Then, Mr. Walter Pereira argued, as I understand him, that the English Law as to an executor *de son tort* was not in force in this Island. It seems to me rather late in the day to argue that: there have been numerous cases in which such action have been recognized by this Court.

Then he said that in the present case she was not an executrix *de son tort*, because if she was in possession she was in possession as representing the community, and therefore in rightful possession. But it seems to me to follow from that that the action was rightly brought against her. There are cases in which it was held that a surviving widow who was married in community may sell the property of the community to pay the debts of the community. This debt of Rs. 100,000 was undoubtedly a debt of the community and, under the Roman-Dutch Law, it would have been a right and duty of the widow to pay that debt and sell this estate, if it were necessary for that purpose. So it seems to me that, whether we look upon her as executrix *de son tort* or as the surviving partner in the community, the judgment was equally right.

BROWNE, A.P.J.—

I agree, and would only add that I consider the *onus* throughout this action to have lain upon the plaintiff, and not, as was submitted by appellant's counsel, to have rested upon the mortgagee purchaser and his representatives at this date to sustain that transaction of so many years ago.