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WIJEYEWARDENE *v.* APONSO.

D. C., Colombo, 13,418.

Prescription—Action by mortgagee against administrator of deceased mortgagor—Payment of part interest after his death by widow of deceased who had married in community—Effect of such payment—Right of heirs of deceased husband to resist action by plea of prescription—Ordinance No. 22 of 1871, s. 13.

In an action brought by a mortgagee against the administrator of the estate of the mortgagor who had been married in community, and whose widow had paid some portion of the interest due,—

Held that, as the joint matrimonial estate of the mortgagor and his spouse was originally liable on the obligation incurred by the husband, such liability could not be affected by the death of the husband, and that the heirs of the deceased husband could not resist the mortgagor's action on the plea that the payment of interest by his widow after his death did not keep his share of the obligation alive.

THIS was an action by a mortgagee against the administrator of the estate of the mortgagor on two bonds dated respectively the 13th August, 1888, and 11th December, 1888. It was alleged in the plaint that after the death of the mortgagor Harmanis Peris on the 20th April, 1889, his widow Selestina paid the plaintiff from time to time certain sums of money as interest through certain persons, and that all interest up to the 31st December, 1891, had been paid, the last of such payments having been paid on the 22nd September, 1895.

Two issues were formulated at the trial, namely: first, whether interest was paid as alleged; and second, whether the action instituted on the 3rd February, 1900, was prescribed.

The District Judge Mr. N. E. Cooke found that interest was not paid by the mortgagor during his lifetime, but that it was paid by his widow on five different dates between 22nd November, 1889, and 22nd September, 1895; and as to the question of prescription, he ruled as follows:—

"D. C., Kandy, 94,994 (*7 S. C. C. 192*), and D. C., Kandy, 94,944 (*7 S. C. C. 183*), were decided under the old Prescription Ordinance, No. 8 of 1834. In the first case it was held that payment of interest in order to have prescription must be a payment by the debtor himself or his authorized agent. In the second case, where a husband and wife had granted a bond mortgaging their common estate and the wife died, it was held that the payment of interest by the husband kept the debt alive as against the wife's share in the land hypothecated as well as against his own.

"The present case must be governed by the Prescription Ordinance, No. 22 of 1871. By section 6 of that Ordinance it is

enacted that no action shall be maintainable for the recovery of any sum due upon any hypothecation or mortgage of any property unless the same be commenced within ten years from the date of such instrument of mortgage or hypothecation, or of last payment of interest thereon; and it is provided by section 13 of that Ordinance that the payment of interest may be by any person whatsoever. Here the payment of interest was by the widow of the mortgagor, who has an interest in the property mortgaged."

The learned District Judge held that the plaintiff's action was not prescribed, and gave judgment for plaintiff as prayed.

The defendant appealed.

Samarawickrama (with him *H. J. C. Pereira*), for defendant, appellant.—Payment of interest by the widow does not take the case out of prescription. Those payments were invalid. Payments to be valid must be made by or in the name of the debtor (*Henry's Vanderlinden, p. 264; Voet Ad Pand. 46, 3*). Here the debtor was dead, and no legal representative had been appointed to his estate. No valid payment, therefore, could have been made in respect of this debt. The payments pleaded were, in the eye of the law, no payments at all. They certainly were not payments within the meaning of the Prescription Ordinance (*3 Burge's Colonial Laws, 870*). This Court sitting collectively has followed the English cases of *Harding v. Edgecombe* (*28 L. J. Ex. 313*), *Chinnery v. Evans* (*11 H. L. 115*), *Dickenson v. Teasdale* (*1 De G. and S. 52*), and *Harlock v. Ashberry* (*19 Ch. D. 539*), and held in *Clerihew's Case* (*7 S. C. C. 192*) that under Ordinance No. 8 of 1834 payment of interest by the purchaser of the mortgaged premises was ineffectual for the purpose of taking the case out of prescription, as such payment was not an act of the debtor within the meaning of the 7th section of the Ordinance. The learned Judge, however, thought that the law has been altered by the first proviso to section 13 of Ordinance No. 22 of 1871, and that the effect of that proviso, which ran as follows: "Provided that nothing herein contained shall alter or take away or lessen the effect of any payment by any person whatsoever"—was to make payment by any human being sufficient to keep a debt alive. Such a construction would defeat the object of the Ordinance, because then a creditor may always get a friend to make a small payment on account of any debt and take it out of the Ordinance. The proviso referred to, so far from altering the law, expressly says that the law is to remain unaltered. Nothing in the Ordinance was to alter the effect of a payment, that is to say, the effect of a payment was to be the same as before, and what that was in such a case as

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this is clear from *Clerihew's Case*. Moreover, it has been expressly held in a case reported in *2 Bar. and Cres. p. 23*, under a proviso to a clause in *9 Geo. IV. C. 14*, expressed in almost the same words, that payment by a joint surviving contractor after the death of the testator will not take the case out of the Statute. These payments therefore not having been made by the debtor or his agent do not take the case out of the Ordinance, and not having been made even in the name of the debtor are legally no payments at all, and the plaintiff's claim is therefore prescribed.

Walter Pereira, for plaintiff, respondent.—Payment by a stranger may not be sufficient for the purpose of taking the case out of prescription, but payment by the widow stands on quite a different footing. She has an interest in the payment of the debt. In *Gunawardena v. Liyana* (*7 S. C. C. p. 183*) it was held that payment by a surviving spouse kept the debt alive at least for the purpose of enabling a mortgage to enforce his claim against the whole of the mortgaged property, including the deceased wife's moiety. Heirs are to a certain extent liable for the debts of their intestate, and therefore are entitled to pay the debts of the deceased. It is admitted that the widow had been married in community of property. She was therefore jointly liable for the debt of the community. These payments should therefore be treated as payments made by one of two joint debtors. Besides, it is clear law that a widow is entitled to administer the common property. *Wijeyaratna v. Abeyweera 5 S. C. S. 70; Vander Linden's Institutes, Henry's Trans. p. 264; Hadjiar v. Hendrick Appu, 2 N. L. R. 26.* She is entitled to sell property belonging to the common estate. Therefore she is entitled to pay debts. Payments made by her take the case out of the Ordinance.

Cur. adv. vult.

29th October, 1903. WENDT, J.—

THIS is an action to recover two mortgage debts, and the question is whether the action is barred by the limitation contained in section 6 of the Prescription Ordinance of 1871. The mortgages are dated respectively 3rd August, 1888, and 11th December, 1888, for Rs. 1,500 and Rs. 250 respectively, payable on demand. The mortgagor Harmanis Fernando was at those dates married in the community of property to Selestina Peries. He died intestate in April, 1889, leaving her and certain issue surviving him and leaving the debts unpaid. Letters of administration to the intestate's estate were in November, 1899, granted to the defendant, his son-in-law.

The present action was commenced by the mortgagee in February, 1900, against the administrator; and in order to take the case out of prescription he alleged that "Selestina Peries (through her lessee Don Charles), Carolis Fernando, brother of the deceased, and the defendant paid the plaintiff the interest which from time to time fell due in respect of the said bonds up to 31st December, 1891 (the last of which said payments was on 22nd September, 1895)." The learned District Judge has found, and there is no reason to disagree with the finding, that five or six months after the mortgagor's death (who had himself paid no interest) the plaintiff sent word to the widow demanding payment, that she called on him and promised to pay the interest due on the bonds, and that thereafter plaintiff received the following payments of interest:—

Novmber 22, 1889, through Don Charles	...	Rs. 280
October 31, 1890, through Don Charles	...	,, 210
November 30, 1891, through Carolis	...	,, 210
August 30, 1895, through defendant	...	,, 50
September 22, 1895, through defendant	...	,, 50

The widow had leased the mortgaged property to Don Charles by instrument dated 23rd November, 1889, and the payments of 1889 and 1890 were made by the lessee on account of the rent reserved and at the request of the widow. These payments were therefore in effect made by the widow herself, and if they were sufficient to prevent the statutory bar from attaching, the action was brought in time. The question then is whether the widow's payment of interest had that effect.

The District Judge has, I think, misread the words of the first proviso to section 13 of the Ordinance. If I understand him aright, he reads them as a legislative enactment "that the payment of interest may be by any person whatsoever." Now, the words do not express a direct enactment at all, but expressly contain a proviso only, saving the effect of payments made by any person whatsoever from the operation of the Ordinance. In other words, payments are to have the same effect as if the Ordinance had not been passed. The Ordinance does not profess to indicate the persons entitled to make payments; for that we must look to the general law (see the history and effect of this proviso lucidly explained by Clarence, J., in *Sathappa Chetty v. Mutturamen Chetty, 5 S. C. C. 62*). The District Judge, however, holds that the widow was entitled to make the payment and keep the debt alive, because she had an interest in the property mortgaged. And we have to consider whether this view is correct.

Harmanis Fernando, as the sole administrator of the property held in community by himself and his wife, was entitled to create

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a valid mortgage over the entirety of this land without the concurrence, or even against the will, of his wife. The debt became a debt of the community, and by the Roman-Dutch Law, on the husband's death, his moiety devolved on his children, and the widow's moiety remained to her at her own absolute disposal, but burdened with the mortgage. She could then be sued for a moiety of the debt. *Grotius 1, 5, 22* (Maasdorp's Translation, *1st Ed., p. 26*); *Vander Keessel, Th. 93; Vander Linden, 1, 3, 7* (Juta's Translation, *2nd Ed., p. 23*). Her obligation was therefore a joint one with the heirs of her husband, not an obligation *in solidum*. As respects interruption of prescription, the act of one of the debtors which effects such interruption binds all, if the obligation is *in solidum*, but not if it is joint: *Voet 45, 1, 6; Pothier* (Evans' Transl.), *vol. I., 459, 460*. If therefore we regard the widow as being at the date of her payments an ordinary joint obligor with her husband's heirs, those payments will not avail the creditor as against the present defendant.

But in my opinion a widow in Selestina Peries's position is something more than a mere joint obligor. As the surviving spouse, she was entitled to administer her husband's estate to the extent of selling the common property in order to pay a debt of the community. *Ederemanasingham's Case, Vand. 264; Wijeratna v. Abeyweera, 5 S. C. C. 70; Ferdinandis v. Fernando, 5 S. C. C. 162*. She may also mortgage such property for the same purpose. *Fernando v. Fernando, 3 Lor. 239; Hadjiar v. Hendrick Appu, 2 N. L. R. 26*. If she can do so much, I do not see how she can be denied the right to pay interest upon an obligation of the community secured by mortgage of the common estate. In the present instance the widow leased the entirety (not the moiety only) of the mortgaged land, and the sums paid as interest come out of the very mortgaged property in the shape of rent. It is to be observed that the statutory bar had not attached at the date of the payments under consideration. There is therefore no such question here as was raised in D. C., Negombo, No. 3,185, *Civ. Min.*, November 29, 1900, as to the widow's right to give a new bond in place of a community debt which was already statute-barred.

Of the cases cited at the argument none are exactly in point. In *Guñawardana v. Liyana* (*7 S. C. C. 183*) there was a joint and several mortgage by husband and wife, and payments of interest by the husband (the first defendant in the action) after the wife's death were held to interrupt prescription of the mortgagee's claim against the other defendants, the heirs of the wife—that claim as regards them being only for a mortgage decree against the land and not involving any liability for the

debt *quoad ultra*. Burnside, C.J., said that "so long as the liability of one of the joint and several debtors remained and was not prescribed, the whole property which had been pledged to meet the liability of either debtor continued bound for that purpose." In the present case, apart from any question of joint or joint and several liability, the action is not against the debtor who made the payments, unless indeed we regard her as sued in the person of the husband's administrator. (Compare *Mack v. Fernando, 7 S. C. C. 82; Perera v. Silva, 2 C. L. R. 150.*) Clarence, J., stated that the splitting up of the mortgaged property by devolution (as in that case) or conveyance could not affect the mortgagee's right to enforce his encumbrance, except so far as it made a change in the individuals necessary to be sued, and that "therefore the hypothecary action for reaching the moiety of the hypothecated property inherited by the children from their deceased parent cannot be barred, so long as there has been within ten years before action brought a payment of interest by the person, their father, on whom the other half of the hypothecated property devolved on their mother's death." Reading this in the light of the learned Justice's remarks on the case of *Fernando v. Silva, Ram. (1876) 320,* presently to be mentioned, it is an opinion supporting the maintenance of the present action at least to the extent of rendering Harmanis Fernando's moiety of the hypothecated property liable for the debt, in addition to the widow's moiety whose liability is continued by her own payment of interest. Dias, J., rested his judgment on the ground that the two debtors being bound *in solidum*, the acknowledgment of one of them interrupted prescription against the heirs of the other.

Clerihew v. Leeclman (7 S. C. C. 192) decided merely that the payment of interest by a vendee of the mortgaged land, who was of course in no degree liable for the debt, and who had not the authority of the mortgagor to make such payment, did not interrupt prescription against the mortgagor's personal liability for the debt.

In *Fernando v. Silva* the husband alone of the two spouses married in community had executed the mortgage, and he made payments of interest after the date of his wife's death. More than ten years after that date, the creditor sued the wife's heirs (her children) who were in possession of a share of the mortgaged land, alleging a balance due on the mortgage. Clarence, J., held that the defendants and their father stood in the position of joint heirs of a deceased debtor, and that therefore a payment by one

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of them would keep the encumbrance alive in respect of his interest only in the mortgaged land. The action was accordingly dismissed. But in *Gunawardana v. Liyana* Clarence, J., expressed the opinion that his decision in this case was erroneous. He considered that it made no difference whether the husband alone or both husband and wife had executed the mortgage, inasmuch as the husband had undoubtedly power to mortgage the whole of the property which was subject to the marriage community, and proceeded to express the view which I have already quoted as applicable to the case now in hand, viz., that payment of interest by the spouse on whom a moiety of the hypothecated property had devolved kept the encumbrance in force against the other moiety as well.

For the reasons already given I consider that defendant's appeal should be dismissed.

MIDDLETON, J.—

I have had the advantage of reading the judgment of my brother Wendt.

The question in the case is, whether the payment of interest upon mortgage bonds granted by the deceased husband on property held in community, by the surviving spouse, will bind the heirs inheriting the husband's moiety so as to prevent the Statute of Limitations (Ordinance No. 22 of 1871, sections 6. 13) running in their favour as regards their moiety of the mortgage debt.

Under Roman-Dutch Law it would appear that the widow's obligation under the bonds would be a joint one with the husband's heirs. It would seem, however, to have been held that a widow may sell or mortgage the common property to pay a debt of the community. If she can do this *a fortiori* she ought to have the right to pay interest on an already incurred obligation of the community.

In this case the widow seems to have given a lease of the mortgaged property apparently with the knowledge of her husband's heirs; they not objecting, and thereby acting for them in the administration of their common affairs.

From the fruits of this lease the interest was paid.

I think therefore that the act of the widow in so doing was the act of the heirs, and that they are bound by it, and agree in dismissing the appeal with costs.

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I agree to dismiss this appeal.

I have always understood the Roman-Dutch Law to be, as it is in force in this Colony, and as it has been interpreted and expressly laid down by several decisions of this Court which it is needless for me to refer to, that the husband has the right to alienate or mortgage any property belonging to the joint matrimonial estate during the existence of the community, and that the widow has the right to sell property of the common estate in order to pay any debts incurred by the husband. If the law gave the widow the right to do this—see *Ederemanasingham's Case*, *Vander.* 264, and the other cases cited by my brother Wendt—then it necessarily follows that in this right is included the right to alienate property for the payment of interest which had accrued on debts contracted by the husband. It is therefore obvious in this case that, as the joint matrimonial estate of both the spouses was originally liable on the obligations incurred by the husband, such liability cannot be affected by the death of one of the spouses. The heirs of the deceased spouse cannot be allowed to say that the payment of interest by the widow after the death of the husband only related to and kept alive her share of the obligations and not her husband's, and that the moiety belonging to the deceased spouse remained unaffected by such payment.

The widow by paying interest kept alive the entire liability just in the same way as she would have kept it alive if she, instead of her husband, had paid interest during the existence of the community, and whilst her husband was living. Any hypothecation of property by the husband during his lifetime was as much his own act as that of the wife and is binding on her; and the creditor is entitled to realize the debt due to him from the whole of such property, and not from the widow's moiety only.