1906. *June* 29.

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

CANTLAY *v.* ELKINGTON.

D. C., Kandy, 15,378.

Marriage in community—Death of one spouse—Administrator of deceased spouse—Vesting of entire estate—Judgment against administrator—Liability of entire estate—English law of executors and administrators—Estoppel.

Held, that—

(1) When one of two spouses married in community of property dies, the entirety of the common estate vests in the administrator of such deceased spouse for purposes of administration; and on a judgment obtained against such administrator alone the entire common property may be sold.

Perera v. Silva (2 *C. L. R.* 150) and *Nonohamy v. Perera* (2 *C. L. R.* 153) followed.

(2) Section 2 of Ordinance No. 7 of 1840 does not apply to the division of property in community, which takes place by operation of law and not by convention of parties.

(3) The English Land Transfer Act, 1897, does not apply to Ceylon.

LASCELLES, A.C.J.—In matters involving title to property it is a well established principle that a decision, which has been in force and has been acted on for some time, should not be disturbed except for the strongest reasons.

WOOD RENTON, J.—A *cursus curiæ* of long standing and the rights which have grown up under its sanction should not be lightly disturbed.

Where the wife, married in community of property, allowed a third party to take out administration to her deceased husband's estate and to enter into possession of the whole of the common property, did not ask for any accounts, and though represented

in Ceylon by an attorney and aware that the entire property had been sold by the Fiscal, took no steps to claim her share for several years,— 1906. *June* 29.

Held, that she must be taken to have renounced her right to any share in the property, and that her conduct estopped her from claiming any share of the property now.

IN REVIEW.

JAMES CANTLAY and Alexander Cantlay were the owners of a property called Ladbroke estate. James Cantlay married the plaintiff on the 13th February, 1877, in community of property, and died intestate on 31 August, 1888. Charles Cantlay was appointed administrator of James Cantlay's estate. A. C. White instituted an action against Alexander Cantlay and Charles Cantlay, as administrator of the estate of James Cantlay, on a mortgage bond executed by James Cantlay and Alexander Cantlay mortgaging a property called Gingran-oya estate, and obtained judgment and issued writ. The mortgaged property was sold but did not realize the amount of the decree. In order to recover the balance due Ladbroke estate belonging to James Cantlay and Alexander Cantlay was seized and sold by the Fiscal and purchased by A. C. White, who obtained a Fiscal's transfer dated 4th June, 1889, which conveyed to him the "right, title, and interest of Alexander Cantlay and the late James Cantlay." The defendant claimed title to the property through the purchaser at the Fiscal's sale. The plaintiff left the Island in March, 1889, and returned in May, 1901, and in May, 1903, instituted this action to vindicate one-fourth share of Ladbroke estate, alleging that her interest in the common property of her herself and her husband had not been seized or sold by the Fiscal. The District Judge (J. H. de Saram, Esq.) dismissed the action. His judgment was as follows:—

"This is an action to vindicate from the defendant an undivided fourth share in Ladbroke estate. The estate was owned by two brothers, James Cantlay and Alexander Cantlay. The transfer in their favour is dated 28th June, 1886. James Cantlay married the plaintiff in community of property on the 13th February, 1877, and died intestate on 31st August, 1886. The plaintiff alleges that the community came to an end on the death of her husband, and that she then became, in her own right, entitled to an undivided fourth share of Ladbroke. Charles Cantlay was appointed by this Court administrator of James Cantlay's estate. A. C. White instituted the action No. 1,810 of this Court against Alexander Cantlay and Charles Cantlay, administrator of James Cantlay's estate, to recover a large sum of money due by Alexander Cantlay and

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James Cantlay. Gingran-oya estate, the property mortgaged, was sold, but did not realize sufficient to pay the mortgage debt. Ladbroke estate was then seized and sold by the Fiscal on the 4th May, 1889. A. C. White purchased the right, title, and interest of Alexander Cantlay and of James Cantlay and obtained a Fiscal's conveyance, which is dated 4th June, 1889. After certain devolutions of title, the defendant purchased the whole of Ladbroke on the 1st June, 1900. The plaintiff left the Island in March, 1889, and returned in May, 1901. The administrator was in possession of Ladbroke when she left. She pleads the benefit of clause 14 of the Ordinance No. 22 of 1871 and the saving clause therein contained in favour of those absent beyond the seas with reference to claims to land. She complains of the defendant that he has been in unlawful possession of a fourth of the estate since June, 1900, and prays that she be declared entitled to that share. The question I have to determine is whether the administrator of the husband's estate had power to deal with the common estate of the husband and wife for the debt of the community. In his inventory the administrator included the whole share owned by the husband and wife, and accounted for it in the testamentary action. The contention for the plaintiff is that at most the Fiscal sold James Cantlay's interest only, which at the date of sale it is said was a fourth share, and that as the plaintiff was not a party to the action No. 1,810, her share in the property could not be sold. Mr. Dornhorst appearing for the defendant argued that the whole estate *stante matrimonio* was seized and the Fiscal's conveyance of the husband's interest was good, it being a conveyance of the husband's estate which binds the widow. It was held in *Perera v. Silva* (1) by Burnside C.J. that upon the death of one of the spouses the entire common estate vests, in the first instance, in the administrator of the deceased for disposal among the persons legally entitled to individual shares of it. This is what the Chief Justice said: '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 payment 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 that 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,

(1) (1893) 2 *C. L. R.* 150.

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 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' estate, 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.'

" In *Nonohami v. Perera* (1) Withers J. agreed with Burnside C.J. He said: ' I understand the Chief Justice to have ruled in the case referred to that on the death of a husband who was married in community of goods, intestate, the whole of the common effects vests in the surviving spouse if she takes out letters of administration to his estate, or indeed in any one to whom they may be committed for the purposes of administration. This is consonant with the tendency of decisions of this Court in later days and not inconsistent, I believe, with modern practice. It cannot, I venture to think, be reconciled with Roman-Dutch Law pure and simple, according to which the community of estate between two spouses was dissolved instantly upon the death of either of them, and upon such dissolution the common estate was equally apportioned between the heirs of the deceased and the survivor, with the consequence that after the apportionment the creditor could sue the husband and his heirs for the whole, or the wife and her heirs for the half, of the debts contracted during the marriage as the case might be. That ruling however, it seems to me, is just and convenient, even if it is not the expression of what has been the law uniformly laid down by this Court. I should be sorry to say that it is not. I have once before had with regret to confess my ignorance of the exact state of the law in Ceylon in regard to executors and administrators, and I repeat what I said before that for the sake of the community I am ready to subscribe to any proposition of law on this important matter which is clear and precise and cannot be possibly mistaken, so long of course, as I do not think it to be fundamentally vicious as law.'

" I consider I would be right to follow these judgments and therefore

(1) (1893) 2 *C. L. R.* 153.

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answer the eleventh issue, viz., Had the administrator of the husband's estate power to deal with the common estate of the husband and wife for the debt of the community? in the affirmative. This strikes at the root of the plaintiff's case, which I dismiss with costs. I should not omit to point out the absurdity of the plaintiff's case, whereby she seeks to recover a share in Ladbroke without offering to pay any portion of the debt of the community. It is true she cannot pay that to the defendant, but she does not offer to pay it to any one. The plaintiff is to pay the defendant's costs."

In appeal the judgment of the District Judge was affirmed; and the plaintiff had the case brought up in review preparatory to appeal to His Majesty in Council.

Walter Pereira, K.C., for the plaintiff, appellant.

Dornhorst, K.C. (*VanLangenberg A. S.-G.* with him), for the defendant, respondent.

Cur. adv. vult.

29th June, 1906. LASCELLES A.C.J.—

The principal question for determination is whether on the death of one of two persons married in community of goods the whole of the joint estate vests in the administrator, so as to be liable to be seized and sold in execution for the joint debt of the community.

The question turns not so much upon the Roman-Dutch Law as on the nature and extent of the alterations entailed by the introduction of the English Law of executors and administrators.

I do not agree with the view that the local Ordinance of Frauds (No. 7 of 1840) has any bearing on this question. The provisions of section 2, which require sales, purchases, and transfers to be made by notarial instrument, have in my opinion no application to the change of ownership which is effected by marriage in community of goods.

By Roman-Dutch Law no transfer was required to bring the property of the spouses into the marriage community (1).

This was effected by operation of law, by the *commixtio* which was considered to take place on marriage. In the same way on the death of one of the spouses the division between his heirs and the survivor took place *ipso jure*. The common property was divided into two parts, one being given to the heirs of the deceased spouse and the other to the survivor. Creditors had a right of action for debts contracted during the marriage against the husband or his heirs for the full amount, and against the wife or her heirs for the

(1) *Grotius*, 2, 11, 7, *and note.*

half. If the husband's estate was insufficient there was a right of recourse to that of the wife. The estate was thus taken subject to the debts of the community.

Whether as a matter of practice the estate was cleared of debts before the division was made does not clearly appear from the authorities cited to us.

The difficulty of adapting the English system of administration to the principles of the Roman-Dutch Law has led to considerable confusion. In 1893 in the cases of *Perera v. Silva* (1) and *Nonohamy v. Perera* (2) this Court endeavoured to solve the difficulty by ruling that upon the death of one of the spouses, the entire common estate vests in the first instance in the administrator of the deceased spouse for disposal among the persons legally entitled. We are now in effect asked to over-rule these decisions, which are said to be repugnant to the principles of Roman-Dutch Law.

The language of Burnside C.J. in the first-named case and that of Withers J. clearly shows that these decisions were based on considerations of practical convenience. Burnside C.J. regarded the provision of the Roman-Dutch Law as to suing a surviving spouse as a mere matter of procedure, and laid down the rule which is now called in question in order to avoid multiplicity of suits and divided administration.

Withers J. fully recognized that the ruling could not be reconciled with the Roman-Dutch Law pure and simple, but he regarded it as consonant with the tendency of decisions of this Court in later days and not inconsistent, as he believed, with modern practice.

Whatever objections may be taken to these decisions on the ground of departure from the Roman-Dutch Law, it is clear that they cannot now be over-ruled without producing widespread inconvenience. Grenier J. speaking from his experience as Judge of the District Court of Colombo, endorses what Withers J. stated as to the practice prevailing in modern times.

In a matter like this involving title to property it is a well-established principle that a decision which has been in force and has been acted on for some time should not be disturbed except for the strongest reasons.

I see no adequate ground for setting aside the rule which was laid down by this Court on grounds of public convenience thirteen years ago and has since been generally followed. With regard to Moncreiff J.'s reference to the English Land Transfer Act, I desire only to state that I do not concur in the view that the English statutes relating to executors and administrators are in force in

(1) (1893) 2 *C. L. R.* 150. (2) (1893) 2 *C. L. R.* 153.

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Ceylon. In any case section 1 of that Act, dealing as it does with the devolution of estates in land which are unknown to the law of Ceylon, has in my opinion no bearing on the question under consideration.

I entirely concur in the view that the plaintiff must be taken to have renounced her interest in the common estate. She had notice of Charles Cantlay's application for administration, and was aware that he took possession of all the estate; when she left Ceylon she knew that the half share in Ladbrowe estate was in charge of the administrator; no account was asked for by her during her absence from Ceylon; she heard of the sale to Mr. White, and, though represented in Ceylon by an attorney, took no steps to claim any share in Ladbroke. In my opinion the plaintiff by her conduct has plainly indicated her intention to renounce her share in the estate. It would be unreasonable at the present day to insist upon the performance of the formalities which the Roman-Dutch Law regarded as indications of the widow's intention to renounce inheritance such as placing the key of the house on the coffin or walking in ordinary attire upon the bier.

I should also be prepared to hold that the plaintiff is estopped by her conduct from claiming an interest in Ladbroke estate. By her conduct she has permitted, as far as it was possible for a person in her position to do so, purchasers to act on the belief that she had no claim to the estate. I concur in the judgments under review.

MIDDLETON J.—

The main point insisted on by the appellant's counsel was that the Fiscal's transfer which only purported to convey the right, title, and interest of James and Alexander Cantlay, did not convey with it the interest of the appellant derived from the community in the property.

Assuming that I was wrong in my view of the effect of section 2 of Ordinance No. 7 of 1840, it is difficult to hold, on the theory of a vested right to half the property in the wife, that the defendant should succeed upon a strict construction of the ruling of Chief Justice Burnside and Mr. Justice Withers in the cases of *Perera v. Silva* (1) and *Nonohamy v. Perera* (2), which undoubtedly have the sanction of convenience and long usage to support them.

In these cases the Court held that the " estate of the deceased spouse, together with the share which would belong to the survivor, vested in the administrator for disposal among the persons legally entitled to individual shares of it."

(1) (1893) 2 *C. L. R.* 150. (2) (1893) 2 *C. L. R.* 153.

If it is conceded—and I strongly incline to this view—that the wife's interest in the community does not vest on the death of the husband, but remains a *jus in re* contingent only on the payment of the debts of the community, then I think that the transfer is a good one and includes the interest of the plaintiff.

This view of the position of the wife in regard to the property in community is consonant with the opinion of *Grotius* (*Bk.* III., *Ch. XXVIII.; s.* 2, *Herbert's translation, p.* 407) of the community of property in general. In any case, I think the plaintiff is estopped by her conduct from asserting her title to the portion of Ladbroke estate now in claim by her on the authority of section 115 of the Evidence Ordinance, No. 14 of 1895.

I think that the judgment under review should stand.

WOOD RENTON J.—

I agree that the judgments under review should be affirmed. I rest my decision upon, and confine it to the following grounds: (i.) the *cursus curiæ* in regard to the matter in issue; (ii.) abandonment or renunciation by the widow of the property in community; (iii.) estoppel of the widow *in pais* from alleging that the mortgage decree is not binding on her because she was not made a party to the suit.

And first as to (i.) the *cursus curiæ*. There appears to be some doubt, and some room for doubt, on the Roman-Dutch authorities themselves, as to the practice in regard to the administration of property in community after the death of one of the spouses. It is, of course, clear—to take the class of case before us—that the death of the husband dissolved the community and crystallized the wife's right to a moiety of the property in common subject to the claims of creditors (1). But is it clear that the husband's right of possession of the common property after the death of his wife did not involve the right and duty of paying all the debts of the community and of then—and then only—effecting the division which the law prescribes? There is nothing necessarily inconsistent with this view in the fact that creditors of spouses married in common have an election either to sue the husband for the whole or the wife for the half of the debts due by the estate; and there are texts which seem to support it. It is certain, for instance, that collation preceded division (1); and Burge (1, 311) says that "before the shares can be ascertained, those debts, charges, and expenses to which the property is subject must be deducted." I have unfortunately not been able to get access to the books which he cites as an authority for this proposition, viz., Wesel and Someren. If there were anything in the point that I have raised, I take it that under the law of Ceylon

(1) *Herbert's Grotius*, 2, 11, 18.

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the husband's right of administration would pass to his administrator. In the cases, however, in which the doctrine now challenged by the appellant was introduced into this Colony, it is assumed that a departure was being made from the pure Roman-Dutch Law, and I content myself with expressing my entire concurrence in what has fallen from my brothers as to the importance in such a case as this of not disturbing a *cursus curiæ* of comparatively long standing and the rights which have grown up under its sanction. The effect of the decisions referred to is that the entire property in community vests in the administrator of the husband for purposes of administration. This seems to me to dispose of Mr. Walter Pereira's point as to the Fiscal's transfer. For the right of the husband to the possession of the whole property in common for purposes of administration was part of the right, title, and interest which he had in the estate within the meaning of the Fiscal's conveyance. There are two incidental points on which I must add a word in this connection. I do not think that section 2 of Ordinance No. 7 of 1840 applies to the division of property in community. In my opinion, as the community was constituted on marriage *ipso jure*, without the necessity either then or during the marriage of any transfer to it of the immovable property originally forming part of, or subsequently falling into, the joint estate (1), so nothing in the nature of a transfer is needed or takes place at the ultimate division of the property. The widow has all along had a real though deferred and perhaps contingent right. She has had a right whose reality is shown by the fact that the Courts would, under certain circumstances, interfere with her husband's wide powers of administration for its protection. On the division of the property she merely enters by operation of law on the enjoyment of what has been during the marriage contingently her own. If this process can properly be described as a transfer, I do not think it is the kind of transfer indicated in section 2 of Ordinance No. 7 of 1840, the whole terms, and particularly the second clause, of which seem to contemplate rights created by convention and not by the act of the law.

Again I cannot follow Moncreiff, J. in his references to the Land Transfer Act, 1897. If his remarks are intended only as a *reductio ad absurdum* of the argument of Burnside C.J. in *Perera v. Silva* (2) as to "walking abreast with the law as it now exists," I think he has misapprehended Sir Bruce Burnside's meaning. If they imply anything more, I can only respectfully dissent from them. When we speak of the introduction into Ceylon of the English law

(1) *Voet*, 23, 2, 68; *Grotius* (*Maasdorp*) 2, 11, 7; *Burge*, *vol.* 1. *p.* 280.
(2) (1893) 2 *C. L. R.* 159.

of executors and administrators we refer to the general law alone—to the English conception of executorship and administratorship as contrasted with that of the heir under the Civil and the Roman-Dutch Law. It does not follow—and in my opinion it is not the case—that every English statute dealing with executors and administrators and especially a statute so closely associated with the incidents of English real property law as the Land Transfer Act, 1897, have been incorporated into the law of the Colony.

On the question of abandonment (ii.) and estoppel (iii.) I have nothing to add, except that—in addition to the Roman-Dutch authorities in its favour—the ground of renunciation formed the basis of the decision of Lawrie J. in *Perera v. Silva* (*ubi sup.*); and that the facts appear to me to disclose a complete case of estoppel by conduct against the appellant who comes forward, after years of silent acquiescence, not to deny her indisputable liability, but merely to insist that it shall not be enforced against her in a particular way.