1937 *Present :* **Soertsz J. and Fernando A.J.**

TAMBIAH *v.* SANGARAJAH.

70—D. C. Jaffna, .6,290.

Thesawalamai—*Mortgage of* thediathetam *property by husband—Hypothecary action by mortgagee—Death of wife pending the action—Failure to make the heirs party to the action—Decree not binding on heirs—Ordinance No. 21 of 1927, s. 11.*

Where under the *thesawalamai* the husband mortgaged *thediathetam* property and during the pendency of a hypothecary action brought by the mortgagee against the husband, the wife died leaving heirs,—

***Held,* that the heirs were not bound by the decree entered in the action unless they were made parties to the action.**

***Ambalavanar v. Kurunathan* (*37 N. L. R. 286*) followed.**

Where in an action for declaration of title to land an issue was settled as to whether the plaintiff was entitled to claim equitable relief under section 11 of the Mortgage Ordinance, No. 21 of 1927, and where objection was taken in appeal that the claim was obnoxious to section 35 of the Civil Procedure Code,—

***Held,* that the fact that the issue was adopted implies that the requisite leave was granted under section 35.**

APPEAL from a judgment of the District Judge of Jaffna. The plaintiff brought this action to be declared entitled to a land which he had purchased in execution of a hypothecary decree he had obtained against defendant's father in respect of the land. The defendant's case was that the western portion of the land was the *thediathetam* property of his parents. He admitted that during his lifetime his father mortgaged the land to the plaintiff, who put the bond in suit in case No. 1,631, D. C. Jaffna, making only his father, the defendant. While the case was pending, his mother Nannipillai died. The plaintiff continued the action without making the heirs of Nannipillai parties to

[1] *(1936) 2 A. E. R. 213.*

the action. The defendant contended that he and his minor sister were not bound by the decree entered in the hypothecary action.

The learned District Judge gave judgment for the plaintiff.

H. V. Perera, K.C. (with him *T. Nadarajah*), for defendant, appellant.—Where the husband mortgages *thediathetam* property, and at the time action is brought on the mortgage bond the wife is dead, her heirs must be made parties to the action. Otherwise they are not bound by the decree (*Ambalavanar v. Kurunathan*[1]). Similarly, when the wife dies pending the action, her heirs must be joined. On the death of the wife, community comes to an end, and the children, her heirs, become entitled to a share through their mother and their father has no rights over their property, and as they were not parties, their shares cannot be sold under the decree.

N. E. Weerasooria (with him *Tissevarasinghe, N. Nadarajah*, and *Corea*), for plaintiff, respondent.—The husband has full control over *thediathetam* property, and is entitled to mortgage the entire property, including the wife's share. The wife is not a necessary party in an action on the bond (*Sangarapillai v. Devaraja Mudaliyar* [2]). Rights and liabilities must be considered as they existed at the time the action was instituted. Since the wife was not a necessary party at that time, it follows that her heirs need not be made parties at her death. It is only when a party to an action dies that the legal representatives are to be substituted. The decision in *Ambalavanar v. Kurunathan* (*supra*) should not be followed. Even if it is it can be differentiated, because in that the wife was dead at the time the action was instituted, and therefore her heirs had already become entitled to her share, and had acquired present rights.

Alternatively, plaintiff is entitled to relief under section 11 of the Mortgage Ordinance, No. 21 of 1927.

H. V. Perera, K.C., in reply.—The position as between husband and wife is entirely different. The wife is not a necessary party because the husband has full rights to deal with the whole of the *thediathetam* property. She is represented by her husband and bound by his act. There is no community between the husband and his deceased wife's heirs.

With regard to the alternative claim for relief under section 11 of the Mortgage Ordinance, no such claim was made in the lower Court. Moreover, it is barred by section 35 of the Civil Procedure Code.

Cur. adv. vult.

June 24, 1937. SOERTSZ J.—

The plaintiff brought this action to be declared the owner and proprietor of the land 181 lachams 15½ kulies in extent described in paragraph 1 of the plaint. He alleged that the defendant had objected to, and prevented the Fiscal from putting him in possession thereof, in execution of a hypothecary decree he had obtained against the defendant's father in respect of this land.

The defendant's answer disclosed that he claimed certain interests in the western portion of this land, namely, that portion that is made up of the two lots of 10 lachams and 15 kulies and of 3 lachams and ½ kuly. He claimed nothing of the eastern lot 5 lachams in extent. The defendant's case is that the eastern portion of their land was the

[1] *37 N. L. R. 286.* [2] *38 N. L. R. 1.*

thediathetam property of his parents Sinnadurai and Nannipillai. He admits that during his mother's lifetime, his father mortgaged this land on February 21, 1929, to the plaintiff who put the bond in suit in case No. 1,631, D. C. Jaffna, on November 26, 1931, making only his father Sinnadurai the defendant. While that case was pending Nannipillai (his mother) died on December 14, 1931. The plaintiff continued the action even thereafter only against Sinnadurai the mortgagor, and obtained decree on February 2, 1932, and at the sale in execution purchased this land himself on deed P 3 of February 1, 1934. The defendant contends that he is not bound by the decree and that he and his minor sister are entitled to a half share of the land. That is the principal question for decision.

A Divisional Bench of this Court has held—and that ruling binds us—that under the *thesawalamai* the husband has the same right to mortgage property which forms part of the *thediathetam* property, after the passing of Ordinance No. 1 of 1911, as he had before this Ordinance was enacted, and that the wife is not a necessary party to a hypothecary action against the husband on a mortgage effected by him in respect of *thediathetam* property, in order to make her interest in the property bound by the decree (*Sangarapillai v. Devaraja Mudaliyar* [1]). In that case, however, the wife was alive at the time of the decree and thereafter. In fact, it was she who took the point that she was not bound by the decree entered against her husband. In an earlier case (*Ambalavanar v. Kurunathan* [2]), Poyser and Koch JJ. held that where after the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 a husband mortgaged *thediathetam* property, and the mortgagee *after the death of the wife* put the bond in suit, without making the minor heirs of the wife who were in possession parties to the action, the heirs were not bound by the hypothecary decree.

Counsel for the respondent questioned the soundness of this decision and also maintained that if we accepted that decision, the present case is distinguishable by reason of the fact that in that case the wife was dead at the time the action was brought, whereas in this case the wife was alive and died only two months before decree was entered.

I am unable to appreciate this distinction. I can see no good reason for requiring heirs to be substituted in cases where the wife dies before the institution of the action, and not requiring them to be substituted in cases where she dies pending the action, if it is sought to bind them by decree. In a case in which the wife is alive at the time of the decree, as in the Divisional Bench case I have already referred to, there is manifestly good logical foundation for holding that it will be sufficient to sue the husband in order to bind the wife too. Chief Justice Macdonell based his finding to that effect on the theory that the husband is the sole and irremovable attorney of his wife with regard to alienations of *thediathetam* property by sale or mortgage and that for the purpose of such alienation, the wife's *persona* is "merged in that of the husband and there can be no requirement that she should be joined as a party to any mortgage action, because she cannot on any correct analysis be described as a party separate from her husband". Dalton J. said, "having regard to the powers of the husband in respect

[1] *38 N. L. R. 1.*

[2] *37 N. L. R. 286.*

of the common property of the spouses to mortgage the whole of the property, the wife is not a necessary party to the action to make her interest in it bound by the decree . . . . This seems to me a necessary inference or deduction from his powers to mortgage the whole property".

I prefer myself to state the principle in the way in which Dalton J. stated it, for I find some difficulty in proceeding on the principle of the husband being "the sole and irremovable attorney of his wife". But, it must be remembered that this power of the husband presupposes the existence of a community of property between himself and his wife, and that community of property presupposes in turn the existence of the husband and wife. The death of either husband or wife puts an end to that community for purposes such as those with which we are concerned in this case. In regard to the children, the position of the husband or father is quite different. The moment the wife dies, there is no community between him and his children. They derive their title from their mother, and their father as father has no control over their shares of the property. As husband the position he occupied in regard to his wife was quite different. In a case like the present, it is true that the children's share is liable for the debts, but for that liability to be made effective the children must be sued or made parties to a pending action. I, therefore, see no reason for dissenting from the view taken in *Ambalavanar v. Kurunathan,* and as I have already observed, I do not think that the fact that in this case the wife was alive at the date of the institution of the action makes any difference. Counsel for the respondent alternatively asked for relief under section 11 of the Mortgage Ordinance, and I would have acceded to this request but I find that there is not sufficient material on the record on which to estimate and assess that relief.

Mr. Perera, for the appellant, contended that the plaintiff had not asked for relief under that section and that he could not ask for it in view of terms of section 35 of the Civil Procedure Code. It is correct that in the plaint no claim was made under section 11 of the Mortgage Ordinance, but the question was raised in issue 5.

In regard to the contention that such a claim is obnoxious to section 35 of the Code, if the leave of the Court was necessary for such a claim to be put forward, the fact that the Court adopted and framed issue 5 implies that it gave the requisite leave.

I would therefore set aside the decree of the District Judge and remit the case to him for the investigation of the question of the relief to which the plaintiff is entitled under section 11 of Ordinance No. 1 of 1927. The defendant-appellant has succeeded on the question argued, namely, whether he and his sister were bound by the decree or not and he is, therefore, entitled to the costs of appeal. I leave the question of the costs in the trial Court to the District Judge when he is making his order on the investigation he is directed to make. I would add that the defendant's minor sister should be duly added a party defendant before the case goes further.

FERNANDO A.J.—I agree.

Set aside.