Present: Wood Renton C.J. and Shaw J.

1916.

SILVA *v.* SALMAN.

428—D. C. Galle, 13,337.

Executor de son tort—*Sale of land for payment of debt.*

An alienation by an executor *de son tort* for the purpose of paying the debts of the deceased is valid and will pass the property, at any rate so long as the executor *de son tort* is really acting as executor, and the creditor has reason to believe that he is so acting.

W, who married after Ordinance No. 15 of 1876 came into force, died leaving a widow and three children. W's estate was under Rs. 1,000. M, without taking out letters of administration to her husband's estate, sold the whole of her husband's interest in the land for the purpose of paying off her husband's debt.

Held, that the sale was good.

THE facts are set out in the judgment.

A. St. V. Jayawardene, for plaintiff, appellant.

J. S. Jayawardene, for twenty-second added defendant.

Cur. adv. vult.

December 20, 1916. Wood Renton C.J.—

This is a partition action. But we are concerned only with a point of law arising between the plaintiff and the twenty-second added defendant. The former claims the whole of the share claimed by the latter by virtue of a deed of conveyance from Mancho, the widow of Udarishamy, one of the children, and heirs of a man Kaloris, who purchased a share of the property from one

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of the sons of the original owner. Udarishamy and Mancho were not married in community. The marriage, in fact, took place after Ordinance No. 15 of 1876 had come into operation. Without having taken out letters of administration to her husband's estate, Mancho sold the whole share to the plaintiff for the purpose of paying off some of Udarishamy's debts. The question at issue is whether that sale was valid. The learned District Judge has answered this question in the negative, upon the ground that, without obtaining letters of administration or a certificate of guardianship under Chapter XL. of the Civil Procedure Code, Mancho had no right to alienate, as she has in fact done, the whole share of Udarishamy's property, to which his minor children are by the law of inheritance entitled.

I am unable to agree with this decision. The case of *Prins v. Pieris* [1] makes it quite clear that Mancho, although she was not married in community of property, was in the position of an executrix *de son tort*, and was entitled to pay the debts of her husband's estate, provided that she was really acting at the time in the character of executrix, and that the plaintiff, with whom she was dealing, had fair reason for supposing that she was doing so. The plaintiff's counsel relies strongly on the decision of this Court in *Silva v. Silva*[2] to the effect that on the death of the owner of property intestate the title to that property passes at once to his heirs. But the Supreme Court in that case pointed out that this vesting of the property in the heirs was subject to the right of the administrator to make use of whatever portions were required for the purpose of administration. If the whole property was absorbed by the debts of the estate, there was nothing to go to the heirs at all. I do not think that there was any need for Mancho to have taken out a certificate of guardianship, inasmuch as she was acting in the matter, not as guardian, but as executrix *de son tort*.

For these reasons I would allow the appeal, and I concur in the formal order made by my brother Shaw.

SHAW J.—

The only question involved in this appeal is whether the plaintiff or the twenty-second defendant and her co-heirs are entitled to a share formerly belonging to one Udaris, the father of the twenty-second defendant.

Udaris died leaving the widow Mancho, to whom he was married, not in community of property, and three minor children. He left a mortgage debt on his property, and his estate appears to have been under Rs. 1,000 in value. The widow Mancho, without having taken out administration of her husband's estate, has sold to the plaintiff the whole of her husband's interest in the property,

[1] *(1901) 4 N. L. R. 353, and cf. Fernando v. Fernando (1859) 3 Lor. 235.*

[2] *(1907) 10 N. L. R. 234.*

the subject of this partition suit, for the purpose of paying off her husband's debt.

The question for our determination is whether this sale is good, in so far as it affects the interests of his minor children in the land.

There does not appear to be any reason to suppose that the sale was not made *bona fide* for the purpose of paying off the debt left by the husband, or that the widow made any profit from the transaction.

Had she applied for administration of her husband's estate, she was the natural person to have obtained it; not having done so, and having intermeddled with the estate by paying off the debts, she is in the position of an executrix *de son tort*.

The lawful acts done by an executor *de son tort* are good, and an alienation by a person so acting for the purpose of paying the debts of the deceased is valid and will pass the property (see *Parker v. Kett*[1]), at any rate so long as executor *de son tort* is really acting as executor, and the creditor has reason to believe he is so acting (*Thomson v. Harding*[2]). It has been held in Ceylon that an alienation of land by a widow to discharge a mortgage thereon made by her deceased husband is good as against the heirs of the deceased (see *Fernando v. Fernando*[3]), and in *Prins v. Pieris*[4] it was held that a sale by the Fiscal on a writ issued against a widow, who was in possession of her husband's property as executrix *de son tort* in execution of a decree on a mortgage bond granted by her deceased husband, gave a good title to the purchaser. Although in those cases husband and wife were married in community of property, the interest sold included that of the heirs, as in the present case.

It was contended on behalf of the respondent that, according to the decision in *Silva v. Silva*,[5] upon the death of Udaris intestate his property pased at once to the heirs, and that the conveyance by the widow alone was therefore invalid, but it was pointed out by the Court in that case that the property only passed to the heirs, subject to the rights of the person administering the estate to alienate for the payment of debts.

In the present case the sale was a *bona fide* one, and made for the purpose of payment of debts by the person acting as administrator, and was, in my opinion, valid.

The plaintiff is, therefore, entitled to the shares allotted to the twenty-second defendant and her co-heirs, and I would amend the decree accordingly.

The appellant should have the costs of this appeal and the costs of the contest in the District Court.

Appeal allowed.

[1] *1 Lord Raymond 661.*
[2] *(1853) 2 Ex. B. 630.*
[3] *(1859) 3 Lor. 235.*
[4] *(1901) 4 N. L. R. 353.*
[5] *(1907) 10 N. L. R. 234.*