1955 *Present :* Gratiaen, J., and Sansoni, J.

SARAVANAMUTTU, Appellant, *and* NADARAJAH, Respondent

S. C. 447—D. C. Chavakachcheri, 548

Thesavalamai—Debts of a deceased person—Right of surviving spouse to settle them by sale of deceased's property—Applicability of Roman-Dutch law.

Where the Thesavalamai is silent the Roman-Dutch law is applicable.

The rule of Roman-Dutch law that the surviving spouse may validly sell immovable property of a deceased person in order to pay his debts is applicable to parties governed by the Thesavalamai.

APPEAL from a judgment of the District Court, Chavakachcheri.

S. J. V. Chelvanayakam, Q.C., with *P. Somatilakam* and *C. Shanmuganayagam*, for the plaintiff appellant.

H. W. Tambiah, with *H. L. de Silva*, for the defendant respondent.

Cur. adv. vult.

March 15, 1955. SANSONI, J.—

The land which is the subject matter of this partition action was purchased by one Vairamuttu in 1917. He died in 1929 leaving his widow Sinnammah and his minor child Saravanamuttu, the present plaintiff, and it is common ground that each of them thereupon became entitled to a half share of the land. Vairamuttu had borrowed two sums of Rs. 150 and Rs. 170 on two mortgage bonds in 1925. In 1930 Sinnammah sold the entire land to one Velauthapillai for a sum of Rs. 500. The deed of sale contains recitals to the effect that two sums of Rs. 238 and Rs. 262 respectively were due on the bonds, and that the mortgagees were pressing her for payment. There is no question that the mortgage debts were settled by Sinnammah with the money she obtained by this sale. The plaintiff, however, claims that Sinnammah had no right to sell his half share and that the title to that share is still in him.

The parties are admittedly governed by the Thesavalamai, but there does not appear to be any statutory provision or decision of this Court dealing with the particular point under that special law. The Roman Dutch Law is therefore applicable—*Sabapathypillai v. Sinnatamby*[1]. Now there is an unbroken line of decisions to the effect that the surviving spouse may validly sell the movable and immovable property of a deceased person in order to pay his debts. The earliest case is *Fernando v. Fernando*[2] decided by a Full Bench, the principle applicable being that the survivor represented all the parties interested in the common estate and they must bear the burdens of the estate equally with the survivor ; they should therefore stand by an alienation bona fide made for the purpose of discharging that burden—See *Amaris Appu v. Sadris Perera*[3].

[1] *(1949) 50 N. L. R. 367.* [2] *(1859) 3 Lor. 235.*
[3] *(1883) Wendt 343.*

Perera v. Pathumma [1]. Later cases have decided that the surviving spouse may be considered as acting in the capacity of an executor *de son tort* if the circumstances justify that conclusion, even though there may be only one act of dealing with the property. See *Prins v. Pieris* [2], *Babun Appu et al. v. Waidasekera* [3].

It is too late now for us to reconsider this matter. Mr. Chelvanayakam relied on the case of *Montford v. Gibson* [4] to support his argument that an executor *de son tort* has no power to sell immovable property, but that authority has been referred to in *Babun Appu et al. v. Waidasekera* (supra) so that the judges who decided that case were well aware of it. It follows that the plaintiff has no title to the land sought to be partitioned and his action was rightly dismissed. The appeal must therefore be dismissed with costs in both Courts.

GRATIAEN, J.—I agree.

Appeal dismissed.