

1917.

Present: Wood Renton C.J. and De Sampayo J.

BABUN APPU *et al.*, *v.* WAIDASEKERA.

255—D. C. Galle, 14,060.

Executor de son tort—Right to sell property of deceased spouse for payment of debts—What constitutes a person an executor de son tort ?

A surviving spouse in the capacity of executor *de son tort* may validly sell the property of the deceased spouse for the payment of debts.

A single act of dealing with the property does not constitute the surviving spouse an executor *de son tort* so as to validate the transaction as against the heirs. The question, however, whether a person is an executor *de son tort* is one of fact: it depends on the circumstances of each case.

THE facts are set out in the judgment.

Samarawickreme, for plaintiffs, appellants.

A. St. V. Jayawardene, for defendant, respondent.

Cur. adv. vult.

October 4, 1917. DE SAMPAYO J.—

The question in this case is whether a sale of one Francis Halliday's share in certain immovable property made by his widow Pauline was valid as against the second plaintiff, who is a daughter of Francis Halliday by his first wife. Francis Halliday, together with his mother and brothers and sisters, mortgaged the premises in 1892 to one Vincent Bastiansz, who assigned the mortgage to the defendant in March, 1894. Before any part of the debt was paid Francis Halliday died intestate, and when the bond was put in suit in the action No. 2,990; D. C. Galle, the widow Pauline was made a defendant, as representing Francis Halliday and his then minor daughter the second plaintiff. Judgment was entered on September 3, 1894, and in order to pay off the judgment debt all the parties, including Pauline, sold the land to the defendant. In this partition action the second plaintiff claims to be entitled to one-eighth share of the premises by inheritance from her father, Francis Halliday. This appeal is taken from the judgment of the District Judge, who has dismissed the action.

1917.
Babun Appu
v.
Waidasekera

The law as to executors *de son tort* is well recognized in Ceylon. I need only refer on that point to *Prins v. Pieris*.¹ Indeed, Mr. Samarawickreme, for the plaintiffs, does not question that the law laid down there has been generally accepted, or that a surviving spouse in the capacity of executor *de son tort* may validly sell the property of the deceased spouse for the payment of debts. But he contends that a single act of dealing with the property does not constitute the surviving spouse an executor *de son tort* so as to validate the transaction as against the heirs, and he cites *Mountford v. Gibson*.² This may be granted as a bare proposition of law, but it does not appear to me to apply to the facts of the present case. In the case cited the defendant had sold certain goods to the intestate, who died before the purchase money was paid, and on demand being made for payment or for return of the goods, the widow handed over the goods to the defendant. The Court held that the defendant could not in the circumstances resist the claim of the administrator, who sued him in trover. It is plain, however, that the Court regarded the question as to whether the widow became executrix *de son tort* as one of fact. Every case must depend on its own circumstances. In the present case I am satisfied that Pauline was in fact executrix *de son tort*. She must be taken to have been sued, and judgment to have gone against her on the mortgage bond, in that capacity. The deed conveying the land to the defendant is in the Sinhalese language, and cannot be expected to be couched in strictly technical phraseology; but Pauline described her title as widow of Francis Halliday, and disposed of his whole interest in liquidation of his debt, though, in addition to the second

¹ (1901) 4 N. L. R. 353.

² (1804) 4 East. 441.

1917

DE SAMPAYO
J.Babun Appu
v.
Waidasekera

plaintiff, Francis Halliday left another daughter by Pauline herself. I think that it is sufficiently clear that she purported to act in her representative capacity. The circumstances also indicate that, the children being minors, Pauline was in possession generally of her husband's property. A suit against a widow for the debts of her deceased husband, when she is in possession of the property of the estate, is the most common instance of suits against executors *de son tort*. In *Sellane v. Thyalamuttu*,¹ which was a case of that kind, it was held, as it was in *Prins v. Pieris (supra)*, that a Fiscal's sale in execution of the decree was binding upon the heirs, and a private sale for payment of the judgment debt cannot be less binding. I may also refer to *Silva v. Salman*,² which enunciates the principle of law governing the subject under consideration.

In my opinion this appeal fails. I think, however, that the claim by plaintiffs was not wholly unreasonable, and that the action was not improperly brought, so as to justify the order to pay double stamp duty. I would delete that part of the decree appealed from, but, subject to that modification, I would dismiss the appeal, with costs.

WOOD RENTON C.J.—I agree.

Appeal dismissed.

¹ (1901) 4 S. C. D. 55

² (1916) 19 N. L. R. 305.