1919.

Present: De Sampayo J. and Schneider A.J.

PERERA *v.* PATUMMA.

326—D. C. Kurunegala, 6,690.

Executor de son tort—*Discharge for debt due to estate—Discharge by surviving spouse.*

An executor *de son tort* cannot give a valid discharge of a debt due to estate.

The widow married in community cannot give a valid discharge for debts due to deceased husband.

THE facts appear from the judgment.

Samarawickreme, for defendant, appellant.

No appearance for plaintiff, respondent.

Cur. adv. vult.

March 17, 1919. SCHNEIDER A.J.— 1919.

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The plaintiff, as the administrator of the estate of one Daniel Appu, seeks to recover a half share of the principal and the interest due upon a mortgage bond executed by the defendant in favour of Daniel Appu and his wife Agida Hamy, who were married in community of property. The defence is that after the death of her husband, Agida Hamy received payment in cash for part of the money due, and a fresh bond in her favour for the remainder, and cancelled and discharged the bond sued upon. The only point for decision is the question whether the payment is a good defence, granting that the widow was the executrix *de son tort* of her deceased husband's estate. The learned Acting District Judge held in favour of the plaintiff on all the issues he tried, and the defendants appeal. Counsel for the appellant submitted that the payment was good, even as against the plaintiff, on two grounds as made: (1) To an executor *de son tort;* (2) to the surviving widow of a marriage in community. In support of neither one of these grounds was he able to refer us to any direct authority. I have been unable to discover any. In my opinion on neither one of these grounds is the payment a good defence to the action of the plaintiff.

Generally stated, an executor *de son tort* or of his own wrong has all the liability, but none of the privileges, of a lawful executor. He is liable to be sued as executor by a creditor or legatee, as well as by the lawful executor or administrator, but he cannot bring any action in right of the deceased (*Encyclopædia of the Laws of England, vol. 5, pp. 554 and 555*).

In *Coulter's case*,[1] where it was held that an executor of his own wrong shall not retain any part of the deceased's goods to satisfy his own debt, the reason was stated as follows: " For from thence would ensue great inconvenience and confusion, for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong and of the wrongful taking of the goods of the deceased."

In *Mountford v. Gibson*,[2] where the question was considered how far a creditor of an intestate estate, who received goods of the intestate after his death from his widow in payment of the debt, could protect his possession against an action of trover by the lawful administrator, Lord Ellenborough C.J., in the course of his judgment, said: " If this defence could be maintained, the whole system of administration of an intestate's effects would be put an end to, and instead thereof an authorized scramble introduced by

[1] *5 Coke Reports 30.*

[2] *4 East 441.*

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law among the creditors for priority of payment where the assets were insufficient; as such as had no chance of payment in the regular course of administration would by underhand means plant a beggar in the intestate's house, and under colour of his being thus made an executor *de son tort* would obtain a delivery from him of the goods with which they had respectively furnished the intestate." The reason given in these cases is applicable to the present case, and with greater force.

If a debtor of a deceased person be allowed to exonerate himself by pleading payment to an executor *de son tort*, a man of straw may, in collusion with the debtors of the estate, dissipate all the liquid assets of the estate, leaving the lawful administrator to sue him, from whom nothing could be recovered. The second ground appears to me to be equally untenable. There are a number of cases in our reports where the right of a widow married in community of property who has not taken out administration to alienate immovable property belonging to the community to pay the debts of the community has been recognized. D. C. Colombo, No. 54,929,[1] *Wijeratne v. Abeyweera*,[2] *Ferdinands v. Fernando*,[3] *Amaris Appu v. Sadris Perera*,[4] *Rowel v. Fernando*,[5] *Silva v. Wattuhamy*,[6] *Hadjiar v. Henderick Appu*,[7] *Appuhamy v. Appuhamy*.[8] But in the absence of any authority in the Roman-Dutch law, it is possible to extend this right so as to allow her to recover moneys due to her deceased husband's estate upon mortgages and to give valid discharges.

I would therefore dismiss the appeal, with costs.

DE SAMPAYO J.—

I am of the same opinion. I should like only to add that the Roman-Dutch law, which permits the surviving spouse to alienate the joint property for the payment of the debts of the community, appears to me to be based on the principle that the heirs of the deceased spouse must bear the burdens of the estate equally with the survivor, and must stand by an alienation *bona fide* made for the purpose of discharging those burdens. This qualified right of the survivor to deal with the property of the community, which remains liable to be sold at the instance of creditors, has no analogy to any claim on the part of the survivor to receive assets or to give discharges for debts due to the estate so as to bind the heirs in respect of their share.

Appeal dismissed.

[1] *(1860-1871) Vand. 264.*
[2] *(1882) 5 S. C. C. 70.*
[3] *(1883) 5 S. C. C. 162.*
[4] *(1883) Wendt 343.*
[5] *(1891) 1 S. C. R. 113.*
[6] *(1894) 3 S. C. R. 164.*
[7] *1895) 2 N. L. R. 26.*
[8] *(1900) 4 N. L. R. 337.*