Present: Lascelles C.J. and Pereira J.

1912.

GUNASEKERA *v.* DISSANAYAKE.

136—D. C. Kandy, 21,419.

Estoppel—Intention—Evidence Ordinance, s. 115—Marriage in community—Last will by husband giving property to widow and children in equal shares—Widow dealing with property as if she was not entitled to half the common estate.

The first defendant was married in community of property to one Dissanayake, who died leaving a will by which he gave all his estate in equal shares to his widow (first defendant) and seven children.

The widow and children dealt with the entire estate for thirty years (since the death of Dissanayake) on the footing that the widow was not entitled to half the common estate, and that it devolved on the widow and children in equal shares.

Held, that in the circumstances of this case the widow was estopped from setting up her title to half the estate.

An estoppel will arise where the person who makes the representation so conducts himself that a reasonable man would take the representation to be true and believe that it was intended to be acted on.

PEREIRA J.—With reference to the word "intentionally" in section 115 of the Evidence Ordinance, I may add that intention to have a representation acted upon may be presumable as well as actual, so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result.

APPEAL from a judgment of the District Judge of Kandy (F. R. Dias, Esq.). The facts appear from the judgment of Lascelles C.J.

H. A. Jayewardene, for the appellants.

A. St. V. Jayewardene, for the respondent.

Cur. adv. vult.

October 24, 1912. LASCELLES C.J.—

This is a partition action in which the question for determination is whether the first defendant, the widow of the testator, is entitled to one-fourteenth only of the land in question, as alleged by the plaintiff, or to one-fourteenth plus half (the latter fraction representing her share in the community) as contended by her learned other contesting defendants.

1912.

LASCHELLES C.J.

Gunasekera v. Dissanayake

There is no question but that the testator David Dissanayake and the first defendant were married in community; so that, on the death of the former, his widow became legally entitled to half of the common estate. David Dissanayake left a will by which he gave all his estate in equal shares to his widow and seven children, and appointed his wife to be the sole executrix of his will. In these circumstances, apart from any question of estoppel, the right of the widow to half the common estate would be incontestable.

But the learned District Judge has found that for the last thirty years the widow and children have dealt with the estate on the footing that the widow was not entitled to half the common estate, and that it devolved on the widow and children in equal shares. On this ground he has held that the contesting defendants are now precluded from setting up the widow's title to half the estate.

In the judgment the widow and children are said to have " elected " to regard the estate as belonging to them in equal shares, but I understand the judgment to be based principally on estoppel by conduct. For I do not see how the doctrine of election can be applicable to the facts of this case, unless the will is construed as disposing of the widow's half of the estate as well as the testator's own disposable interest therein. On this footing it might be contended that, inasmuch as the widow had elected to take under the will, she is bound by her election, and cannot object to the will as a disposition of the whole of the common estate. But I do not think that the will can be so construed; for by it the testator purported to dispose only of his own property, and this is the plain meaning of the will.

The true question is whether the contesting defendants are now estopped by their conduct from setting up the first defendant's claim to half the estate. As the learned District Judge has pointed out, the first defendant, as executrix, and the other contesting defendants from 1883 to 1906 have consistently dealt with the estate on the footing that the widow and children took equal shares in the estate.

In 1883, on the marriage of her daughter Jane to the plaintiff, the first defendant transferred to her two lands valued at Rs. 750, representing a one-eighth share in the estate. Then there is a succession of deeds in which the other children dealt each with a one-seventh (not one-fourteenth) of the property, and a planting lease in which the first defendant and her children in 1892 let the entire land on a planting lease to the plaintiff for eighteen years, for Rs. 50 a year, which rent was divided among and paid to the several co-owners.

The plaintiff, it should be stated, now claims 1/7 + [illegible]4 of the e[illegible] The former share he acquired by purchasing [illegible]xecution the [illegible]eventh share of Alexander in 1900, and the [illegible]er share repres[illegible] the plaintiff's interest in a one-seventh s[illegible] sold by Alice in 18[illegible] to Jane, the plaintiff's first wife.

The widow was not called as a witness, and in the absence of any explanation by her, it is difficult to avoid the conclusion that she in effect renounced her half share in the estate in favour of her children, and that when her daughter, the plaintiff's wife, died she endeavoured to recede from this position.

But the appellants contend that the contesting defendants have not by this course of dealing " intentionally caused or permitted " the plaintiff to believe the widow was entitled to one-seventh only of the estate, and to act on that belief within the meaning of section 115 of the Evidence Ordinance.

It is contended that there is no evidence that any of the defendants did any act with the intention of misleading the plaintiff. This may be so, but it is well settled that an estoppel will arise where the person who makes the representation so conducts himself that a reasonable man would take the representation to be true and believe that it was intended to be acted on. *Freeman v. Cooke* [1] (*vide* also authorities cited in Lord Halsbury's *Laws of England, vol. XIII., p. 382*). The question is thus, whether the conduct of the widow has been such that a reasonable man would believe that she had renounced her rights as surviving spouse and had represented herself as being entitled to share in the estate equally with her children, intending that such representation should be acted on. This question, I think, must be answered in the affirmative. As the learned District Judge has pointed out, all the widow's transactions with the estate from the death of her husband in 1879 down to 1906 were entered into on the footing that the widow did not claim more than an equal share with her children in the estate; and in one of these transactions, namely, the lease P 4, the plaintiff was directly concerned. The lease was granted by the widow and her children in 1892 to the plaintiff and a co-lessee, and the first defendant and her children received rent and granted separate receipts on the footing that the first defendant claimed only a one-seventh share in the estate. The plaintiff was also directly concerned in the settlement made by the first defendant on the marriage of her daughter Jane to the plaintiff. Her action with regard to these transactions, coupled with her uniform course of conduct extending over many years, amounts, in my opinion, to a representation which any man might have reasonably acted on, that the interest which she claimed in the estate was a one-seventh share.

It has been contended by the appellants, on the authority of *Swan v. North British Australasian Co.* [2] and *Longman v. Bath Electric Tramways, Limited*,[3] that there can be no estoppel in this case, as the representation was not with regard to the transactions by which the plaintiff acquired title. But the facts of these cases are widely different from those under consideration. The former

[1] *2 Exch. 654*

[2] *2 Heulstone & Col. 183.*

[3] *(1905) 1 Chan. 646.*

1913.

LASCELLES C.J.

Gunasekera v. Dissanayake

case was one of estoppel by negligence. The question was whether the plaintiff was estopped from denying the genuineness of forged transfers by his negligence in giving his broker for another purpose signed forms of transfer in blank. It was held that he was not so estopped for the reason, among others, that the neglect was not in respect of the transaction itself. The latter case dealt with the responsibilities of companies in connection with the " certification " of transfers, and it was held that while certification may have placed the company under special obligations to those to whom it was given, or to those claiming under them, it was otherwise with the plaintiffs, who knew nothing of the certification, and could not have any claim on it. I do not think that either of these authorities throws much light on the present case.

It cannot be disputed that here the conduct of the first defendant and the other contesting defendants in their dealings with the estate generally, and especially in their dealings with the plaintiff's wife and the plaintiff himself, was the proximate cause of the plaintiff purchasing on the footing that the first defendant had renounced her widow's share in her husband's estate.

In my judgment the decision of the learned District Judge is right, and I would dismiss the appeal with costs.

PEREIRA J.—

I agree. With reference to the word " intentionally " in section 115 of the Evidence Ordinance, I may add that, as laid down by Ameer Ali and Woodroffe in their work on the *Law of Evidence* as a result of the authorities cited by them, intention to have a representation acted upon may be presumable as well as actual, so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result.

Appeal dismissed.