1912.

Present: Lascelles C.J. and Grenier J.

KUDA ETANA *v.* RAN ETANA *et al.*

400—D. C. Hatton, 223.

Partition—Kandyan widow entitled to life interest—Heirs cannot claim partition during lifetime of widow Fidei commissarius *cannot claim partition during the time the* fiduciarius *is entitled to possession.*

The heirs of a Kandyan cannot claim partition of the acquired property of the deceased during the life time of the widow, who is entitled to a life interest in that property. The property cannot be said to be held in common, within the meaning of section 2 of Ordinance No. 10 of 1863, by the widow and the heirs who will take after her death.

Obiter,—So long as the *fiduciarius* is entitled to possession, the *fidei commissarius* has not that present interest in the property which entitles him to bring a partition suit.

IN this case the plaintiff-appellant, as the daughter of one Appurala, brought a partition suit to have the lands which Appurala died possessed of partitioned between herself and the second and third defendants-respondents.

Some of the lands were inherited by the said Appurala, and the rest were acquired by him during the subsistence of his marriage with the first defendant-respondent.

The plaintiff-appellant in her plaint expressed her willingness, in conjunction with the second and third defendants-respondents, to

maintain the first defendant-respondent out of the inherited lands, and to permit the first defendant-respondent to remain in possession of the acquired lands by right of her life interest in them.

The learned Judge ruled that it was not competent to the plaintiff-appellant, during the lifetime of the first defendant-respondent, who is the widow of the said Appuvala, to maintain a suit for the partition of the acquired lands.

The plaintiff appealed.

A. St. V. Jayewardene, for the appellant.—The plaintiff is clearly the owner of the property. He does not have a merely contingent right as a *fidei commissarius*.

It has been held that a land burdened with a *fidei commissum* may be partitioned. See *Abeyasundra v. Abeyasundra* [1], *Baby Nona v. Silva* [2]. *A fortiori*, the plaintiff who has a present interest in the property is entitled to get a partition decree.

The appellant does not seek to disturb the widow's possession. There is no reason why the partition inquiry should not be held now when all parties are alive and when all evidence is available.

Counsel cited *Jayewardene on Partition 16*, *Ausadahami v. Tikiri Etana* [3], *Evans v. Bagshaw* [4], *Vanderstraaten's Reports 116*.

Bartholomeusz, for the respondent.—The plaintiff has no present right to possession. The acquired property cannot be said to be "held in common" by the plaintiff and the first defendant. In *Abeyasundra v. Abeyasundra*,[1] the plaintiff being a *fiduciarius* had a right to possession.

The authorities cited are in favour of the respondent.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

February 15, 1912. LASCELLES C.J.—

This case raises the question whether, under Kandyan law, it is competent to one of the heirs to claim partition of acquired property during the lifetime of the widow, who is entitled to a life interest in that property.

No precedent has been cited in favour of the appellant's contention that such a claim is maintainable, and the authorities collected at page 16 of Mr. A. St. V. Jayewardene's work on Partition, so far as they bear on the present question, tell in the opposite direction.

With regard to *fidei commissa*, the better opinion appears to be that so long as the *fiduciarius* is entitled to the possession, the *fidei commissarius* has not that present interest in the property which entitles him to bring a partition suit. Voet (*10, 2; 14*) places *heredes sub conditione instituti* in the first rank of those who cannot claim partition; and Burge adopts this opinion.

[1] *(1909) 12 N. L. R. 373.*
[2] *(1906) 9 N. L. R. 251.*
[3] *(1901) 5 N. L. R. 177.*
[4] *(1869-70) L. R. 5 Ch. 340.*

1912.

LASCELLES C.J.

Kuda Etana v. Ran Etana

Under English law no one can successfully institute an action for partition whose estate is not in possession, and a reversioner cannot maintain such a suit (*Evans v. Bagshaw*[1]). But I prefer not to ground my decision on the analogy between the Kandyan widow on the one side, and the fiduciary owner of the Roman-Dutch law or the tenant for life of the English law on the other side.

The right of a Kandyan widow to possess the acquired property for her life does not depend on any disposition of property in the nature of a will or settlement. It is a privilege allowed her by the law, which rests, at any rate partly, on the presumption that the acquired property was purchased by the savings and exertion of the wife as much as by those of the husband.

The question really is whether, in a case like that now before us, where the widow is entitled to possess for her life, the property can be said to be "held in common," within the meaning of section 2 of Ordinance No. 10 of 1863, by the widow and the heirs who will take after her death. On any reasonable construction of these words, the answer, I think, must be in the negative. The object of the Ordinance is to provide a remedy for the inconvenience caused by property being held in common. It is obvious that in the case under consideration the mischief which the Ordinance was designed to remedy does not exist. The difficulties and disputes which are incident to undivided ownership in common do not arise so long as the widow is in possession.

I think it is clear that the Ordinance does not extend to the present case; and personally I have the greatest reluctance to extend an Ordinance, which is so frequently abused, to any case which is not distinctly contemplated by the Ordinance. In my judgment the decision of the District Judge was right, and I would dismiss the appeal with costs.

GRENIER J.—

I agree. So far as I am aware, I believe this is the first attempt to apply the provisions of the Partition Ordinance to land in the possession of a Kandyan widow who has a life interest in it. As pointed out by my Lord, there is no analogy between the Roman-Dutch law relating to *fidei commissa* and the rights of fiduciaries and the Kandyan law, which is a primitive system, and which will hardly permit of the application of section 2 of the Partition Ordinance to property, which can in no sense be said to be "held in common." The heirs would no doubt be entitled to succeed to the property after the death of the widow, but pending that event they cannot be regarded as having any common ownership or possession with the widow. This being so, it follows that there exists no condition which renders the possession of the property inconvenient or inexpedient.

Appeal dismissed.

[1] (1869-70) L. R. 5 Ch. 340.