1897.
June 8.

PERERA *v.* PERERA.

D. C., Colombo, 6,322.

Donation—Adverse possession—Possession in trust—Partition suit.

(1) D donated a parcel of land to his daughter immediately before her marriage. She accepted the deed, but handed it back to her father for safe keeping. She never entered into possession of the land donated, but her father let it to tenants, who paid him rent; and he repaired the buildings on it during the donee's lifetime, who continued to be on the best of terms with her father—

Held, that D must be taken to have possessed the land in trust for his daughter, and not by a title adverse to her.

(2) A partition suit should not be brought by a man not in possession, whose title is disputed.

THE facts of the case sufficiently appear in the judgment.

Layard, A.-G., for appellant.

Dornhorst, for respondent.

8th June, 1897. LAWRIE, A.C.J.—

Title to this land vested in the deceased wife of the plaintiff by virtue of a conveyance from her father, the late first defendant, the admitted owner.

The title was created in 1879, shortly before the marriage of the donee to the plaintiff.

It is admitted that she accepted the donation, that the deed was handed to her by her father, and that she handed it to him for safe keeping.

It is admitted that she never entered into possession; that her father let the premises to tenants, who paid rent to him; that he repaired the house during the donee's lifetime; that she and her father continued to be on the best of terms; and there is evidence which the learned District Judge believed, and on which he laid much stress, that from time to time the first defendant gave his daughter small sums of money, saying, "Child, this is your rent." I do not reject nor entirely disbelieve this evidence of acknowledgment and of payment, but coming as it does from a stranger to the family, who was at the time of the alleged payments a boy of fourteen, I am not able to attach much importance to it.

Independent of his evidence, I hold that it is not proved that the first defendant possessed by a title adverse to his daughter. He conveyed to her this land as a provision for herself, which her husband could not alienate. It is said that after the marriage he gave the plaintiff, his son-in-law, Rs. 1,000. If it had been well proved that the father gave that money to the plaintiff in lieu of the property gifted to the daughter, such a transaction to the daughter's prejudice without her knowledge and consent would have been a fraud on her, which could not take from her the legal estate in the land: but there is not sufficient proof of such a transaction. When the first defendant getting the deed to keep continued to possess, he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her.

In my opinion no such overt act was proved, and consequently there has not been proved a possession by the donor on a title adverse to the donee, his daughter.

I hold that when she died in December, 1884, she was vested in the property conveyed to her by the deed of 1879, that prescription had not commenced to run against her.

No administration was taken of her estate; for several years her husband allowed his father-in-law to continue in the undisturbed possession of the land; he looked on in silence when his father-in-law built a new house; but latterly he and his father-in-law disagreed; he charged him in the Police Court with the theft

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LAWRIE, A.C.J.

of the deed of donation; and finally, nine years and nine months after his wife's death, he brought this action for a declaration of his title as one of his deceased wife's heirs to one-half of the premises, and prayed for a partition, allotting to his father-in-law one-fourth and to his brother-in-law the remaining one-fourth.

The latter part of his action cannot be approved: it has often been held by this Court that a partition suit should not be brought by a man not in possession, whose title is disputed.

As for the prayer for declaration of title, the action was brought within ten years of the time when the plaintiff's cause of action arose, that is, within ten years of his wife's death; the possession of the first defendant, however undisturbed, however distinctly adverse, had not lasted quite long enough to entitle to the benefit of the Prescription Ordinance.

I am for affirming the declaration of the plaintiff's title to half, with costs.

WITHERS, J., agreed.