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SINCHI APPU *v.* WIJEGUNASEKERA.

1902.
July 24, 25, and Sept. 17

D. C., Negombo, 4,232.

Partition—Ordinance No. 10 of 1863—Action for partition by plaintiff who has never had possession.

A person claiming to be the owner of an undivided share of a land, and to be therefore entitled to possession of it, is competent to maintain an action to have that land partitioned, although neither he nor his predecessor has had possession, and although the defendants wholly deny his title.

Where such an action is brought in good faith, its failure ought not to render the plaintiff liable to be cast in double costs under section 4 of the Ordinance No. 10 of 1897.

THE plaintiff claimed one-third share of the land called Ketakellagahawatta, and prayed to have it partitioned from the rest of the land. The defendants denied the title of the plaintiff to any share in it, and claimed the whole of the said land by right of purchase from one Mudalihamy.

After evidence heard, the District Judge found that the one-third share claimed by the plaintiff belonged to one Resohamy by inheritance from her parents Mudalihamy and Ransohamy; that neither Resohamy nor her vendees ever had any possession of it; that the plaintiff, who deduced title from Resohamy's vendees, did not himself obtain possession of the land; that the defendants did not acquire a title against Resohamy or her privies in title by adverse possession; and that neither the plaintiff nor his predecessors in title ever possessed the land in common with the defendants.

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The District Judge further held that the plaintiff's proper remedy was an action for declaration of title, and not a suit for partition. He was of opinion that this suit was instituted by the plaintiff to escape the payment of stamp duty, and that as he had abused the privilege granted by the Ordinance No. 10 of 1897, he should pay to the Crown double the amount of stamp duty payable in this case (Ordinance No. 10 of 1897, section 4).

He then declared plaintiff to be entitled to one-third of the land described in the plaint, but not to any share of the buildings thereon, inasmuch as they were built by the first defendant, and the District Judge directed the land to be partitioned accordingly.

The plaintiff appealed.

The case, coming on for argument before Moncreiff, A.C.J., and Wendt, J., on the 24th July, 1902, was ordered to be listed the next day before the Full Court, in view of conflicting decisions on the question raised by counsel.

On the 25th July the case was heard by Moncreiff, A.C.J., Wendt, J., and Middleton, J.

E. W. Jayawardene, for defendants, appellants.

H. J. C. Pereira, for plaintiff, respondent.

The following cases were referred to in the argument:—C. R. Negombo, 3,695. decided 31st May, 1897 (unreported); D. C., Colombo, 12,901, 4th July, 1900; *Perera v. Perera (2 N. L. R. 370)*; *Silva v. Paulu (4 N. L. R. 174)*; *Caralasingam v. Velupillai (2 Browne 103)*; *Fernando v. Appuhamy (2 Browne 214)*; *Koch's Reports 5;* D. C., Colombo, 12,315, 14th October, 1899; *Buller v. Koelman (Ram. 1848, p. 143)*; *Fernando v. Mohamadu Saibo (3 N. L. R. 321)*.

Cur. adv. vult.

17th September, 1902. MONCREIFF, A.C.J.—

I have had the advantage of reading the judgments of my brothers in this case, which deal fully with the history and merits of the action. I agree with their opinion, and concur in the terms of the order which they suggest as proper to be made on this appeal. I shall simply refer to the subject in respect of which the case was referred to the Full Court.

While granting a partition decree and allotting to the plaintiff the extent of the land he claims, the Judge has ordered him to pay double stamp duty, on the ground that he has committed an abuse of the Partition Ordinance (within the meaning of section 4 of No. 10 of 1897) by bringing a partition action when his proper remedy was an action for declaration of title.

It has been again argued that a partition suit can only be maintained by a plaintiff who is in possession, or whose title is not disputed. In this case the plaintiff had no possession, either by himself or those through whom he claimed, for at least twenty years; he had a good title, but it was disputed; and because it was disputed by the first defendant, who should not have disputed it, the plaintiff, forsooth, has no remedy by partition action. Why so? We have asked the appellant's counsel for a reason, but he could give none. He referred us to a series of well-known decisions, which, with more or less inconsistency, favour the view for which he contends, but in none of those decisions did the Judges who took part in them offer either authority or reason for their opinion. I am not aware of any authority or reason for the law laid down in these decisions, but I am aware of certain provisions in the Partition Ordinance which seem to me to be utterly destructive of it.

I thought this conception was dead, but it dies hard; and it seems that a Full Court decision is necessary to sanctify its dissolution. I can only think that the jurisprudence referred to was a sort of tradition, filtering down from the Partition provisions of the Wills (Landed Property) Ordinance (No. 21 of 1844) and the Roman-Dutch Law. The matter is made clear in my brother Wendt's judgment. Under that Ordinance, partition, as it seems, could only proceed between persons who were admittedly co-owners, or who had legally established their title. The Court could not, and did not, investigate title. These provisions, being found inconvenient and in some respects injurious to the parties interested, were repealed by Ordinance No. 11 of 1852, when, I suppose, parties were remitted to such rights as they had at Common Law.

Then came the Partition Ordinance, No. 10 of 1863, which no doubt a plaintiff should not use for the purpose of getting a declaration of title, but which enabled him—whether in possession or out of possession—to ask for what is practically a declaration of title, provided that he also asks for partition. Here we are not considering the case of a plaintiff who sets up a bogus claim to title, but that of a plaintiff who had a good title, and has made it good. The learned Judge thinks that his action was brought merely to obtain a declaration of title. What justification is there for this? The man asked for partition, and that is all that is required by the present Partition Ordinance; when he does that, he is at liberty, and he is obliged, to prove his title.

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The preamble of the Ordinance certainly speaks of land "held" in common; but the word—whatever it may mean—cannot contradict the plain sense of the text.

The 2nd section, which confers the right to compel a partition or sale, gives such right, "when any landed property shall belong to two or more owners," to "one or more of such owners." There is nothing in this section to indicate an intention to make possession, or the admission of such "ownership," a condition precedent to the exercise of the right conferred. It is only required that the parties shall be "owners" to whom the land "belongs" in common.

The 4th section provides for the hearing of evidence with a view to the proof of the plaintiff's title, and the title of the other parties. It also provides for this very case. When the defendants dispute the plaintiff's title, the Judge is to examine the titles of all parties interested, and decree partition or sale, as he thinks fit. Nothing could be more comprehensive. There is not a word to suggest the exclusion of an owner not in possession.

I am of opinion that the Judge's order on this matter was wrong, and that it should be varied as explained in the judgments of my brothers.

WENDT, J.—

This case came on before the Acting Chief Justice and myself on the 24th July, 1902, when it was found that it involved the vexed question as to how far an admission of some interest in the plaintiff, and how far possession by virtue of such interest, is necessary to the maintenance of a partition suit. In view of the conflicting decisions upon this point, we acceded to the suggestion of counsel that the matter should be brought up before the Full Court, and the case was accordingly re-argued next day.

The facts upon which this question is raised are, briefly, as follows:—The land which is the subject of this action is about 3 acres in extent, and represents a fourth part of a larger extent of land, which admittedly belonged to one Samel Appu, and it was in 1873 donated by him to Tikirihamy and her daughter Ransohamy and the latter's husband Mudalihamy. The parties are agreed that by this conveyance the husband and wife each took a third of the subject donated. Ransohamy died intestate on 23rd October, 1874, leaving an only child, Resohamy, born on 1st July, 1874, who, owing to the parents having been married in the community of property, inherited from her mother an undivided one-third share of the land. She married on the 8th October, 1891,

and in December, 1893, conveyed her one-third share to plaintiff's brother and sons and son-in-law. This share eventually passed to plaintiff by conveyance dated December, 1900, and he brought the present action in September, 1901. The first defendant (the second being his son) claimed the whole of the two-thirds which had belonged to Ránsohamy and Mudalihamy by virture of a conveyance on sale from the latter dated December, 1879. By arrangement between first defendant and Tikirihamy in April, 1880, the land was divided, allotting to first defendant in respect of his two-thirds an extent of 1 acre 2 roods and 26 perches. The first defendant has had exclusive possession of this extent from that date up to the present time, and the District Judge has found (and this finding is not contested) that neither plaintiff nor any of his predecessors in title after Ransohamy and Mudalihamy have had any possession of the land.

The District Judge has held that under these circumstances Mudalihamy's transfer to the first defendant passed only one-third of the land, and that first defendant's adverse possession of the two-thirds does not avail to give him a prescriptive right against Resohamy and the plaintiff as representing her, by reason of Resohamy's having laboured under disability up to within ten years of this action. A partition has been decreed of the extent of 1 acre 2 roods and 26 perches, allotting one-half to the plaintiff and the other half to the defendants, with all the buildings which were erected by them.

By the Roman-Dutch Law, where property was owned in undivided shares, an action for partition lay at the instance of any one of the owners (*actio communi dividundo*), and it was immaterial whether all or none or only one of them was in possession (*Voet X., 3, 1*). It was immaterial whether they owned the land under the same or under different titles, and among the requisites for the maintenance of such an action I do not find it stated that plaintiff's right to some share at least should be admitted by the defendants, and this, although in treating of the analogous *actio familiæ erciscundæ*, which was allowed to one heir against his co-heirs for the division of an inheritance (*Voet X, 2, 9: Sampson's Translation, p. 362*), states that if the plaintiff's heirship was denied, but he was in possession, the Judge had to try the question whether he was an heir or not, whereas if he was out of possession, he might by exception be compelled first to bring the action styled *hereditatis petitio* to establish his right.

Under this law, as the Common Law of Ceylon, actions for partition were instituted and decided (see *Abesekere v. Silva, 1838, Morg. Dig. 237; Aberan v. De Silva, 1840, ibid. 302*). Then

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came the Ordinance No. 21 of 1844, and from this point the history of the legislation and of the course of decisions under it is fully and clearly stated by Lawrie, A.C.J., in *Fernando v. Mohamadu Saibo* (*3 N. L. R. 321*), and I need not repeat it here. He quotes from *Buller v. Koelman* (*Ramanathan's Reports, 1848, p. 143*) the opinion of the judges that, in the absence of any express direction in the Ordinance as to how the respective rights or proportions of the owners should be ascertained where they are disputed on these summary applications, the proper course is for such contested claim to be tried in an incidental suit and the proceedings on the application to be stayed, in like manner as directed by the 18th rule of section 1 on claims upon sequestration. The Ordinance of 1863 clearly contemplates the investigation of titles by the Court, which the older Ordinance did not, and expressly directs that such investigation shall be " in the same cause." It says that, " if the defendants shall appear and dispute the title of the plaintiffs, or shall claim larger shares or interests than the plaintiffs have stated to belong to them," the Court shall proceed to determine the dispute. These words contemplate not merely an adjustment of the proportions in which the land is owned, but a determination as to whether plaintiff has any title at all, if that is disputed by the defendants. The Ordinance says not a word as to possession.

This being the scope of the Ordinance, I am inclined to think that those decisions, which held it to be a fatal objection to a partition suit that plaintiff's co-ownership with defendants was disputed, proceeded upon some revival (on grounds of convenience perhaps) of the practice which prevailed under the Ordinance of 1844. It must be noted that even that old practice did not justify the dismissal of the partition action, but merely a stay of proceedings in it until declaration of title was obtained in an incidental action.

The earliest of those decisions which have been cited to us is that of Lawrie, A.C.J., on 31st May, 1897, in an unreported case, C. R., Negombo, 3,695, where he said: " This Court has, in many judgments, laid down that it is a misuse of the Ordinance to make title by a partition action and decree. The Partition Ordinance ought to be used only when the relation of joint owners admittedly exists between the plaintiff and those whom he calls into Court. It is proper to settle by partition suit the extent of the co-owners' shares and to separate them. Such a suit should not be brought against those who dispute that there is a co-ownership."

This was followed by *Perera v. Perera* (*2 N. L. R. 370*), where plaintiff's title was denied *in toto*, but was upheld by the District

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Judge. Whether he decreed a partition is not stated in the report, but Lawrie, A.C.J., affirmed the declaration of plaintiff's title, observing in the course of his judgment, " the latter part of the 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." Withers, J., concurred in this judgment, without adding any reasons of his own. None of the many decisions referred to by Lawrie, A.C.J., have been cited to us, and I do not myself remember any. I have looked through my notes of cases decided during my practice at the Bar and have not been successful in tracing any. On the other hand, I have found one reported case, D. C., Kalutara 26,747, (*Grenier, 1874, p. 48*), where plaintiff was out of possession and defendant claimed the whole land, and yet no objection was taken to the plaintiff's right to sue, and he recovered judgment.

In *Nona Baba v. Namohamy* (*3 N. L. R. 12*) the District Judge had dismissed the action altogether, holding that plaintiff had no title, and Withers, J., thought it was a sufficient ground for supporting the dismissal that the action was an abuse of the Partition Ordinance. He added that the primary object of partition proceedings was not to try and determine contested questions of title. Partition proceedings were really meant for those whose shares in the land were admitted at least to some extent. The contest as to title should first be settled in an appropriate action, and plaintiff might then, if successful, initiate partition proceedings. He said nothing as to the necessity for possession, and it does not appear from the report whether the plaintiff was or was not in possession.

In *Silva v. Paulu* (*4 N. L. R. 174*) Lawrie, J., said he was doubtful of the soundness of his ruling in *Perera v. Perera*, that an action for partition could not be brought by a party not in possession whose title was disputed. He doubted whether it was necessary to aver or prove that he was in possession. It was not necessary that his title be admitted. He added that the circumstances of the case of *Perera v. Perera* were peculiar.

Caralasingam v. Velupillai (*2 Browne 103*) was decided by Withers, J., in whose judgment Bonser, C.J., concurred. The District Judge relying upon *Nona Baba v. Namohamy* had dismissed the plaintiff's action altogether, because on the pleadings some of the defendants had denied his title. This Court sent the case back for the examination of the parties, Withers, J., pointing out that if the judge was then satisfied " that the plaintiff had no ground for asserting co-ownership, and that these proceedings were taken merely to settle disputed contests about

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title to shares which the plaintiff had never actually enjoyed," he would be right to dismiss the action, but otherwise allow it to proceed. I do not know what exactly was intended by the expression " ground for asserting co-ownership," but if it meant title to a share of the land, it is conceded plaintiff could not succeed without it. As to plaintiff never having actually enjoyed the share he claims, does it mean that possession by a predecessor in title is not sufficient? If a predecessor's possession is sufficient, how far back would a plaintiff be permitted to go ? In the present case plaintiff's predecessor two steps removed, viz., Ransohamy, was admittedly the owner and in possession up to her death in 1874. Is that title and possession not sufficient ? Suppose Resohamy (Ransohamy's daughter and sole heiress) were bringing this action, must she fail because during her infancy defendant took, and has since kept, possession adversely to her ? Or, again, assuming plaintiff admittedly once had title by deed, but for over ten years has been out of possession, would defendant's mere assertion of a prescriptive right throw plaintiff out of Court ?

The next case is D. C., Galle, 5,137, (*Koch*, 5), where also the District Judge had dismissed the action on the authority of *Nona Baba v. Namohamy*, because defendant denied plaintiff's title. It is not stated whether plaintiff was in possession. Bonser, C.J. (Lawrie, J., concurring), sent the case back for trial.

" It seems to me," he said, " that the District Judge has assumed that the case of *Nona Baba v. Namohamy* laid down a general rule binding in every case whereas it is clear from the report that the remarks of the learned judge were directed to the facts of that particular case. He did no intend to lay down the general proposition that, whenever a defendant in a partition suit disputes the plaintiff's title, the case should be dismissed, for that is contrary to section 4 of the Partition Ordinance ..... But I entirely agree in the remarks in the case to which I have referred as to the impropriety of making partition suits a substitute for actions *rei vindicatio*." I have sent for and examined the record of this action. The plaintiffs in their plaint, which was filed on 27th July, 1898, allotted to the twenty-fourth defendant an undivided one-twelfth of the land, as purchased by deed dated 4th March, 1896. The twenty-fourth defendant, who alone contested the action, denied altogether the right of the plaintiffs and the other defendants, and claimed the whole land for himself exclusively, alleging that he had his predecessors in title had for over ten years possessed it adversely to plaintiffs and the other defendants. The deed of 4th March, 1896, was a conveyance of the entire land. The District Judge took no evidence, but after hearing

parties dismissed the action on the authority of *Nona Baba v. Namohamy*. When, therefore, the case came before Bonser, C.J., and Lawrie, J., it was one in which both plaintiffs' title and possession were disputed, and therefore one in which the plaintiffs ought to have been referred to a *rei vindicatio* action, if that is the only form of action which is open to a man who is out of possession, and whose title is wholly denied, and yet this Court sent the case back for a trial as a partition action. (I observe that after a full trial the plaintiffs' action was in August, 1900, dismissed with costs, and an appeal against the dismissal is now pending in this Court.)

The next case in order of date is that of *Fernando v. Mohamadu Saibo* (*3 N. L. R. 321*). Plaintiffs claimed three-fourths of the land, and, allotting the remaining fourth to defendants, complained of defendants having some time before taken possession of the entirety and excluded plaintiffs. The prayer was for declaration of title and partition. Defendants claimed the whole land, and took the objection that, as plaintiffs were out of possession, they must first establish their title in a separate action. The District Judge, relying on *Perera v. Perera*, rejected the prayer for partition, and ordered that the action do proceed as one seeking merely a declaration of title. The Supreme Court set aside this order, and directed that the action be proceeded with as under the Partition Ordinance. Lawrie, J., after going into the history of the question, reconsidered his opinion in *Perera v. Perera*, and laid it down, after full consideration of the Ordinance, that neither the fact that the title either of plaintiff or defendant is denied, nor the fact that neither plaintiff nor defendant is in possession, is a good objection to the maintenance of a partition action. It is clear (though the contrary was argued before us) that he meant that even the concurrence of both these facts would not put the plaintiff out of Court, for in that action plaintiffs' title was denied, and they were also out of possession. Withers, J., made a distinction on the latter point, based on the fact that defendants themselves had ousted plaintiffs. He also thought *Perera v. Perera* was rightly decided, because there neither plaintiff nor his immediate predecessor in title had ever enjoyed possession; but he did not endorse, he rather threw doubt upon the correctness of, the dictum of Lawrie, A.C.J., in that case, to the effect that "it had often been held by this Court that a partition suit should not be brought by a man out of possession whose title is disputed."

In D. C., Colombo, 12,901 (decided by Bonser, C.J., and Moncreiff, J., on 4th July, 1900), plaintiff claimed title by

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inheritance from his father, who, being in joint possession with defendant, had died 2½ years before the action, and alleged that after that event he and his brothers had entered into possession, but after a month were ousted by defendant. The District Judge dismissed the action, apparently on the authority of one of the cases I have referred to, but this Court sent the case back for further inquiry, Bonser, C.J., intimating that, if plaintiff after his father's death had no possession jointly with defendant, the action ought to be dismissed, and the same result should follow if he had had possession, but had thereafter been forcibly excluded by defendant, thus holding in effect that if plaintiff was out of possession at the date of action (no matter how he lost possession) he could not sue for a partition. The Chief Justice apparently did not agree with Withers, J., in the view that for defendant to take advantage of his own wrongful act of ouster was an "audacious defence." I read the present Acting Chief Justice's judgment in that case to lay down that, if the action was brought for the simple object of partitioning the land, it ought to proceed, although it involved an inquiry into title, and he considered it of considerable importance to know whether plaintiff had been in possession and then been ousted two years ago by defendant as he alleged.

In *Fernando v. Appuhamy* (*2 Browne's Report's 214*), the latest of the cases cited to us, plaintiff's title was denied by some of the defendants, and (as the District Judge found) he had not himself had any possession. His action was dismissed, but the Acting Chief Justice and myself sitting in appeal sent the case back for trial. In my judgment I mentioned *Fernando v. Mohamadu Saibo* as establishing a different view of the Partition Ordinance from that taken in the earlier cases, but the point principally dealt with in appeal was, whether the District Judge was entitled to take account of the motives which influenced the plaintiff in resorting to the Ordinance, and we held that he was not, and that plaintiff should succeed if he showed that he had title to some share and was therefore a co-owner.

The effect of these decisions, which date from 1897, may be summed up thus: Lawrie, J., at first held the opinion that if plaintiff's title was disputed, he could not sue for partition, and Withers, J., decided that plaintiff's title must be admitted at least to some extent, and also that he cannot rely on a contested title if he had never possessed. Later, Withers, J., appears to have thought (*3 N. L. R. 324*) that the possession of a predecessor in title would be sufficient; and Lawrie, J., considered that neither denial of title nor absence of possession was an obstacle to the

maintenance of an action. Bonser, C.J. (Lawrie, J., concurring), thought that there was no general rule that denial of plaintiff's title put him out of Court, but that partition suits should not be made a substitute for *rei vindicatio;* and, later, that if plaintiff was out of possession, even though he lost possession by defendants ousting him shortly before action, he must fail, thus differing from the view of Withers, J., who characterized the last as an " audacious defence " (*3 N. L. R. 324*). In this state of judicial opinion on the construction of the Ordinance, I think we are free to hold, and ought to hold, that the effect of the plain words of the enactment is that a person claiming to be owner of an undivided share of land, and to be therefore entitled to possession of it, is competent to maintain an action to have that land partitioned, although neither he nor his predecessor in title has had possession, and although the defendants wholly deny his title. In the present case, however, as I have pointed out already, possession of the share plaintiff claimed by a predecessor in title is admitted.

As we think the present action maintainable, it follows that the plaintiff who has succeeded in it ought not to be cast in double stamp costs under section 4 of the Ordinance of 1897. Plaintiff's appeal will therefore succeed. The District Judge held that in the absence of possession and also of any admission of title, plaintiff's proper remedy was an action for declaration of title, and that he had brought the present action merely to escape the payment of stamp duty. Yet the District Judge illogically upheld plaintiff's title and made a decree for partition, and then ordered him to pay double stamp costs. I think we ought to follow the construction of section 4 of that Ordinance, which was adopted by Bonser, C.J., and Lawrie, J., in *De Saram v. Perera* (unreported, decided on 17th October, 1899), and hold that where the action is brought in good faith, even its failure ought not to render the plaintiff liable to that penalty.

Upon the evidence, first defendant is not solely entitled to a moiety, inasmuch as his deceased wife left two children (viz., second defendant and Henry Martin), who inherited her one-fourth share. I agree that the case should go back for the District Judge to ascertain and deal with the minor's interests. As to the buildings, no doubt the defendants are solely entitled to them as improvements, but the title to them must go with the title to the soil.

In the partition, the Commissioner making it will, if possible, so divide the land that the buildings may fall in the defendant's moiety, but if that be not possible, some other mode of division

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will be adopted which will give defendants the entire value of the buildings. The general costs of partition (not merely the surveyor's fees) will be borne *pro ratâ*. The defendants will pay the costs of the contention in the District Court and the costs of this appeal.

MIDDLETON, J.—

This was an action claiming partition of a piece of land called Ketakellagahawatta, and the District Judge awarded half of this land to the plaintiff and half to the defendant.

The decision on the facts of the case is, in my opinion, correct, except that from the defendant's evidence it appears that his wife, since deceased, of whom he is the administrator, re-purchased the property in question in 1892, and that she left a minor child.

The case should be referred back to the District Judge for the amendment of the partition order, so as to show the respective shares of the defendant and his child, if this be so.

There were, however, other points raised by the appellant, the first being, whether possession was necessary to found a right to make a claim for partition? (2) Can a person not having an admitted claim bring a partition action?

A great number of cases were quoted by appellant's counsel to support the affirmative of the first question, and shewing that Mr. Justice Withers always adhered to his opinion that possession was necessary; that Mr. Justice Lawrie originally agreed with Mr. Justice Withers opinion, but subsequently changed his views; and finally, that my Lord and my brother Wendt have confirmed Mr. Justic Lawrie's retractation in *3 N. L. R. 312* by their judgment reported in *2 Browne 214*.

So far as I can ascertain from a perusal of the cases relied upon by Mr. Jayawardene, there is no attempt to show any reason or to refer to any authority to support the proposition that possession is necessary to found a right to make a claim for partition. All that is said is that it has been often so held.

In the Ordinance of 1863 there is nothing to show that possession is a condition precedent to the institution of a partition action. On the other hand, there is the authority of Burge (*vol. II., p. 676*), derived from the Digest, "that the person to whom real property belongs in common with another *qui rem pro indiviso communem habent*, whether they have acquired it by succession, gift, purchase, or any other title, may compel a partition. It is not material whether his *dominium* be *directum* or *utile*, or whether one or more, or whether all the joint owners *be or be not in possession* of the property."

From this it is clear that inheritance cases are not the only ones alluded to by Burge, as Mr. Jayawardene suggests.

As regards the second question, it is only necessary, I think, to look at section 4 of the Partition Ordinance of 1863 to see that that Ordinance evidently contemplated the proof, disproof, and examination of the title of parties claiming a partition, and therefore that persons having no admitted claim might bring partition actions.

The contrary conclusion might have been derived from the Ordinance No. 21 of 1844, which, in section 10 and the following section only, appears to consider the case of admitted joint owners or owners in common.

The theory that underlies the provisions in the Ordinance of 1863 probably is that it is expedient to avoid multiplicity of suits.

As regards the Stamp Act of 1897, it appears to me that the penalty enforceable under section 4 would be properly applicable to some cases where a plaintiff failed to establish his title in a partition action instituted by him, as this might be an endeavour to improperly take advantage of the exemption from stamp duty. To bring a partition action on a non-admitted title is not, however, in my view, an endeavour to improperly take advantage of the exemption from stamp duty, as the Ordinance of 1863 contemplates such claims.

In my opinion, therefore, a person not having an admitted claim can bring a partition action, and possession is not necessary to found a right to make a claim for partition; nor should the Court enforce the payment of double stamp duty where a plaintiff in an action for partition relies on a title which is denied, and has to be, and is, proved.

I would therefore affirm the judgment of the District Court so far as the merits of the action are concerned, save, as I have before mentioned, as regards the amendment of the decree of partition; but I would set aside the order for payment of double stamp duty.