1933 *Present :* **Dalton S.P.J. and Poyser J.**

CHARLES APPU *v.* DIAS ABEYSINGHE.

236—D. C. Galle, 30,093.

Partition—Property held subject to life-interest—Right of holder to bring partition action.

A person who is entitled to the dominion only of an undivided share of land, the usufruct being vested in another, is not entitled to bring a partition action.

APPEAL from a judgment of the District Judge of Galle.

Soertsz, K.C., for plaintiff, appellant.

C. V. Ranawake, for defendants, respondents.

Cur. adv. vult.

December 1, 1933. DALTON S.P.J.—

In this partition action plaintiff sought to partition the land described in the plaint between himself and the second, third and fourth defendants. The first defendant was made a party as she had a life-interest in the property.

[1] *(1932) 34 N. L. R. 252.*

It is conceded that one F. E. Abeyesundere was at one time entitled to the whole of the land sought to be partitioned. He by deed P 5 of September 19, 1911, conveyed by way of gift the land to the second, third, and fourth defendants, subject to the right of their mother the first defendant " to take during her lifetime, the rents, profits, and issues of the said premises to and for her own use and benefit ". By deed P 6 of 1926, the third defendant sold " an undivided one-fourth of an acre " of his interest in the property to plaintiff. The description of the interest sold on P 6 is of course a most unhappy one, but it is not in the circumstances here material.

The trial Judge dismissed plaintiff's action on the ground that no right has vested in the plaintiff to enter into possession of the property purchased by him as the first defendant is still alive, and he holds that the decisions in *Carry v. Carry*[1] and *Kuda Etana v. Ran Etana*[2] apply to the facts of this case. I am not able to agree with this reasoning, although I have come to the conclusion, with some hesitation I must admit, that the appeal must be dismissed. No case has been cited to us in which the exact point arising here has arisen before.

The first matter for consideration here is the nature of the first defendant's life-interest. Is it a life-interest created by way of *fidei commissum* or by way of usufruct ? If it is the former, the matter is governed by authority. Having regard to the terms of P 5 there is no doubt whatever about the nature of the interest. The property is immediately vested by the deed in the second, third, and fourth defendants, the life-interest created in favour of their mother being by way of usufruct. The *dominium* therefore vests in the donees, and by P 6 the interest of the third defendant vested, by virtue of that conveyance, in the plaintiff. The case of *Carry v. Carry* (*supra*) is one where the deed in question there created a *fidei commissum*. In that case the fideicommissary took no immediate interest, since the *dominium* is vested in the fiduciary. Nevertheless, the mother, the fiduciary, and one of the fideicommissary heirs instituted a partition action against the other fideicommissary heirs. The Court held that the action could not be maintained since the property did not belong in common to the mother and her children.

The case of *Kuda Etana v. Ran Etana* (*supra*) is one dealing with the life-interest of a Kandyan widow in acquired property. No question of the application of Kandyan law arises in the case before us, and the learned Judges in that case in fact point out that there is no analogy between the Roman-Dutch law relating to the rights of fiduciaries, and I might add the rights of usufructuaries, and the Kandyan law. In any case, however if the presumption is that acquired property was purchased by the savings and exertion of the wife as much as by those of the husband, it is difficult to see how the nature of the right of the widow in acquired property can be akin to a usufruct.

The plaintiff then has a vested interest in the property, which interest he can for example mortgage, sell, or dispose of by will, and in that sense can possess and enjoy. He certainly has a " present interest "of a kind (see *2 Burge 678*), although the first defendant during her lifetime is

[1] *4 C. W. R. 50.* [2] *15 N. L. R. 154.*

entitled to all the rents, profits, and issues of a usufructuary. Whether however he has such a "present interest" as to entitle him to prosecute this remedy is, I think, doubtful, although it may well be that the plaintiff, if he can get the property belonging in common to him and others (subject to the usufruct of course) partitioned so that his interest thereafter is in a specific portion only, his title being also fortified by a partition decree, his interest may be still more valuable to him, expecially for such a purpose as raising money on mortgage.

In such a case as this, is there anything in the Partition Ordinance repugnant to the plaintiff instituting a partition action? The land is "held in common", to use the words in the preamble, and "belong in common", to use the words in section 2 of the Partition Ordinance, as between him and the second, third, and fourth defendants subject to a usufruct. The words "held in common" have on occasion, it would seem, been construed to mean "possessed in common", and we have also been referred in answer to this question to the decision in *Evans v. Bagshaw* [1] We have been asked to apply the rule followed in the case here. It was there held by the House of Lords that in England a tenant in common in reversion cannot maintain a suit for partition. The rule is stated to be not merely technical but to be founded on good sense in not allowing the reversioner to disturb the existing state of things. The term "reversion" although it is sometimes loosely used, denotes an estate vested in interest although not in possession, as opposed to the term "remainder", and therefore in that respect a reversioner is in the same position as plaintiff in whom the *dominium* is vested. The rule followed in this English decision is referred to by Lascelles C. J., with approval in *Kuda Etana v. Ran Etana* (*supra*) although he does not decide the matter arising there by the help of this decision. It is further referred to by the late Mr. Justice A. St. V. Jayewardene in his *Law of Partition* at p. 44, where he seems to suggest that the reason for the rule followed there exists under the provisions of the Partition Ordinance. The use in Ceylon of terms taken from the English law of real property certainly at times is apt to cause confusion; whilst fideicommissaries and remainder-men may be put in the same category, in so far as they have no "present interest", I am doubtful if same can be said of a reversioner. He would have no more or no less interest than a person in the position of plaintiff in this case. To his rights I have already referred. However, the trend of opinion would appear to support the conclusion that the effect of the Partition Ordinance is that, to maintain a partition action, a person must be the owner or claim to be the owner of an undivided share, and also be in possession or be entitled to be or have a claim to be in possession of that share. I have therefore come to the conclusion that the plaintiff, so long as he owns only the bare *dominium* of the property or a share in it without any right to the usufruct over the property is not entitled to bring a partition action.

The appeal must therefore be dismissed with costs.

POYSER J.—I agree.

Appeal dismissed.

[1] (1870) *L. R. 5 Ch. 340.*