Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Guy v. *Guy, from Canada; delivered 6th December*, 1866.

Present:

SIR WILLIAM ERLE.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
LORD JUSTICE CAIRNS.
SIR RICHARD T. KINDERSLEY.

THIS is an action for the rescission of a contract of partition, in which the primary Court of Canada having made a decree annulling the partition, the Court of Queen's Bench, upon appeal, have quashed that decree; and the propriety of that sentence of the Court of Queen's Bench is now before us for decision.

The contract of partition was between the Appellant and his sister and brother, who are the Respondents, and the first question which their Lordships have had to consider is, What was the interest which that brother and sister took in the property which was the subject of partition?

Now, this interest was derived under the will of the father, which is printed in the 9th page of the Appendix; and it has been argued before us, on behalf of the Appellant, that the effect of that will was to give the whole succession of the father in the first place to his widow, burdened with the obligation on her part to hand it over to the children after her death, as substitutes, with a further obligation on the part of the children to hand it over to a class to be ascertained at a future period, which class were also to be substitutes; and it was argued that inasmuch as the children were substitutes under that will, and during the incumbency (if I may use the expression) of the widow, the first taker, they had no power of dis-

posing of or dividing the property, and that therefore the partition was null and void.

Their Lordships cannot adopt that construction of the Will. They consider that the expressions in the will, and more particularly the expressions in the 4th and the 6th clauses of the Will (the 4th clause speaking distinctly of the extinction of the usufruct in the widow, and the 6th clause providing that after the death of the widow and of the children the usufruct should return and become re-united and consolidated with the *corpus* of the property) are clearly indicative of this, that the intention was to create in the widow, and to create in the children successively usufructs, and usufructs only, and that the *corpus* of the property is not affected by the Will until a period which has not yet arrived—the death of the survivor of the children.

But then it was contended, and more particularly by Mr. Wickens in his able argument, that even if this were a case in which the children were usufructuaries, yet that at the time of the partition they were usufructuaries whose possession had not actually accrued, and that until the time of possession they could not bind their interest by way of contract or by way of partition.

No authority has been cited to their Lordships in support of that position.

The learned Judges of the Court of Queen's Bench have held that the actual possession is not necessary to make a binding partition between usufructuaries so situated; and their Lordships would be slow to hold, in the absence of express authority, that there was not the power in usufructuaries, even before their time of possession had arrived, to bind their interest by way of alienation, or, at all events, to determine, by a contract otherwise valid, as to the manner in which they should enjoy the property, by metes and bounds, when the time of possession should arrive.

Their Lordships, therefore, cannot accede to that argument on behalf of the Appellant.

If that be so, it disposes of the objections which were made, and which were more relied upon in the Court of Queen's Bench in the Colony than they have been before us, viz. that this partition affected the rights of third parties, and that inas-

much as no curator was appointed, and no valuation made, those third parties, viz. the grandchildren who are ultimately to take the property, would not be bound, and the partition could not stand.

Their Lordships do not so understand the contract of partition in this case. They consider the partition, on the face of it, takes notice that that which was the subject of division was the usufruct, and the usufruct only; and that there was no intention manifested on the face of the deed to affect, and, in point of fact, no act of partition could could have been made which would affect, in any way, the interests of those in remainder.

There remains to consider the objection which was still further urged on the part of the Appellant, with regard to what was termed the inequality of value in the lots that were divided. It was said that the lot which fell to the Appellant was less in value by a considerable amount than the lot which fell to the Respondent; that there was lesion, as against the Appellant, in respect of that inequality of value; and upon that ground of lesion this partition should be set aside.

Now it is to be observed in the first place, that the learned Judges in the Colony—the Judges both of the Primary Court and the Appellate Court—have given no weight to this argument on the ground of lesion from inequality of value. It is further to be observed, that the *onus* of proving inequality of value, if inequality there were, rests entirely on the Appellant who asserts it.

Their Lordships also must take notice that in looking into the evidence on this point, the witnesses have not, in any case that their Lordships can see, addressed themselves to that which was the real point, viz. the relative value of the usufruct to the different children, but have rather addressed themselves to the value of the *corpus* of the various shares.

In addition to this, their Lordships, if it were necessary to decide the point, would be disposed to think that the period at which the question of equality or inequality of value should be determined, would be the period of the contract of partition; but the witnesses in their evidence as to value, none of them, prove the value at the time of

the contract of partition, but speak, with some degree of obscurity, of the value at the time of the succession; and, the greater number of them, of the value at the time of giving their evidence, after the action was brought, when, of course, the question of value would be comparatively unimportant.

Their Lordships, therefore, are of opinion that the Appellant has made out no case with regard to inequality of value.

But, further, their Lordships are by no means prepared to hold that in a contract of this kind, otherwise valid and regular, a renunciation of all right of reclamation, on the ground of inequality of value, is not within the competency of the parties to the contract; and they find that in this contract there is a clear and distinct renunciation of any objection to be made at a future period, on the ground of lesion, from inequality of value.

Their Lordships, therefore, in the result, see nothing to induce them to depart from the decision of the Court of Queen's Bench in the Province, and they will therefore humbly advise Her Majesty to affirm the sentence of that Court, and to dismiss the Appeal with costs.