2, 1957

No. 37 of 1952

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON.

BETWEEN

LLEWELLYN PERERA ABEYAWARDENE (Plaintiff) *Appellant*

(Substituted in the place of Danister Perera Abeyawardene and Geoffrey Perera Abeyawardene both since deceased.)

— AND —

MRS. CARMEN SYLVENE WEST
(Defendant) *Respondent.*

CASE FOR THE APPELLANTS.

RECORD.

1. This is an Appeal from a judgment and decree of the Supreme Court of Ceylon dated the 10th October, 1951, setting aside a judgment and decree of the District Court of Colombo dated the 29th July, 1948, whereby it was held, *inter alia*, that the title to certain land was vested in the Appellants. pp. 108–118, 118–9. pp. 87–99, 99–101.

2. The Appeal involves a number of important questions of Roman-Dutch law relating to *fideicommissa*, and in particular the following:—

(a) whether acceptance of a *fideicommissary* donation must be made by or on behalf of the *fideicommissaries* as well as the *fiduciaries*;*

(b) if the answer to (a) be that acceptance on behalf of the *fideicommissaries* (remaindermen) is generally necessary, but that there is an exception in favour of a "*fideicommissum in favorem familiæ*", what must be the characteristics of a *fideicommissum* in order to obtain the benefit of the exception;

FOOTNOTE.

*The meaning of "*fideicommissary*" and "*fiduciary*" can be gathered from the following statement:—

"By a *fideicommissum* the ownership is vested in the *fiduciary* or middleman, and at his death "or at the time of fulfilment of the condition prescribed by the testator, passes on to the "*fideicommissary* or remainderman."

(*Van Rensburg v. Van Rensburg*, 1937, E.D.L. 59, at p. 73.)

(c) if application to the Court under the Entail and Settlement Ordinance (No. 11 of 1876, now Chapter 54 of the Legislative Enactments) is, or is deemed to be, necessary in order to make a change in the parcels of property donated, who are the proper applicants to take the matter to Court;

(d) whether, if application is made to the Court in order to make a change in the parcels of property donated and an order is made allowing the application, the new parcel is subjected to the old restrictions even if the order of the Court does not say so;

(e) whether in Roman-Dutch law a *bona fide* purchaser for value without notice of land which is subject to a *fidei-commissum* acquires any rights other than a right to compensation for improvements and a *jus retentionis* until this compensation is paid.

p. 15, ll. 28–38. p. 16, l. 5. p. 88, ll. 5–6. p. 91, l. 37. p. 47, ll. 2–12.

3. The land in question in the action, a portion of a larger parcel known as Sirinivasa, consists of about 2 roods and 25 perches situated in the fashionable residential quarter of Colombo known as Cinnamon Gardens. It now has on it two modern well-appointed bungalows admittedly built by the Respondent or her father, Mr. R. L. Pereira, a well known Queen's Counsel in Ceylon. In respect of the cost thus incurred, compensation for improvements in the sum of Rs.59,837/37 was awarded by the trial Judge, and no question now arises as to the right of the Respondent to such compensation.

p. 97, l. 20. p. 98.

4. The early history of the matter was substantially undisputed and is set out in paragraphs 5 to 21 of this Case.

p. 12, ll. 16–19. p. 87, ll. 12–14. p. 129, l. 23. p. 126, ll. 19–20. p. 52, ll. 16–17, l. 23.

5. A different parcel of land known as "The Priory" was in 1883 owned by Siman Fernando (hereinafter called "Siman") and his wife Maria Perera (hereinafter called "Maria") who were married in community of property. Siman and Maria had two sons, Alfred Thomas and James, and three daughters, Isabella who in 1883 was already married to one John Jacob Cooray, Cecilia who was then aged 9, and Jane who was then aged $6\frac{1}{2}$.

p. 161, l. 16. p. 14, ll. 9–10.

Jane later married Edward Danister Perera Abeyawardene and the Appellants are their three sons.

pp. 125–7.

6. By Deed No. 2110 of the 4th October, 1883 (referred to throughout the proceedings as P. 1B) Siman and Maria gifted "The Priory" to Cecilia and Jane in equal undivided shares. The gift was expressed to be subject to the following conditions:—

p. 125, l. 39– p. 126, l. 15.

(a) that Siman during his lifetime should be entitled to the rents and profits;

(b) that after Siman's death Maria should be entitled to one half of the rents and profits, the other half going to the donees;

(c) that the donees should not be entitled to sell, mortgage, lease (except for a term of not more than 4 years) or otherwise alienate or encumber the property;

(d) that neither the property nor the profits thereof should be liable to be sold in execution for any debts;

(e) that, after the donees' death, the property should devolve on their lawful issue;

(f) that in the event of one of the donees dying without lawful issue, her share should go to the other donee subject to the same conditions.

7. Cecilia and Jane both being then minors, acceptance on their behalf was made by their brother-in-law, John Jacob Cooray, and their two brothers, Alfred Thomas and James. p. 126, ll. 16–21.

8. Thirteen years later, on the 16th June, 1896, Cecilia being then 22 and Jane 19½, a petition was presented to the District Court of Colombo under the said Entail and Settlement Ordinance, in Special Case No. 116, by Siman and Maria, the respondents thereto being Cecilia and Jane (the latter represented by her brother James as guardian *ad litem*). The Petition recited that it was not considered desirable or beneficial for Cecilia and Jane to hold "The Priory" in common, that the Petitioners being now in more affluent circumstances were anxious to make better provision for Cecilia and Jane by giving them in lieu of "The Priory" certain other property, namely the said larger parcel of land then known as "Sirinivasa", and that it was proposed to give these properties on the condition that Cecilia and Jane should not sell, mortgage or otherwise alienate the same without the consent of the Petitioners and the survivor of them. pp. 127–138. pp. 129–132. p. 130, ll. 13–22, 33–37. l. 15. l. 33.

9. This Petition was verified by affidavit affirmed by Siman and Maria on the same date, the 16th June, 1896, and minutes of consent by Cecilia, Jane and James of the same date were also recorded. pp. 135–8. p. 133, ll. 22–27. pp. 140–2.

10. On this Petition an Order of the said District Court of Colombo was made on the 18th June, 1896, whereby it was ordered and decreed that:— p. 134, l. 28.

"upon the petitioners transferring and assigning unto "(Cecilia and Jane) the allotments of land . . . . known as "'Sirinivasa' . . . . subject to the conditions following, that is to "say: that they (Cecilia and Jane) shall not sell mortgage or "otherwise alienate the said premises except with the consent of "the petitioners or the survivor of them and that (Siman) shall "during his lifetime be entitled to make, use, enjoy and appro- "priate to his own use the rents issues and profits of the said "premises and that after his death and in the event of (Maria) "surviving him she shall during her lifetime be entitled to take p. 134, l. 31– p. 135, l. 15.

"use enjoy and appropriate to her own use one just half of the "said rents, issues and profits, the other half being taken, used, "enjoyed and appropriated by (Cecilia and Jane), that (Cecilia, "and James as guardian *ad litem* of Jane) do and they are "hereby authorised and empowered to convey and assign unto "(Siman) the aforesaid lands and premises known as 'The "Priory' absolutely and free from all conditions and restrictions
pp. 125-7. "contained in Deed No. 2110 dated the 4th day of October, 1883, "and that (Cecilia, and James as guardian *ad litem* of Jane) do "and they are hereby empowered and authorised to execute and 10 "deliver the necessary deed of conveyance of the said premises "in favour of (Siman) absolutely and free and clear of all "conditions and restrictions."

p. 134, l. 32–p. 135, l. 14. 11. It is noticeable that the said Order and Decree of the District Court of Colombo, while reserving to Siman and Maria life interests in "Sirinivasa", made no provision for the issue of Cecilia and Jane and did not fetter their power of alienation save to the
pp. 129-131. extent of requiring the consent of Siman and Maria or the survivor of them. (A similar omission is to be found in the Petition.) The situation was, however, as both Courts in Ceylon held, covered (if 20 the proceedings above mentioned were properly instituted) by Section 8 of the said Entail and Settlement Ordinance which provided that "any property taken in exchange for any property "exchanged under the provisions of this Ordinance shall become "subject to the same entail, *fideicommissum*, or settlement, as the "property for which it was given in exchange was subject to at the "time of such exchange."

The provisions of this and other relevant sections of this Ordinance are set out in the Appendix to this Case. 30

pp. 147-151. 12. On the 23rd June, 1896, by Deed No. 1398 (P. 4) Siman and
p. 134, l. 32–p. 135, l. 14. Maria, purporting to act pursuant to the said Order and Decree of the District Court of Colombo, conveyed "Sirinivasa" to Cecilia and Jane, their heirs, executors, administrators and assigns, for ever
p. 149, l. 45–p. 150, l. 4. "subject however to the conditions following: that is to say, namely, "that (Cecilia and Jane) shall not sell, mortgage or otherwise "alienate the said premises except with the consent of (Siman and "Maria) or the survivor of them" and that (Siman and Maria) should have their respective life interests.

pp. 142-7. 13. On the same day, the 23rd June, 1896, by Deed No. 1399 40 (P. 3), the appropriate conveyance of "The Priory" to Siman was executed by Cecilia and by James as guardian *ad litem* of Jane.

pp. 152-4. 14. On the same day, the 23rd June, 1896, by Deed No. 1401 (P. 5) Cecilia, in consideration of Rs. 45,000/–, purported to convey her undivided moiety of "Sirinivasa" to Siman, his heirs, executors, administrators and assigns absolutely.

15. On the basis that Siman and Jane were now the co-owners of the whole of "Sirinivasa", they proceeded four years later, namely on the 30th June, 1900, to partition the property by Deed No. 2180 (P. 6), Siman taking the western portion, described as Lots D and E, and Jane the eastern portion described as Lots A, B and C and more specifically designated in the Third Schedule to the Appellants' Plaint in the action. pp. 156–161.

16. Five years after that, namely on the 30th November, 1905, by Deed No. 3129 (D. 2), Jane, with the concurrence of her husband, in consideration of Rs. 75,000/–, purported to convey her divided moiety of "Sirinivasa" to Siman, his heirs, executors, administrators and assigns absolutely. pp. 161–4.

17. Two years later, namely on the 6th December, 1907, by Deed No. 4218 (D. 3), Siman, purporting to be now the sole owner absolutely of the whole of "Sirinivasa", transferred it to James along with another property for the sum of Rs. 175,000/– of which Rs. 75,000/– was to be paid, the balance being left outstanding on an existing mortgage subject to which the properties were sold. pp. 164–8. p. 165, ll. 16–28.

18. On the 17th March, 1911, James died leaving a Will dated the 8th April, 1909, and a Codicil dated the 10th March, 1910, which were duly proved before the District Court of Colombo on the 3rd August, 1911. p. 176, l. 28. pp. 168–172. pp. 173–4. pp. 174–5.

19. Under James's said Will a trust known as the Sri Chandrasekera Trust was created, and the trustees of this Trust, on the basis that the whole of "Sirinivasa" had along with the other property mentioned in paragraph 17 hereof validly passed to James, had the whole of the said properties conveyed to them by the executors of the Will, by Deed No. 1382 of the 12th July 1924. The trustees then called for tenders for the purchase of the northern portion amounting in all to 1 acre, 1 rood and 1/10th perch, and the highest tender was put in by the said Mr. R. L. Pereira, K.C. A conveyance in his favour of that portion was executed by the trustees by Deed No. 290 of the 6th January, 1925, and other portions were similarly conveyed to him by Deed No. 318 of the 23rd March, 1925 and Deed No. 419 of the 19th January, 1926. pp. 168–172. pp. 175–183. pp. 175–180. p. 62, l. 13. p. 91, ll. 19–21. pp. 183–9. pp. 193–9, pp. 199–201.

20. On the 20th April, 1935, by Deed No. 340 R. L. Pereira, K.C. gifted the parcel of land thus purported to be conveyed to him to his daughter, the present Respondent. pp. 206–9.

21. Meanwhile Jane died on the 6th May, 1933, Siman and Maria having predeceased her. She left as her lawful issue the present Appellants. p. 205, l. 10.

22. The Appellants as plaintiffs instituted the proceedings out of which this Appeal arises by Plaint filed on the 9th March, 1943. pp. 12–20.

pp. 21–24. pp. 24–28, 28–33, 33–37. The Respondent as defendant filed her Answer, which was subsequently amended and re-amended.

pp. 38–40. pp. 40–42. The Appellants filed Replication on the 20th April, 1944, and an amended Replication on the 29th October, 1947.

23. The Appellants' contentions, put forward in their pleadings, may be summarised as follows:—

pp. 125–7. (a) Deed No. 2110 of the 4th October, 1883 (P. 1B) created a valid *fideicommissum* of the premises called "The Priory", enuring to the benefit of the lawful issue of Cecilia and Jane as *fideicommissaries*.

pp. 127–138. (b) The result of the proceedings in the District Court of Colombo in 1896 was that the same *fideicommissum* became attached to the substituted property "Sirinivasa".

(c) No dealing with the property by Jane could therefore be effective to revoke, undo, or in any way fetter the *fideicommissary* interest of the Appellants as Jane's lawful issue.

(d) The Appellants are therefor entitled to the half share allotted to Jane on the partition of 1900, which half share comprised the land now in dispute.

24. The Respondent's main contentions, as put forward in her pleadings, may be summarised as follows:—

pp. 125–7. (a) There was no valid acceptance of the said Deed of the 4th October, 1883 (P. 1B), the purported acceptors having no legal power to accept.

pp. 125–7. (b) The said Deed failed, so far as the *fideicommissaries* (i.e., in the events which happened, the now Appellants) were concerned, because there was no acceptance by them or on their behalf.

pp. 127–138. (c) The said proceedings in 1896 obliterated the *fideicommissum*, the authority to transfer "Sirinivasa" being subjected only to a consent from Siman and Maria or the survivor of them.

(d) (inconsistently with (c)) Those proceedings were a nullity, not having been brought by the proper parties.

(e) In any case, the Respondent's predecessor in title acquired the property free from any *fideicommissum* by virtue of having been a *bona fide* purchaser for value without notice of the *fideicommissum*.

Further contentions on her behalf were:—

p. 134, l. 32–p. 135, l. 14. (f) The said Order in the said proceedings in 1896 (see paragraph 10 hereof) was obtained by representations which were false and fraudulent.

(g) The Respondent and her predecessor in title had title by prescription.

(h) If the Respondent had not title to the land she was in any event entitled to compensation for improvements, payable by the Appellants.

25. In 1945 sundry proceedings took place with a view to fixing a date for the trial, but it was not until the 24th June, 1948, that the substantive hearing began. The first step was to frame elaborate Issues, which are set out in full in the Record. Thereafter evidence was given which, apart from producing the relevant deeds, was mainly concerned with the value of the property and of the improvements, matters which are not now material, there being no longer any issue as to the Respondent's right to compensation if the Appellants succeed in this Appeal, nor as to the amount thereof. pp. 43–5. p. 49, l. 1. pp. 49–52.

26. On the 29th July, 1948, the learned District Judge delivered his judgment. The substance of his decision was as follows:— pp. 87–99.

(a) The Deed of the 4th October, 1883, created *prima facie* a valid *fideicommissum:* indeed the contrary had not been argued. p. 87, ll. 20–22. p. 92, ll. 10–13. pp. 125–7.

(b) The acceptance purported to have been given by the brother-in-law and the brothers on behalf of Cecilia and Jane had been ratified by them; on this point the decision of the Supreme Court in *Abeyewardene v. Tyrrell* (1938) 39 N.L.R. 505 (other proceedings brought by the present Appellants in respect of another parcel of the same land, based on the same early history) was binding on him. p. 92, ll. 39–42, l. 20. p. 93, l. 1.

(c) The acceptance by or on behalf of Jane enured for the benefit of the *fideicommissarii* (the now Appellants); the contrary had not been argued, but the decision of the Supreme Court in *Wijetunge v. Rossie* (1946) 47 N.L.R. 361 was authority which settled the matter. p. 92, ll. 22–26.

(d) On the authority again of *Abeyewardene v. Tyrrell*, the *fideicommissum* contained in the Deed of the 4th October, 1883, became attached to "Sirinivasa" as a result of the proceedings in 1896. p. 93, ll. 2–7, 17–25, 35–40. pp. 125–7.

(e) On the authority of the same case, the parties to the 1896 proceedings were the proper parties. p. 93, ll. 8–16.

(f) The Order in the 1896 proceedings was made on the representations contained in the Petition, but there was no evidence of any fraud in the matter. p. 93, ll. 23–31.

(g) Deed No. 2180 of the 30th June, 1900, was effective to pass to Jane the property therein conveyed to her. p. 94, ll. 1–45. pp. 156–161.

(h) Under Roman-Dutch law (as distinct from English law relating to trusts) the title of a *fideicommissary* was valid p. 95, ll. 1–19.

against the whole world and could not be destroyed by the *fiduciary*, so that no legal title to the property could be acquired even on the basis of *bona fide* purchase for value.

p. 95, ll. 33–38. (i) The Appellants acquired title on the death of Jane on the 6th May, 1933, and commenced their proceedings on the 9th March, 1943, so that no question of prescription could arise.

p. 95, l. 39. p. 96, ll. 6–7. (j) The Appellants accordingly had established their title to the property in question.

p. 96, ll. 19–39. (k) Even though Mr. R. L. Pereira had knowledge of the existence of the *fideicommissum* by virtue of having read, before making his purchase, the Deed of the 23rd June, 1896, which recited the original *fideicommissum* contained in the Deed of the 4th October, 1883, his possession did not become *male fide* merely because he concluded in law that the *fideicommissum* had been obliterated by the 1896 proceedings.

p. 96, ll. 7–43. p. 97, ll. 1–20. p. 98, l. 26. (l) The Respondent, being successor in title to a *bona fide* possessor who had purchased for value, was entitled to compensation for the improvements which had been effected, the value of which was fixed by the District Judge at Rs. 59,857/37, and to a *jus retentionis* until this sum had been paid.

p. 98, ll. 27–37. (m) The Appellants were entitled to damages at the rate of Rs. 487/50 per month from the date of payment of compensation for improvements until possession was given to them.

p. 98, l. 38. p. 99, ll. 1–4. (n) The Appellants' case having been contested on title and the Respondent's case having been contested on the right to compensation for improvements, the fair order as to costs was that each party should bear their own (subject to certain minor matters).

pp. 99–101. 27. On the 29th July, 1948, a Decree of the District Court was entered in accordance with the foregoing judgment, declaring that the Appellants were entitled to the property in question, but directing that they should pay Rs. 59,857/37 as compensation for improvements, that the Respondent should have a *jus retentionis* until this sum was paid but should thereafter be ejected, that the Respondent should pay to the Appellants Rs. 487/50 per month from the date of payment of compensation until possession was given, and that each party (subject to the said minor matters) should bear their own costs.

pp. 102–7. 28. From this judgment and decree the Respondent appealed to the Supreme Court of Ceylon by Petition dated the 2nd August, 1948, in which the grounds of appeal are fully recorded. There was no cross appeal by the Appellants challenging the Respondent's rights to compensation for improvements and to a *jus retentionis*.

29. The appeal was heard before the Supreme Court (Basnayake J. and Gunasekara J.) on the 10th, 11th, 13th, 14th, 24th and 25th September, 1951, and reserved judgments were delivered on the 10th October, 1951, allowing the appeal with costs in that Court and below. pp. 108–118. p. 108, l. 15.

30. In the leading judgment, Basnayake J. recorded the contentions for the present Respondent as follows:— pp. 108–117.

(a) That the Deed of the 4th October, 1883, did not bring into existence a *fideicommissum* because there was no acceptance on behalf of (1) donees (Cecilia and Jane) and (2) the *fideicommissaries* (the now Appellants). p. 111, ll. 1–14. pp. 125–7.

(b) That, even if the said deed brought into existence a *fideicommissum*, the *fideicommissum* had been destroyed by the proceedings in 1896 under the said Entail and Settlement Ordinance, inasmuch as the Court therein authorised a transfer of "Sirinivasa" without the burden of a *fideicommissum*. pp. 127–138.

(c) That the said proceedings in 1896 had not been brought by the proper party and the order made on that application was therefore null and void. pp. 127–138.

(d) That in any case the Respondent was a *bona fide* purchaser for value without notice of the *fideicommissum*, and could therefore retain the property.

It will be convenient to narrate the learned Judges' reasons on these points generally in the same order.

31. With regard to the point set out in paragraph 30 (a) (1) above, Basnayake J. agreed with the District Judge that there had been a subsequent ratification by the donees (Cecilia and Jane) of the acceptance, so that the original validity of the acceptance on their behalf was of only academic interest. It is submitted respectfully that this was right. p. 111, ll. 18–38.

32. With regard to the point set out in paragraph 30 (a) (2) above, Basnayake J. said that, on the question whether an acceptance by the *fiduciary* (the immediate donee) was a sufficient acceptance on behalf of the *fideicommissaries* (persons who would often not even be in esse at the time!), the authorities were divided, Soertsz J. having held in *Carolis v. Alwis* (1944) 45 N.L.R. 156, that acceptance by the *fideicommissaries* was necessary, whereas Wijeyewardene S.P.J. held in *Wijetunge v. Rossie* (1946) 47 N.L.R. 361, that a donation duly accepted by a donee was irrevocable even in the absence of a separate acceptance on behalf of children, at any rate where the children were not in esse. Basnayake J., while conceding that jurists of repute had maintained the view accepted by Wijeyewardene S.P.J., stated that— p. 111, l. 38–p. 113, l. 35.

"I find myself unable to accept the view of those jurists. "The other school of thought appeals to me, as it seems to be p. 112, ll. 23–25.

"more in keeping with the underlying principles of our law of "donations."

pp. 112–13. He regarded Pothier, van Leeuwen and Burge as supporting this attitude.

p. 113, ll. 36–37. Basnayake J., however, conceded that, if this was the basic rule,
p. 114, ll. 21–8. there was an established exception in the case of a "*fideicommissum*
p. 115, ll. 18–22. *in favorem familiæ*", but he held that this only applied where the *fideicommissum* in question was not "*unicum*" but "*multiplex*" or
pp. 114–5. perpetual, i.e., one lasting as long as any one in the family survived. As authority for this view he relied on certain sections of the "*Commentarius de prohibita rerum alienatione*" of Joannes van den Sande (hereinafter called Sande).

33. The Appellants respectfully submit that on both these aspects of the position Basnayake J. was wrong. The mediæval Dutch jurists were undoubtedly in controversy on the basic question, but Perezius,* on whom Burge mainly depended on this topic, conceded that the view opposite to the one he favoured was the majority opinion. Voet, who was of the same opinion as Perezius, devotes most of his consideration of *fideicommissa* to testamentary devolutions and deals very scantily with the donatory type, while Pothier really does no more than pose the problem without answering it. The Appellants will accordingly contend that the opinion ascribed by Perezius to the majority is correct: indeed it is difficult to see how otherwise the position of unborn children could be protected at all, not only if they were children in the family but in any case. This seems to have been the view of
p. 114, ll. 1–5. de Villiers J.P. in *Ex parte Orlandini* (1931) O.F.S.P.D. 141.

34. On the second aspect of the question, the basic authority is *Perezius ad Code* 8/55/12 where it was laid down that, in the case of a *fideicommissum* in favour of a family, acceptance by the *fiduciary* enures for the benefit of the *fideicommissaries*, born or unborn. On this point there is, so far as Ceylon is concerned, no substantial division of authority. The principle was accepted as long ago as 1884 in *John Perera v. Avoo Lebbe Marikar*, 6 S.C.C. 138, which was a decision of the Full Bench (although Soertsz J. in *Carolis v. Alwis* incorrectly asserted otherwise) and in a large number of later cases.

35. Was it therefore correct to assert, as Basnayake J. did, that this principle only applied to a *fideicommissum multiplex*, and not to a *fideicommissum unicum*? With respect it is submitted not. In *Wijetunge v. Rossie* 47 N.L.R. at p. 370 it was pointed out that the disposition in the Full Bench case itself (*John Perera v. Lebbe*

FOOTNOTE.

* Antonius Perezius, *Prælectiones in diodecim libros Codicis justiniani*, commonly cited as "*Perezius ad Code.*"

Marikar 6 S.C.C. 138) did not contain language capable of creating a *multiplex fideicommissum*. And *ex parte* Orchison (1951) 3 S.A.L.R. 550 is direct authority for the application of the principle to a *fideicommissum unicum*. With the isolated exception of Soertsz J.'s decision in *Carolis v. Alwis*, no suggestion to the contrary had been made in any of the other cases cited in paragraph 34 hereof, some of which were plainly cases of a *fideicommissum unicum*.

36. The opinion of Basnayake J. seems to be based to some extent on the view that the phrase '*fideicommissum in favorem familiæ*' covers only a *fideicommissum multiplex* (i.e., a *fideicommissum* binding on more than one grade of *fiduciaries*) and did not cover a *fideicommissum unicum* (i.e., a *fideicommissum* binding only on the first takers of the property and no further). It is submitted with respect that such a view is erroneous. Voet in his commentaries states that "a *fideicommissum* can also be left to a family", and considers, in the passage cited by Basnayake J., to discuss what persons are embraced by the term 'family'; he then proceeds, in a passage not cited by Basnayake J.:— p. 114, ll. 7–20.

> "Where a *fideicommissum* is left to a family the nature and "effect of such a bequest is not the same in every case. For the "bequest may be of such a kind that the *fideicommissum* is a "single one; and, where it has operated once, or where there has "been one restitution to the family, the *fideicommissary* obliga- "tion is determined; nor is the person who by virtue of such a "restitution to the family has acquired the property or the "inheritance obliged after his death to restore it to another "member of the same family, but he is able to transfer it to a "stranger by act *inter vivos* or by last Will. But on the other "hand, it may be a recurring (*multiplex*) *fideicommissum*, "circulating as it were throughout the family, with the result "that the person to whom in the first instance restitution has "been made as being one of the family is bound to restore the "inheritance to another member of the family, and he again to a "third member, and so on, so long as there are members of the "same family surviving."

So, too, among living authors, Prof. Lee in his Introduction to Roman-Dutch Law (4th Ed. p. 378, note 4) points out that a *fideicommissum familiæ* may be "*verbis in rem conceptis*" (i.e., a *fideicommissum multiplex*) or "*verbis in personam conceptis*" (i.e., a *fideicommissum unicum*): see also T. Nadaraja "The Roman-Dutch Law of *Fideicommissa*, as applied in Ceylon", p. 102. and S. Africa.

The authorities are to the same effect—

In South Africa: *Union Govt. v. Olivier* (1916) A.D. 74; *Moolman v. Est Moolman* (1927) A.D. 133;

In Ceylon: *Sopinona v. Abeywardene* (1928) 30 N.L.R. 295, *Palipane v. Taldena* (1929) 31 N.L.R. 196; *Wijetunge v. Rossie* (1945) 47 N.L.R. 361, 370.

37. It remains on this topic to consider the authority on which
p. 114, l. 35–p. 115, l. 17. Basnayake J. relies, namely Sande. In the Record it appears as though it were a consecutive passage extending from p. 114, l. 35 to p. 115, l. 17, but in fact what is there quoted is three separate and distinct passages (3-5-7; 3-5-15; and 3-6-2/3); and the last three and a half lines (Record p. 115, ll. 14-17) i.e., the words "In the case of
p. 115, ll. 14–17. "*fideicommissum* in favour of a family, the donor or testator must "use the expression 'family' or words to that effect in order to "indicate his clear intention to benefit his family" are misarranged in the printing. They are not the words of Sande at all but of Basnayake J. It is therefore essential to read the passages in their proper context and arrangement, to understand what Sande is really saying. What emerges from an examination of the text is, it is submitted, as follows:—

(a) In 3-5-1/6 (not cited by Basnayake J.), Sande sets out the difference between a *fideicommissum* which is simple or absolute and a *fideicommissum* which is conditional in the sense that it becomes operative only in the event of a breach of the wishes of the creator of the *fideicommissum*;

p. 114, ll. 35–43. (b) then comes 3-5-7 (the first passage cited by Basnayake J.) in which Sande is pointing out that where there is a bequest *to* a family the *fiduciary* has a power of selecting the *fideicommissaries*, unlike the case where the property is left *in* a family where there is no such power of selection. This plainly has nothing whatever to do with the question whether the phrase '*fideicommissum in favorem familiæ*' does or does not cover a *fideicommissum unicum*;

(c) In the following sections, 3-5-8 and 3-5-9/14 (again unfortunately not quoted by Basnayake J.) Sande goes on to consider the quite different point, namely "is a *fideicommissum* "which results from a prohibition against alienation outside "the family *unicum* or is it *multiplex*" (i.e., is it binding only on the first *fiduciary* or also on the successive takers of the property). In this discussion it appears quite clearly, particularly from 3-5-9/14, that in Sande's view a *fideicommissum in favorem familiæ* could be either a *fideicommissum unicum* or a *fideicommissum multiplex:* the gist is (see particularly 3-5-10 and 3-5-14) that the law disfavours the burdening of property as much as possible and therefore, in the absence of sufficiently clear language to indicate that the *fideicommissum* should be binding on more than one grade of *fiduciaries*, the *fideicommissum* will be a *fideicommissum unicum* binding on the first *fiduciary* alone;

(d) in 3-5-15 (the second passage cited by Basnayake J.) Sande proceeds to point out the circumstances in which, notwithstanding this leaning of the law against continued burden of property, a *fideicommissum* resulting from a prohibition against alienation outside the family would be a *fideicommissum multiplex*, i.e., binding on successive *fiduciaries;* p. 115, ll. 1–8.

(e) in 3-5-16/18 Sande mentions another illustration of the disfavour with which the law regards the continuance of *fideicommissary* burdens and in 3-5-19/21 he points out that none the less, provided the language is clear enough, a *fideicommissum* may even be perpetual;

(f) Sande in his next chapter, 3-6 (from which comes the third passage cited by Basnayake J.) then proceeds to quite a different topic altogether, namely who are the persons comprised by the terms "*familia*" or "*nomen*" on whom a right of action is conferred in the event of an alienation being made contrary to the wishes of the creator of the *fideicommissum.* This is, of course, very important when issues arise as to (a) who is entitled to claim property which has been left subject to a prohibition against alienation out of a family, when the prohibition has been broken, or (b) as to the persons to whom a *fiduciary*, who has been given expressly or impliedly a power to appoint the *fideicommissaries*, may leave the property, or (c) as to who is entitled to succeed where *fideicommissaries* have been indicated, not individually by name, but by the collective description "the family". But it is respectfully submitted that it has no bearing whatever on what is here the crucial question, namely, whether a *fideicommissum unicum* can be a *fideicommissum in favorem familiæ* just as much as a *fideicommissum multiplex.* pp. 112–13.

38. For the reasons appearing from the foregoing the Appellants submit that the Deed (P 1B) of the 4th October, 1883, created a *fideicommissum in favorem familiæ* and that, on the authority of Perezius, the acceptance by the *fiduciaries* enured for the benefit of the *fideicommissaries*, i.e., the Appellants. pp. 125–7.

39. With regard to the point set out in paragraph 30 (b) hereof (namely, whether the proceedings in 1896 destroyed the *fideicommissum*), Basnayake J. agreed with the view of the District Judge that the provisions of Section 8 of the Entail and Settlement Ordinance were overriding and could not be got round, however parties might frame their application to the Court or execute their deeds of conveyance. The Appellants humbly submit that this was right, and will rely on *Abeywardene v. Tyrrell* 39 N.L.R. 505 and *Perera v. de Fonseka* 51 N.L.R. 97. p. 117, ll. 7–13. pp. 127–138.

40. With regard to the point set out in paragraph 30 (c) hereof (namely, whether the said proceedings were brought by the proper p. 116, l. 17–p. 117, l. 2. pp. 127–138.

party), however, Basnayake J. held that Section 8 did not in fact come into play because the parties to the application of 1896 were not, in his view, the proper parties. In support of this view he cited a passage in Voet (36-1-63) from which he concluded that under Roman-Dutch common law the proper person to make an application to the Court for leave to sell the *fideicommissary* property is the *fiduciary*, and he thought that an intention to depart from the common law was not to be imputed to the legislation in question. It is respectfully submitted that both in his premiss and in his deduction the learned Judge was wrong.

p. 115, l. 37–p. 116, l. 16.

p. 116, ll. 17–21.
p. 116, ll. 21–3.

41. With regard to the learned Judge's premiss, the said passage in Voet is clearly good authority for the proposition that the *fiduciary* can apply to the Court for authority to sell the *fideicommissary* property. It is not, however, authority for the corollary that he is the only person who can do so. It has to be remembered that, throughout the 72 sections contained in Book 6 Title 1 of his Commentaries, Voet is dealing with testamentary *fideicommissa*, and that it is only quite incidentally that he mentions in one section (36-1-9) that a *fideicommissum* can be created *inter vivos:* and, of course, in a testamentary *fideicommissum* there is *ex hypothesi* no donor in a position to make an application. Furthermore, there is the important fact in the present instance that the benefit of the rent and profits was reserved to Siman for his life and to Maria following Siman's death if she survived him, and it would be strange if as usufructuaries they had no say in the matter at all. Certainly as far as South Africa is concerned no obstacle has been placed in the way of a usufructuary making an application under the Removal or Modification of Restrictions on Immovable Property Act No. 2 of 1916 (see *ex parte* Jacobs 1927 O.P.D. 205; *ex parte* Est. McDonald 1945 N.P.D. 348) and it has been stated in terms that the case of a person having a usufructuary life interest, so far as applications to the Court for relief are concerned, is in principle the same as that of a person having a *fiduciary* life interest.

p. 116, l. 17–p. 117, l. 2.

42. As regards Basnayake J.'s deduction, the paramount question is the meaning of the words used in Section 5 of the Entail and Settlement Ordinance. The relevant words are "any person entitled to the possession or to the receipt of the rents and profits "of any immovable property". Basnayake J. conceded that "in a sense" the donor under the deed in question was such a person, but regarded "the golden rule that the words of the statute "must *prima facie* be given their ordinary meaning" as one which had exceptions, one exception being "that where the plain words "fail to achieve the manifest purpose of the enactment, the ordinary "meaning must yield to what is the real meaning of the words "according to the intent and purpose of the legislature". With respect, it is suggested that Basnayake J. overlooked that the

p. 116, l. 31.
p. 116, ll. 39–44.
p. 116, ll. 41–4.

Ordinance was dealing not only with *fideicommissa* but also with entails and settlements, and that his inference as to what was the intent and purpose of the legislature in relation to *fideicommissa* was pure guesswork. Indeed, so far from the purpose which he deduced being "manifest", it is noteworthy that no such point had been taken in *Abeywardene v. Tyrrell* 39 N.L.R. 505 or in *Perera v. de Fonseka* 51 N.L.R. 97, where applications of the same kind had been made by the same donors. There was, therefore, no reason for departing from what he himself described as the golden rule, and no basis for giving to the words of the section any meaning other than what he seems to have conceded to be the ordinary meaning of plain words.

43. With regard to the final point, that set out in paragraph 30 (d) hereof (namely, that the Respondent was entitled to the property because her father had bought it in good faith without notice), Basnayake J. made no finding at all. The Ceylon authorities are, however, all one way: that whereas "in the trust the "interest of the beneficiary, though described as an equitable "ownership, is properly '*jus neque in re neque ad rem*', against the "*bona fide alienee* of the legal estate it is paralysed and ineffectual; "in the *fideicommissum* the *fideicommissary*, once his interest has "vested, has a right which he can make good against all the world, "a right which the *fiduciary* cannot destroy or burden by alienation "or by charge" (*Sitti Kadija v. de Saram* (1946) A.C. 208, at p. 217), where the Privy Council approved Prof. Lee's statement of the position in his Introduction to Roman-Dutch Law (3rd Ed., p. 372). (See also *Gunatilleke v. Fernando* 22 N.L.R. at p. 392; *Tillekeratne v. de Silva* 49 N.L.R. at p. 30.) In any event it is respectfully submitted that, having regard to Mr. R. L. Pereira's knowledge of the existence of the *fideicommissum* derived from the Deed of 1883, his *bona fides* in assuming that it had been discharged by the order of the Court in 1896 and the deeds executed pursuant thereto could not bring him within the benefit of the English principle, if it were to apply, as he plainly did have notice.

p. 72, ll. 15–25.
pp. 125–7.
pp. 134–5.

44. The supporting judgment of Gunasekara J. in the Supreme Court was short. He merely said "I agree that Deed No. 2110 of "4th October, 1883, did not create a *fideicommissum* for the reasons "that there has been no acceptance on behalf of the *fideicommissaries* and that it was not the intention of the donor to create a "*fideicommissum* in favour of a family".

p. 118, ll. 4–8.

45. In accordance with the said judgments a decree of the Supreme Court was entered dated the 10th October, 1951, whereby it was decreed that the appeal of the Respondent be allowed with costs in the Supreme Court and below.

pp. 118–9.

46. Being aggrieved by the said judgment and decree of the Supreme Court dated the 10th October, 1951, the Appellants duly

pp. 108–119.
pp. 119–122.

applied for and were granted conditional leave to appeal to the
pp. 123-4. Privy Council on the 13th November, 1951, and final leave so to appeal on the 16th January, 1952.

pp. 108-119. 47. The Appellants humbly submit that the said judgment and decree of the Supreme Court of Ceylon dated the 10th October, 1951,
pp. 99-101. should be set aside and the decree of the District Court of Colombo dated the 29th July, 1948, restored for the following amongst other

REASONS.

1. BECAUSE there was by ratification or otherwise a valid acceptance by the donees of the Deed dated the 4th October, 1883.
2. BECAUSE on the true principles of Roman-Dutch law an acceptance of a *fideicommissum* by the *fiduciaries* enures for the benefit of *fideicommissaries* who are unborn or otherwise incapable of accepting on their own behalf.
3. BECAUSE the said deed created a *fideicommissum in favorem familiæ* so that, according to Roman-Dutch law, an acceptance by the *fiduciaries* enured for the benefit of the *fideicommissaries*.
4. BECAUSE no valid ground was established for impugning the *fideicommissum* contained in the said deed.
5. BECAUSE the *fideicommissum* contained in the said deed became attached as a result of the proceedings in the District Court of Colombo in 1896 to the property now in question.
6. BECAUSE the said proceedings in the District Court of Colombo in 1896 were properly instituted.
7. BECAUSE no grounds for impugning the said proceedings in the District Court of Colombo in 1896 were established.
8. BECAUSE it was not established that the Respondent's predecessor in title had no notice of the *fideicommissum* above referred to.
9. BECAUSE Roman-Dutch law does not confer any title to property subjected to a *fideicommissum* on a purchaser even if he does take *bona fide* and for value and without notice.

10. BECAUSE the Respondent has no right further or other than a right to compensation for improvements and a *jus retentionis*.

11. BECAUSE no prescriptive title was established against the Appellants.

12. BECAUSE the title established by the Appellants was valid.

13. BECAUSE the judgment of the Supreme Court was wrong and ought to be reversed.

10 14. BECAUSE the judgment of the District Court was right and ought to be restored.

D. N. PRITT.

STEPHEN CHAPMAN.

APPENDIX.

Relevant Sections of Entail and Settlement Ordinance (No. 11 of 1876: Chapter 54 of Revised Legislative Enactments of Ceylon 1938). SECTIONS 5–10.

5. Any person entitled to the possession or to the receipt of the rents and profits of any immovable property now or which may hereafter become subject to such entail, *fideicommissum*, or settlement as aforesaid, or of any share thereof, may apply to the District Court by petition in a summary way to exercise the powers conferred by this Ordinance.

6. Before making any order authorising any such lease, exchange, or sale as aforesaid, the District Court shall require such notice, as it shall deem expedient, of the application to be given to all persons interested under the entail, *fideicommissum*, or settlement, who may be living at the time, and whose place of abode can, after reasonable inquiry, be ascertained. Such notice shall be sufficient if left at the last known place of abode in the Island of the person to be affected thereby:

Provided that if any person to whom notice has to be given shall be under the disability of minority, idiocy, or lunacy, it shall be sufficient if the notice is given to the guardian or curator of such person. It shall be competent for any person interested under the entail, *fideicommissum*, or settlement, to appear before the Court and show cause against any such lease, exchange, or sale being authorised.

7. All money received under or by virtue of any sale effected under the authority of this Ordinance shall be applied, as the District Court shall from time to time direct, to some one or more of the following purposes, that is to say:—

(a) the discharge or redemption of any charge or incumbrance affecting the property, or affecting any other property subject to the same entail, *fideicommissum*, or settlement; or

(b) the purchase of other immovable property to be settled in the same manner as the property in respect of which the money was paid; or

(c) investments in the Loan Board or in Government securities, the interest thereof being made payable to the party for the time being otherwise entitled to the rents and profits of the land sold; or

(d) the payment to any person becoming absolutely entitled.

8. Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become

subject to the same entail, *fideicommissum*, or settlement, as the property for which it was given in exchange was subject to at the time of such exchange.

9. On every lease, exchange, or sale to be effected as hereinbefore mentioned, the Court may direct what person or persons shall execute the deed of lease, transfer, or assurance; and the deed executed by such person or persons shall take effect as if all the persons interested or who might become interested in the property under the will or instrument by which the entail, *fideicommissum*, or settlement was created, had joined in such lease, transfer, or assurance. The Court may also direct by whom and in what proportions the cost of such lease, transfer or assurance, and of the proceedings taken under this Ordinance, shall be paid. Such costs may be recovered in the same way as costs in ordinary civil actions brought in District Courts.

10. Every order or direction of the District Court made under any of the provisions of this Ordinance shall be subject to appeal to the Supreme Court, and such appeal shall be subject to and governed by the same rules and procedure as are applicable to appeals from interlocutory orders of District Courts.

No. 37 of 1952.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

LLEWELLYN PERERA ABEYAWARDENE (Plaintiff) *Appellant*

(Substituted in the place of Danister Perera Abeyawardene and Geoffrey Perera Abeyawardene both since deceased.)

— AND —

Mrs. CARMEN SYLVENE WEST

(Defendant) *Respondent.*

CASE FOR THE APPELLANTS.

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