

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

10 MRS. CARMEN SYLVENE WEST (nee  
PEREIRA) of Anandagiri, Green Path,  
Colombo *Defendant-Respondent.*

UNIVERSITY OF LONDON  
W. : :  
25 FEB 1958  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

49786

## Case for the Respondent

RECORD.

1. This is an appeal from the Judgment dated 10th October, 1951, of the Supreme Court of Ceylon (Basnayake, J., and Gunasekara, J.) reversing the Judgment dated the 29th July, 1948, of the District Court of Colombo (Jayawickrema, J.) whereby, in an action wherein the Appellants (namely the above-mentioned Llewellyn Perera Abeyawardene and his two brothers respectively Danister Perera Abeyawardene and Geoffrey Perera Abeyawardene both of whom died during the pendency of this appeal and for whom consequently the said Llewellyn Perera Abeyawardene pursuant to order of the Supreme Court of Ceylon made thereunto was as above set forth substituted on the record of this appeal) were the plaintiffs and the Respondent was the defendant, it was held that the said Appellants were entitled to certain land called "Sirinivasa" (described in Schedule Four to the plaint) and the buildings thereon.

pp. 108-118.

pp. 87-99.

pp. 98, 10.

2. The claim of the Respondent, to compensation for improvements in regard to the buildings built on the said land and to a *jus retentionis* until the compensation be paid made in the said action by the Respondent on the footing of it being held (contrary to her denial) that the said Appellants were entitled to the said land and buildings, was not disputed by the said Appellants in the Appeal brought by the Respondent to the Supreme Court and the main question which arises in this appeal is whether the said Appellants are entitled to the said land.

p. 32, ll. 32-36, 40.  
p. 33, ll. 1-4.  
p. 98, ll. 32-35.  
p. 111, ll. 15-17.

3. The claim of the said Appellants to be entitled to the said land has its basis in a Deed No. 2110, dated the 4th October, 1883, by which one Siman Fernando and his wife, Maria, who were married in community of property, gifted to their daughters, Cecilia and Jane, both of whom were

Exh. P.I.B.  
p. 125.

p. 125, l. 39-p. 126,  
l. 15.

at that time minors, aged respectively 9 and  $6\frac{1}{2}$  years, in equal undivided shares, two allotments of land the property of the said Siman and Maria of 3 acres 2 roods and 38.24 perches in extent, known as "The Priory" (a different property from the said "Sirinivasa") subject to certain conditions as follows:—

" . . . that the said Siman Fernando shall during his lifetime  
 " be entitled to take use and appropriate to his own use the issues,  
 " rents and profits of the said premises and that after his death and  
 " in the event of his wife (Maria) surviving him she shall during her  
 " lifetime be entitled to take use and appropriate to her own use 10  
 " a just half of the said issues, rents and profits the other half  
 " being taken used and appropriated by the donees to wit, the said  
 " (Cecilia and Jane) and subject also to the conditions that the  
 " said donee (sic) (Cecilia and Jane) shall not nor shall either of  
 " them be entitled to sell, mortgage, lease for a longer term than  
 " four years at a time or otherwise alienate or encumber the said  
 " premises nor shall the same or the rents and profits thereof be  
 " liable to be sold in execution for their debts or for the debts of  
 " any or either of them and the said premises shall after their  
 " death devolve on their lawful issues respectively and in the 20  
 " event of any one of the said donees dying without lawful issue  
 " her share right and interest to the said premises shall devolve on  
 " and revert to the surviving donee subject however to the  
 " conditions and restrictions aforesaid."

4. The said Deed No. 2110 was notarially executed and the gift to Cecilia and Jane was purportedly accepted on their behalf in the following terms:—

p. 126, ll. 16-21.

" And these presents further witness that Mututantrige John  
 " Jacob Cooray . . . doth hereby on behalf of the said Mututantrige  
 " Cecilia Fernando and Mututantrige Jane Fernando, who are 30  
 " minors, jointly with Mututantrige Alfred Thomas Fernando and  
 " Mututantrige James Fernando brothers of the said minor donees  
 " accept the gift and grant of the said premises subject to the  
 " respective conditions aforesaid."

5. John Jacob Cooray was a brother-in-law, and Alfred Thomas Fernando and James Fernando respectively were brothers of Cecilia and Jane.

Exh. P.2.  
pp. 127-138.

6. Thereafter some 13 years later namely on the 16th June 1896, Siman and Maria instituted proceedings in the District Court of Colombo in what is called Special Case No. 116, purporting to be brought under the provisions of the Entail and Settlement Ordinance (No. 11 of 1876).  
 Cecilia and Jane were respondents in these proceedings; Jane being a minor aged  $19\frac{1}{2}$  years was represented by her aforesaid brother James (who was appointed guardian *ad litem* on the 18th June, 1896). The object of the proceedings according to the terms of the application dated the 16th June, 1896, was as follows:— 40

Exh. P.2,  
p. 128, ll. 11-34.

" . . . move that under the provisions of the Ordinance No. 11  
 " of 1876, this Court may be pleased to authorise and empower the

“ first Respondent Cecilia Fernando and the third Respondent as  
 “ Guardian *ad litem* of the second Respondent Jane Fernando to  
 “ convey and assign unto first petitioner (i.e. Siman) the premises  
 “ called and known as ‘ The Priory ’ (described in Schedule A in  
 “ the said Petition) free from all conditions and restrictions and to  
 “ order and decree accordingly and to authorise and empower the  
 “ first respondent Cecilia Fernando and the third respondent as  
 “ guardian as aforesaid to execute the necessary Deed of Conveyance  
 “ in favour of the first petitioner absolutely and free from all  
 “ conditions and restrictions.

Exh. P.2, p. 131, l. 36 ;  
 p. 132, l. 12.

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“ 2. . . . In consideration thereof to authorise and empower  
 “ the petitioners to transfer and assign unto the 1st and 2nd  
 “ respondents the allotments of land and the buildings thereon  
 “ called Sirinivasa (fuller described in Schedule B to the said  
 “ petition) subject to the conditions that they shall not sell,  
 “ mortgage or otherwise alienate the same except with the consent  
 “ of the petitioners or the survivor of them and to the further  
 “ condition that the first petitioner (Siman) shall during his lifetime  
 “ be entitled to take use and enjoy and appropriate to his own  
 “ use the rents issues and profits of the said premises and after  
 “ his death and in the event of the second petitioner ” (Maria)  
 “ surviving him she shall during her lifetime be entitled to take use  
 “ enjoy and appropriate to her own use one just half of the said  
 “ rents issues and profits the other half thereof being taken used  
 “ and enjoyed and appropriated by the 1st and 2nd respondents.”

Exh. P.2,  
 p. 132, l. 14-1. 41.

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7. In the affidavit sworn on the 16th June, 1896, by Siman in  
 support of the application he deposed as regards the reasons therefor as  
 follows :—

Exh. P.2,  
 p. 136, ll. 25-35.

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“ (5) Both I and the 2nd petitioner ” (Maria) “ apprehend  
 “ that it is not desirable or beneficial for the 1st and 2nd respondents  
 “ to hold in common the aforesaid property called ‘ The Priory ’  
 “ and I being in more affluent circumstances am anxious to make  
 “ better provision for our unmarried daughters, the 1st and 2nd  
 “ respondents, by giving them the entirety of the several allotments  
 “ of land described in the Schedule letter B hereto annexed and all  
 “ that house and buildings standing on one portion thereof called  
 “ and known as ‘ Sirinivasa ’ situated at Edinburgh Crescent  
 “ and Green Path, Cinnamon Gardens, Colombo, in lieu and instead  
 “ of the said premises called ‘ The Priory ’.”

p. 138, ll. 1-28.

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8. By sections 5 and 8 of the said Entail and Settlement Ordinance  
 it is provided as follows :—

Cap. 54 Legisl.  
 Enactments of Ceylon,  
 pp. 83, 84.

“ 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, *fidei commissum*,  
 “ 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.

Entail and Settlement.

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

“ subject to the said entail, *fidei commissum*, or settlement, as the  
 “ property for which it was given in exchange was subject to at  
 “ the time of such exchange.”

9. On the 17th June, 1896, the application came before the District Court (of Colombo) which reserved its decision till the next day, namely, the 18th June, 1896, when it was adjudged and ordered that the said James Fernando be appointed guardian to Jane to represent her in the said proceedings and it was further ordered and decreed that upon Siman and Maria, as Petitioners, transferring and assigning to Cecilia and Jane, the land known as “ Sirinivasa ” subject to the conditions that— 10

(A) Cecilia and Jane should not sell mortgage or otherwise alienate the said premises “ except with the consent ” of Siman and Maria or the survivor of them . . .

(B) Siman should during his lifetime be entitled to take use enjoy and appropriate to his own use the rents issues and profits of the said premises and after his death and in the event of Maria surviving him she should during her lifetime be entitled to take use enjoy and appropriate to her own use one just half of the said rents etc., the other half thereof being used enjoyed and appropriated by Cecilia and Jane—Cecilia and James as Guardian of 20 Jane were authorised and empowered to convey and assign to Siman the land and premises called and known as “ The Priory ” absolutely and free from all conditions and restrictions contained in the said Deed No. 2110, and that Cecilia and James as Jane’s Guardian were empowered and authorised to execute and deliver the necessary Deed of Conveyance of the said premises (that is, “ The Priory ”) in favour of Siman absolutely and free and clear of all conditions and restrictions.

Exh. P. 3,  
pp. 142-147;  
p. 144, l. 45;  
p. 145, l. 13;  
p. 145, ll. 42-44.

On the 23rd June, 1896, consequent upon the said order Siman and Maria having by Deed No. 1398 conveyed Sirinivasa to Cecilia and Jane, 30 they, Cecilia and Jane (acting by her guardian James) on the same date, by Deed No. 1399 (wherein the Deed No. 1398 is recited) conveyed The Priory to Siman absolutely freed and clear from all and every restrictions and conditions contained in the Deed of Gift No. 2110 : The value of The Priory was stated therein as being Rs.45,000.

10. On the 23rd June, 1896, being the date on which, as set forth in paragraph 9 hereof, the conveyances were made by the Deeds Nos. 1399 and 1398 of The Priory from Cecilia and Jane to Siman and of Sirinivasa from Siman and Maria to Cecilia and Jane—

(A) Cecilia by Deed No. 1401 in consideration of the price of 40 Rs.45,000 paid to her by Siman conveyed to him her undivided half-share in Sirinivasa.

(B) Siman by Deed No. 1400 gifted absolutely and irrevocably The Priory to Cecilia subject to the conditions that—Siman should during his life be entitled to take and enjoy and appropriate to his own use the rents, issues and profits of the said premises, and after his death and in the event of his wife (Maria) surviving him

Exh. P. 5, p. 152.

Exh. D. 18,  
pp. 154-156.

Maria should during her lifetime be entitled to take etc., a just half of the said rents etc., the other half being taken etc., by Cecilia and subject also to the condition—

that Cecilia should not be entitled to sell, mortgage or otherwise alienate or encumber the said premises without the consent of Siman and after his death Maria and

that in the event of Cecilia dying without leaving any issue— then the said premises were to revert to Siman and in case he should be dead then the said premises were to go and devolve on his heirs.

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11. Thereafter by Deed No. 2180, dated the 30th June, 1900, a partition of Sirinivasa was effected between Siman and Jane (who was by then of full age and *sui juris*) and thereby (as recited in the said Deed) Siman conveyed to Jane the eastern portion of Sirinivasa and Jane, conveyed to Siman the western portion thereof.

Exh. P. 6,  
pp. 156-161.p. 158, l. 1; p. 159, l. 2;  
p. 159, ll. 3-39.

12. Then by Deed No. 3129, dated the 30th November, 1905, Jane with the consent and concurrence of her husband, Edward Denister Pereira Abeyawardena (she having by then married), and Maria, parties thereto, for the price of Rs.75,000 paid to her by Siman, conveyed to him her said divided eastern portion of Sirinivasa.

Exh. D.2,  
pp. 161-164.

p. 162, ll. 1-12.

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13. And by Deed No. 4218 dated the 6th December, 1907, Siman as the (as is therein recited) lawful and absolute owner and seized and possessed of or otherwise well and sufficiently entitled thereto, for the price of Rs.175,000 conveyed to his son the said James Fernando the entirety of Sirinivasa together with adjoining premises called "Anandagiri." It is recited in the said Deed that the said Sirinivasa premises were then subject to a mortgage thereon for Rs.100,000 and interest created by a Bond bearing No. 4140, dated the 9th September, 1907, and, by reason thereof, the said price of Rs.175,000 was by the Deed No. 4218 agreed to be paid to Siman by James by a sum of Rs.75,000 out of the said purchase money and the taking over by James of the said mortgage, the amount whereof was equivalent to the balance of the said purchase money.

Exh. D.3,  
pp. 164-168;  
p. 165, ll. 8-15.

p. 165, ll. 16-19.

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p. 165, ll. 20-27.

14. James Fernando died on the 17th March, 1911, leaving a Will and also a Codicil which were duly proved in Testamentary proceedings No. 3927 of the District Court of Colombo.

p. 34, ll. 34-36;  
p. 39, l. 6.  
Exh. D.4, pp. 168-172.  
Exh. D.5, pp. 173-174.  
Exh. D.6, pp. 174-175.

15. By Deed No. 1382, dated the 12th July, 1924, Sirinivasa together with other properties was conveyed in terms of the said Will of James Fernando to the Honourable Cecil Clementi, the then Colonial Secretary of the Island of Ceylon, and the Honourable Robert Neimann Thaine, the then Government Agent for the Western Province of the said Island, as trustees by virtue of their holding their said respective offices of the Sri Chandrasekera Fund created under and by the said Will.

Exh. D.7, pp. 175-180.  
p. 34, l. 37.  
p. 35, l. 3.  
p. 41, ll. 22-26.  
p. 90, ll. 24-34.  
p. 110, ll. 26-28.  
p. 176, ll. 5-21.  
p. 178, l. 16-p. 179,  
l. 17.

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16. The Respondent's father, R. L. Pereira, an Advocate of over forty years' standing at the Ceylon Bar, and one of Her Majesty's Counsel for Ceylon, purchased the land claimed from the said Trustees by

Exh. D.10, pp. 193-198.

Exh. D.11, pp. 199-204.  
p. 62, ll. 12-27.  
p. 91, ll. 13-28.  
Exh. D.9, pp. 190-193.  
Exh. D.10, p. 196,  
ll. 24-28.

Deeds Nos. 318 and 419 dated respectively the 23rd March, 1925, and 19th January, 1926. The property comprised in the former Deed was purchased by him at a public auction held upon the instructions of the said Trustees on the 28th January, 1925, and the property comprised in the latter Deed was purchased by him from the said Trustees in order to straighten out the southern boundary of the said portion of property which he purchased by the said Deed No. 318.

Exh. D.12, pp. 206-209.  
p. 62, ll. 12-32.  
Exh. D.10, pp. 193-198.  
Exh. D.11, pp. 199-204.

17. By Deed No. 340 dated the 20th April, 1935, the said R. L. Pereira gifted to his daughter, the Respondent, subject to the conditions therein, the said property purchased by him as aforesaid by 10 the Deeds Nos. 318 and 419.

p. 14, ll. 7, 9.  
p. 34, ll. 14-15.

18. The said Siman Fernando and Maria Fernando at the time of the commencement of the said action by the said Appellants against the Respondent were dead and their said daughter Jane Fernando died on the 6th May, 1933, leaving surviving her the said Appellants who are her children.

p. 52, ll. 1-2.  
p. 53, ll. 3-4.

19. There was no evidence that the said Cecilia Fernando is dead.

20. The claim of the said Appellants is based upon an alleged *fidei commissum* created by the gift made by Deed No. 2110 by the said Siman Fernando and Maria Fernando to their daughters Cecilia and Jane. 20

pp. 49-52.

21. Twenty-two issues were raised between the parties at the trial by issues framed and subsequently (by leave) amended. Many of these were subsidiary to the main issues. The main issues so far as they require now to be determined may be summarised as follows:—

A. (i) *Whether* there was any acceptance by Cecilia and Jane as donees of the gift granted by Deed 2110 sufficient to constitute the same a valid gift in law ;

(ii) If there was such acceptance by the donees, *whether* there was any acceptance by or on behalf of the said Appellants as *fidei commissaries* sufficient to confirm or establish the *fidei commissum* 30 contained in Deed 2110.

B. (i) If both the gift and the *fidei commissum* contained in Deed 2110 were perfected by such acceptance as aforesaid, *whether* the *fidei commissum* was not extinguished by the Order made in the Special Case No. 116 as set forth in paragraph 9 of this case ;

(ii) If the *fidei commissum* was not extinguished by the said Order, *whether*, on the contrary the Order was a nullity because made in excess of the Court's jurisdiction and in contravention of the statutory provisions contained in Section 8 of the *Entail and Settlement Ordinance (No. 11 of 1876)*. 40

Cap. 54, Legisl.  
Enactments of  
Ceylon.

C. *Whether* in any view of the law, the Order in the Special Case No. 116 was void because obtained by fraud or by such conduct short of fraud as amounted to an abuse of the process of the Court.

D. *Whether* the land in dispute was not different from (and therefore not subject to any *fidei commissum* which may have attached

to) the land dealt with by the Order in Special Case No. 116, inasmuch as the last-mentioned parcel of land had been partitioned and there was no privity between the said Appellants and Siman Fernando.

10 E. *Whether* (A) Siman, by reason of Deeds: No. 1400 (23rd June 1896); No. 1401 (23rd June, 1896); No. 2180 (30th June, 1900); and No. 3129 (30th November, 1905), was not absolutely entitled free from any *fidei commissum* created by Deed No. 2110 to the whole of Sirinivasa including the portion thereof held by the Respondent; and/or

(B) *Whether* the partition of Sirinivasa effected by Deed No. 2180 between the co-owners thereof, namely, Siman, purchaser from Cecilia, a purported fiduciary, and Jane, a fiduciary, could be valid or of any effect in law except upon the footing that Siman was absolutely entitled free from the said *fidei commissum*, to the whole of Sirinivasa including the said partitioned portion.

20 F. *Whether* the partition of Sirinivasa having been effected as aforesaid the land in dispute forming part of, and being no greater in extent than, the undivided interest acquired by Siman from Cecilia, the Respondent is not entitled to the possession of the land in dispute unless it be proved that Cecilia died without issue.

G. *Whether* in any event the land in dispute having been purchased by the said R. L. Pereira for value in good faith and without notice of any *fidei commissum* the Respondent can be bound by the same.

22. Upon the said issues the Respondent contended and contends that :—

30 (A) It not having been proved that the said John Jacob Cooray or the said Alfred Thomas Fernando or the said James Fernando were requested or authorised by the said Siman Fernando or the said Maria Fernando to accept the said purported gift made by Siman and Maria to their daughters Cecilia and Jane, the said gift was therefore not accepted according to the requirements of the Roman Dutch Law and the said purported gift is therefore invalid and of no legal force or effect.

40 (B) (i) Even if the said gift to Cecilia and Jane was validly accepted on their behalf there was nevertheless no acceptance by the *fidei commissaries* (said Appellants) under the *fidei commissum* created by the said gift and furthermore the said *fidei commissum* being by its terms *unicum* and not *multiplex* or *perpetual*, was not within the exception that a gift *in favorem familiae* is sufficiently accepted by the *fidei commissaries* if accepted by the first donees (Cecilia and Jane) and, therefore, inasmuch as there had been no acceptance of the gift by the *fidei commissary* donees (said Appellants) the said gift was invalid and of no legal force or effect or, if valid, could be and in fact was revoked by agreement between the donors (Siman and Maria) and the fiduciaries (Cecilia and Jane).

(ii) If the said gift was within the exception of being in *favorem familiæ* then it has never been accepted by the fiduciary donees (Cecilia and Jane), inasmuch as the said fiduciary donees were minors and the said gift was and could only be accepted on their behalf and those accepting on behalf of the fiduciary donees could not thereby accept on behalf of the *fidei commissary* donees.

(c) The effect of the proceedings and application made by Siman and Maria under the said Entail and Settlement Ordinance and the said order and decree made thereunder was to give the power to Cecilia and Jane to sell with the consent of Siman and Maria 10 and that such power with the said consent of Siman and Maria having been exercised the title of the Respondent's predecessors and of herself through them having been derived from the said exercise of the said power the Respondent is entitled to the said land and the said Appellants have no title thereto.

(D) That, having regard to the said order and decree made in the said proceedings and application brought and made under the said Entail and Settlement Ordinance by Siman and Maria and the effect given thereto by the said Deeds Nos. 1399 and 1398, Section 8 of the said Ordinance was inoperative and of no legal force or effect 20 whatsoever and the said *fidei commissum* created by Deed No. 2110 was thereby mutually revoked by Siman, Cecilia and Jane, as they were entitled to do, or is to be implied or was rescinded or in consequence extinguished. Alternatively—

(E) The said proceedings and application under the said Entail and Settlement Ordinance were brought and made without jurisdiction and that therefore neither Section 8 nor any of the other provisions of the said ordinance were operative as regards or applied to the said *fidei commissum*.

(F) The said proceedings and application under the said Entail 30 and Settlement Ordinance were a mere sham and were an abuse of the process of the Court and were taken and made for an ulterior purpose as is shown by the statement made in the affidavit by Siman on the 16th June, 1896, in support of the said application, as follows :—

“ (5) Both I and (Maria) apprehend that it is not desirable  
 “ or beneficial for (Cecilia and Jane) to hold in common the afore-  
 “ said property called ‘ The Priory ’ and I being in more affluent  
 “ circumstances am anxious to make better provision for our  
 “ unmarried daughters (Cecilia and Jane) by giving them the 40  
 “ entirety of the several allotments of land described in the  
 “ Schedule B hereto annexed and all that house and buildings  
 “ standing on one portion called and known as ‘ Sirinivasa ’ . . .  
 “ in lieu and instead of the said premises called ‘ The Priory ’ .”

And especially when the said statement is contrasted with the transactions which took place in regard to the (1) sale by Cecilia to Siman of her undivided half share of Sirinivasa, (2) the partition thereof between Siman and Jane, (3) the sale by Jane to Siman of her partitioned half, and (4) the sale by Siman to James as set forth 50 in paragraph 13 hereof.



(G) Having regard to the provisions of the said Entail and Settlement Ordinance and in particular Section 5 thereof the purported proceedings and application brought and made thereunder by Siman and Maria were wrongly brought and made and that consequently the said proceedings and application and the said order and decree made thereunder are of no legal force or effect whatsoever.

10 (H) By reason of the partition of the said land known as Sirinivasa between Siman and Jane the said partitioned land is different from the land claimed by the said Appellants and that the said partition having taken place by mutual agreement between Jane a *fiduciarius* and her co-owner Siman who was not, there is no privity created between Jane and the said Appellants as *fidei commissaries* in regard to the said partitioned land and therefore the said partitioned land was not subject to the said *fidei commissum* created by the said Deed No. 2110 and is otherwise of no legal force or effect.

(I) By reason of the facts—

20 (i) By Deed No. 1400 dated the 23rd June, 1896, Siman gifted The Priory to Cecilia ;

(ii) By Deed No. 1401, also dated the 23rd June, 1896, Siman having paid to Cecilia as a consideration the sum of Rs.45,000 she conveyed to him free from all encumbrances whatsoever all her undivided moiety in Sirinivasa ;

(iii) By Deed No. 2180 dated the 30th June, 1900, made between Siman and Jane a partition of Sirinivasa was effected between them ;

30 (iv) By Deed No. 3129, dated the 30th November, 1905, Siman having paid to Jane as consideration the sum of Rs.75,000, Jane conveyed to him the partitioned eastern portion of Sirinivasa free from all encumbrances so that Siman, his executors, administrators and assigns should hold the same for ever

And further or alternatively—

40 (v) The said partition was effected between Siman a purchaser from Cecilia the purported fiduciary, and Jane a fiduciary in consequence whereof the said partition was valid and effective in law only upon the footing that Siman was absolutely entitled free from the said *fidei commissum* to the whole including the divided portion of Sirinivasa claimed by the said Appellants from the Respondent—the Respondent is entitled to the said land and the said Appellants are not.

(J) As the partition of Sirinivasa was effected between Siman, purchaser from Cecilia a purported fiduciary of all her undivided interest therein and to whom Siman had by Deed No. 1400 gifted The Priory (in purported exchange for which as aforesaid Siman and Maria had originally gifted Sirinivasa to Cecilia and Jane) and Jane, as a fiduciary, the said partition is of no force or effect in law, and in consequence, since the land in dispute formed part of and

is no greater in extent than, the said undivided interest of Siman in Sirinivasa, it not having been proved that Cecilia had died or had no issue, the Respondent is entitled to the possession of the land in dispute and the said Appellants are not.

(κ) The land claimed by the said Appellants was bought by the said R. L. Pereira *bona fide* and for value and without knowledge of the said *fidei commissum* and in consequence the title of the said R. L. Pereira and the Respondent is good and the Respondent is entitled to the said land and the said Appellants are not.

23. The learned Judge of the District Court found against the 10  
Respondent (then Defendant) upon all the issues summarised in  
paragraph 21 of this case.

P. 92, l. 16-p. 99, l. 5.

In regard to issue (A) (i) (acceptance by the Donees) he held that there was acceptance by the donees as minors which was ratified on their behalf by relatives. The learned Judge also held that this point was concluded by authority of the Supreme Court.

p. 92, l. 40.

In regard to issue A (ii) (acceptance by or on behalf of the *fidei commissaries*) the learned Judge held that acceptance by one of the donees (Jane) was acceptance on behalf of the *fidei commissaries* and that this point also was concluded by authority (47 N.L.R. 361). 20

p. 92, l. 20.

In regard to issues B (i) (whether any *fidei commissum* was extinguished by the Court Order) and B (ii) (whether such Order was not altogether a nullity because in excess of jurisdiction) the learned Judge did not, it is respectfully submitted, deal with the matter except by saying it was concluded by authority and that as all parties concerned were before the Court the Order was good.

p. 93, l. 10.

In regard to issue C (fraud or equivalent) the learned Judge held there was no evidence from which fraud could be inferred.

p. 93, l. 24.

In regard to issue D (partition of the land) the learned Judge held that the land in dispute could be identified as part of the land to which 30  
the *fidei commissum* attached and that therefore the partition of the  
latter did not affect the *fidei commissum*.

p. 95, l. 40.

24. The Supreme Court on Appeal (in the judgment delivered by Basnayake, J.) held—

A. In regard to issue A (i), that there had been ratification of the gift on behalf of the donees ; In regard to issue A (ii), that the *fidei commissum* contained in Deed 2110 was *unicum* and not *in favorem familiae* and as it had not been accepted by or on behalf of the *fidei commissaries* it was revocable by mutual consent of the donor and donees. 40

pp. 112, l. 1 to  
115, l. 20.

B. In regard to issues B (i) and B (ii), that as the gift and (by necessary implication) the *fidei commissum* also were validly revoked by agreement between the donor and donees, the proceedings in Special Case 116 were unnecessary but were also incompetent insomuch as the applicant had no *locus standi* and consequently the Order made by the Court was of no effect.

p. 116, ll. 30-40,  
p. 117, l. 1.

C, D and E. The Supreme Court, having held—

(A) that there never was any valid *fidei commissum* since being *unicum* it had never been perfected by acceptance of the *fidei commissaries*; and

(B) that the *fidei commissum* so far as it bound the fiduciary donees was validly revoked by them; and

(C) that the Court Order in Special Case 116 was in effect a nullity,

10 evidently found it unnecessary to consider, and did not consider p. 117, l. 15.  
any other issues in the case.

25. The Respondent submits therefore that the said judgment of the Supreme Court should be affirmed and that this appeal should be dismissed for the following amongst other

### REASONS

- 20
- (1) BECAUSE the said gift under Deed No. 2110 was not validly accepted by or on behalf of the donees Cecilia and Jane.
  - (2) BECAUSE there was no acceptance of the said *fidei commissum* by or on behalf of the *fidei commissary donees*.
  - (3) BECAUSE the said *fidei commissum* created by the said Deed No. 2110 was *unicum* and not in *favorem familiae* and such acceptance as there might have been by the fiduciary donees (Jane and Cecilia) could not render the said *fidei commissum* valid and binding as regards the *fidei commissaries*.
  - 30 (4) BECAUSE even if the said *fidei commissum* was in *favorem familiae* and not *unicum* it required for its validity acceptance by the *fidei commissaries* and would not be binding upon them by an acceptance given by or on behalf of the fiduciary donees.
  - (5) BECAUSE any *fidei commissum* created by Deed 2110 was validly revoked by agreement between the donor and donees.
  - (6) BECAUSE the provisions of the Entail and Settlement Ordinance did and do not apply.
  - (7) BECAUSE the purported Order in Special Case 116 was a nullity.
  - 40 (8) BECAUSE even if any *fidei commissum* were validly created by Deed No. 2110 the Respondent's title to the land in dispute, acquired by her through Siman a purchaser thereof, and arising from the partition between

Siman who was not a fiduciary and Jane who was of their respective undivided interests in the whole of Sirinivasa (of which the land in dispute was a part), is indisputable and the said Appellants can have no right or title thereto.

- (9) BECAUSE the land in dispute formed part of and was no greater in extent than the undivided interest in Sirinivasa purchased by Siman from Cecilia a purported fiduciary and that it has not been proved that Cecilia had died or had died without issue. 10
- (10) BECAUSE there is and was no privity between the said Appellants and Jane or Siman Fernando through whom they purport to claim in respect of the land in dispute.
- (11) BECAUSE the Respondent derives title from a *bona fide* purchaser for value without notice of any *fidei commissum*.
- (12) BECAUSE the said Appellants have failed to establish any right, claim or title to the land in dispute.
- (13) BECAUSE for the reasons given therein and for other good and sufficient reasons the judgment of the Supreme 20 Court is right.

HARTLEY SHAWCROSS.

S. N. BERNSTEIN.

In the Privy Council.

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ON APPEAL  
*from the Supreme Court of Ceylon.*

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BETWEEN

ABEYAWARDENE . . . *Plaintiff-Appellant*

AND

Mrs. C. S. WEST . . . *Defendant-Respondent.*

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Case for the Respondent

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*Solicitors for the Respondent.*