1951 *Present :* **Basnayake J. and Gunasekara J.**

WEST, Appellant, *and* ABEYAWARDENA *et al.*, Respondents

S. C. 572—D. C. Colombo, 2,680

Donation—Fideicommissum in favour of family—Acceptance—Revocability—Exchange of property—Entail and Settlement Ordinance (Cap. 54), ss. 5, 8.

A deed of gift in favour of C and J, who were daughters of the donors, contained a clause prohibiting the donees from selling, mortgaging or otherwise alienating the gifted property and proceeded to say that after the death of the donees the property should devolve on their lawful issue, and that, in the event of any one of the donees dying without lawful issue, her rights in the property should devolve on the surviving donee. As the donees were minors, the gift was accepted on their behalf by their brother-in-law and two brothers. There was, however, no acceptance on behalf of the fideicommissaries.

Held, that the deed did not create a fideicommissum for the reasons that there had been no acceptance on behalf of the fideicommissaries and that the deed did not constitute a fideicommissum in favour of a family. It was therefore open to the donors to revoke the gift with the consent of the donees.

Quaere, whether, under section 5 of the Entail and Settlement Ordinance, a donor who has created a fideicommissum reserving a life interest is entitled to make an application for exchange of the fideicommissary property.

APPEAL from a judgment of the District Court, Colombo.

N. K. Choksy, K.C., with *Sir Ukwatte Jayasundera*, K.C., *H. W. Jayewardene* and *G. T. Samarawickrema*, for the defendant-appellant.—The deed P 1B did not create a valid gift because there was no acceptance by Cecilia and Jane. Somebody who stands *in loco parentis* should accept a gift on behalf of minors. Cooray was only a brother-in-law. He was not a guardian nor was he in some relationship to the minors and having an implied authority to accept—*Soysa v. Mohideen* [1]. There must be an overt act of acceptance or words to the effect that the donee accepts. Acceptance must be signified on the face of the deed itself. Till it has been completed by acceptance a donation is revocable—*Carolis v. Alwis* [2].

Even assuming there has been a valid acceptance on behalf of the donee, there has been no acceptance on behalf of the fideicommissaries. If this is a " perpetual " fideicommissum then acceptance by Cecilia and Jane is sufficient, in order to give effect to the intention of the donor to keep the property in the family. But the present deed does not, on the face of it, purport to be a " perpetual " fideicommissum. " Family " means the " descendants " and acceptance must be by the " head of the family ", as stated by de Sampayo J. in *Soysa v. Mohideen* (*supra*) quoted by Soertsz J. in *Carolis v. Alwis* (*supra*, at p. 163.)

Even if there was a valid fideicommissum, the fideicommissum ceased to be operative by virtue of the order of the District Judge in the proceedings under the Entail and Settlement Ordinance. That order was

[1] *(1914) 17 N. L. R. 279.* [2] *(1944) 45 N. L. R. 156.*

final and conclusive. It contained certain terms and conditions but no reference to a fideicommissum. Plaintiffs were bound by that order and could not set up any other terms and conditions.

The application under section 5 of the Entail and Settlement Ordinance was made by a wrong party. The proper party to make such an application is somebody entitled to possession under the entail. Statutory results follow only if the proper party made the application. Otherwise the Court has no jurisdiction and the order is a nullity. If the order is a nullity section 8 has no effect and there is no fideicommissum automatically attaching to the property taken in exchange. For this reason *Abeywardene v. Tyrrel* [1] has been wrongly decided.

Assuming a valid fideicommissum was created, the purchaser for value without notice is not bound by any alleged fideicommissum—*Anees v. Bank of Chettinad* [2]. Looking at the Order of Court the purchaser had no notice of a fideicommissum attaching to " Siriniwasa ". Notice must be notice of facts, not of a legal position. The facts by themselves do not show the existence of a fideicommissum. See *Soysa v. Miskin* [3]. The purchaser need not look beyond the Order of Court—*Mirando v. Coudert* [4].

The heirs of Jane cannot repudiate the title of their predecessor. Jane could not have claimed absolute title to half share of " Siriniwasa ". Jane had a life interest and Siman was the purchaser of a life interest. There was therefore no valid and effectual partition binding on the fideicommissaries. [Counsel cited *McGregor's Voet, pp.* 136, 137 and *Sande on Restraints, p.* 269].

On the question of compensation for improvements and *ius retentionis* the District Judge has held in favour of the appellant.

N. E. Weerasooria, K.C., with *Vernon Wijetunge*, for the plaintiffs-respondents.—The persons who accepted the gift were persons competent to accept on behalf of a minor—*Lewishamy v. Silva* [5]; *Francisco v. Costa* [6]. Acceptance can even be by conduct subsequently, where there is no acceptance on the face of the deed itself—*The Government Agent, Southern Province v. Karolis* [7] ; *Lokuhamy v. Juan* [8]. The whole basis of the application under the Entail and Settlement Ordinance was on the basis that the deed P 1B created a valid gift. Clearly that was subsequent conduct confirming acceptance by the gift.

With regard to the question whether acceptance by the fiduciary is valid acceptance by the fideicommissaries the authorities are clear that when the fideicommissaries are " descendants " acceptance by a fiduciary is sufficient—*Wijetunge v. Duwalge Rossie* [9]. The observations of Soertsz J. in *Carolis v. Alwis* (*supra*) are *obiter*, because the persons to be benefited in that case were not " descendants " but brother and sister. The donor need not use the identical expression—" in favour of a family ". If the persons to be benefited came within that description it would be

[1] *(1938) 39 N. L. R. 505.*
[2] *(1941) 42 N. L. R. 436.*
[3] *(1945) 46 N. L. R. 385 at p. 390.*
[4] *(1916) 19 N. L. R. 90.*
[5] *(1906) 3 Bal. Rep. 43.*
[6] *(1888) 8 S. C. C. 190.*
[7] *(1896) 2 N. L. R. 72.*
[8] *(1875-76) Ram. 215.*
[9] *(1946) 47 N. L. R. 361 at p. 366.*

sufficient—*Ex parte Orlandini* [1]; *Ex parte Isted* [2]; *Ex parte Kleynhaus* [3]; *In re Allen Trust* [4]; *Weerakkodage John Perera v. Avoo Lebbe Marikar* [5]; *Soysa v. Mohideen* [6]; *Abeyesinghe v. Perera* [7]; *Ayamperumal v. Meeyan* [8]; *Fernando v. Alwis* [9]; *Wijetunge v. Duwalge Rossie* (*supra*); *Vallipuram v. Gasperson* [10]. See also *Voet* (*McGregor's trans.*) 36-1-27, 28; *Peresius* Bk. 8, title 55, section 10 (*Wikramanayake's trans.*, p. 29); *Pothier on Obligations* (*Evans' trans.*) Pt. I., Chap. I, Art 5, section 73; 2 *Burge* 148.

The application under the Entail and Settlement Ordinance was intended to be, and was, in fact, a perfectly genuine transaction although it may have proceeded on a mistaken view of the law. With regard to the Entail and Settlement Ordinance the view adopted in *Abeywardene v. Tyrrel* (*supra*) was accepted as correct in *Perera v. de Fonseka* [11]. "Exchange" in section 8 means substitution of one property for another. It cannot be said that the wrong party made the application. Siman and Maria, who made the application, were then entitled to rents and profits. The statute clearly says that "any person entitled to possession, &c." may make application, not "any person beneficially entitled". Therefore the Court properly made the Order and according to the terms of the statute the fideicommissum attached to the property—*Abeywardene v. Tyrrel* (*supra*.)

With regard to the suggestion that the division of "Siriniwasa" was bad, the law is clear that where there is a bona fide division of property among fiduciaries it is binding on the fideicommissaries—*Abdul Cader v. Habibu Umma* [12]; *Dassenaike v. Tillekeratne* [13]. Whether there was a partition by Jane and Siman is a question of fact, admitted in the lower Court and not put in issue or raised in the petition of appeal.

In regard to the contention that, assuming a valid fideicommissum attached to "Siriniwasa", the defendant was in the position of a bona fide purchaser for value without notice, it is submitted that the doctrine of a purchaser for value without notice does not apply to the facts of the present case. The defendant herself is a volunteer, that is, a donee of a purchaser, and the purchaser had notice of the conditions attaching to the property. With regard to the application of the doctrine stated in *Anees v. Bank of Chettinad* (*supra*) several points of distinction have to be noted. The basis on which that case was decided was section 9 of the Partition Ordinance. No one can say by looking at the partition proceedings that there is a fideicommissum. In the proceedings under the Entail and Settlement Ordinance the conditions were on the face of the proceedings, and the purchaser had notice of facts which created a fideicommissum. The purchaser was put upon inquiry. In the present case one is not confronted with the wiping out of the earlier title under section 9 of the Partition Ordinance. Here, section 8 of the Entail and Settlement Ordinance makes it clear that on exchange a fideicommissum

[1] *(1931) O. F. S. (P. D.) 141.*
[2] *(1918) S. A. L. R., Vol. II, p. 71.*
[3] *(1948) S. A. L. R., Vol. II, p. 85.*
[4] *(1941) N. P. D. 147.*
[5] *(1884) 6 S. C. C. 138.*
[6] *(1914) 17 N. L. R. 279.*
[7] *(1915) 18 N. L. R. 222.*
[8] *(1917) 4 C. W. R. 182.*
[9] *(1935) 37 N. L. R. 226.*
[10] *(1950) 52 N. L. R. 169.*
[11] *(1949) 51 N. L. R. 97.*
[12] *(1926) 28 N. L. R. 92. at p. 96.*
[13] *(1917) 4 C. W. R. 334.*

is impressed on the property taken in exchange. Even if a Court makes an Order contrary to statute, the statute must prevail. Further, the fideicommissaries do not claim through the fiduciary but on the deed—*Soysa v. Mohideen* (*supra*, at p. 284). Therefore, the Order of Court does not bind the plaintiffs. In *Tillekeratne v. de Silva* [1] a fideicommissum was expressly mentioned in the interlocutory decree of a partition action but it was omitted in the final decree. It was held that a fideicommissum attached, and the Court questioned whether the doctrine of purchaser for value without notice can be applied to a fideicommissum. The question came up in another form in *Sitti Kadija v. de Saram* [2] before the Privy Council. See the remarks of Lord Thankerton at p. 175 where the differences between trusts and fideicommissa, as set out by Prof. R. W. Lee in his "Introduction to Roman-Dutch Law", are approved.

N. K. Choksy, K.C., in reply.—Unless there is acceptance there is no valid donation—*Kanapathipillai v. Kasinather* [3]. Acceptance must be during the lifetime of donor. Acceptance can be by one under whose *potestas* one is. If it is not a fideicommissum in favour of a family there can be no acceptance on behalf of persons not *in esse*. A member of a family is not the same as a "family" in the context of the Roman-Dutch Law writers. There must be acceptance by the fiduciary for himself and on behalf of the fideicommissaries. Jane and Cecilia dealt with the property as absolute owners. Hence it cannot be said that Jane's children could by conduct accept the deed.

There is no authority for stating that a purchaser from one fiduciary could partition with another fiduciary. A purchaser does not stand on the footing of a fiduciary. Fideicommissaries are privies of fiduciaries and would be bound by partition among fiduciaries. This does not apply where partition is between a purchaser and a fiduciary—*Charles v. Nonohamy* [4]; *Dassanaike v. Tillekeratne* [5]. A purchaser from a fiduciary is not a privy of a fiduciary—*Kader v. Marrikar* [6]. *Anees v. Bank of Chettinad* (*supra*) followed McDonell C.J.'s judgment in *Kusumawathie v. Weerasinghe* [7]. Section 9 of the Partition Ordinance is not the decisive factor of these cases.

Cur. adv. vult.

October 10, 1951. BASNAYAKE J.—

This is an action for declaration of title to a portion of land in extent about 2 roods and 25 perches. The plaintiffs claim that they are entitled to the land as the heirs of one Mututantrige Jane Fernando. Their case is that one Siman Fernando was the original owner of the land. By deed No. 2110 of 4th October, 1883 (hereinafter referred to as P 1B), Siman and his wife Maria gifted to their daughters Cecilia and Jane both of whom were minors at that date, one being 9 years and the other 6½ years.

[1] *(1947) 49 N. L. R. 25.*
[2] *(1946) 47 N. L. R. 171 at p. 175.* *(1937) 10 C. L. W. 34.*
[3] *(1942) 43 N. L. R. 387.*
[4] *(1928) 25. N. L. R. 233 at p. 238.*
[5] *(1917) 4 C. W. R. 334.*
[6] *(1942) 43 N. L. R. 387.*
[7] *(1932) 33 N. L. R. 423.*

in equal undivided shares, an allotment of land in extent 3 acres 2 roods and 38.24 perches, known as " The Priory ". The gift was subject to the following conditions:—

(*a*) that Siman during his lifetime be entitled to take the rents and profits of the premises.

(*b*) that after his death his wife should be entitled to take one half of the rents and profits, the other half going to the donees.

(*c*) that the donees shall not be entitled to sell, mortgage, lease, or otherwise alienate or encumber the land for a term longer than four years at a time.

(*d*) that the rents and profits shall not be liable to be sold in execution for their debts.

(*e*) that after the death of the donees the land shall devolve on their lawful issue, and that in the event of any one of the donees dying without lawful issue, her rights in the land should devolve on the surviving donee.

The gift was accepted by one Jacob Cooray and two brothers of the donees, Alfred Thomas Fernando and James Fernando.

In 1896, 13 years afterwards, the donors Siman and Maria made an application under the Entail and Settlement Ordinance to which the donees were made respondents. Jane who was a minor aged 19½ years was represented by her brother James as guardian *ad litem*. In that application the donors sought the authority of Court to exchange " The Priory " for another property known as " Siriniwasa ". The relevant paragraphs of that application are as follows:—

" . . . . 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 the first petitioner 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.

" In consideration thereof to authorise and empower the petitioners to transfer and assign unto the first and second respondents the allotments of lands and the buildings thereon called " Siriniwasa " (fully 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 shall, 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 the second petitioner 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 enjoyed and appropriated by the first and second respondents."

That application was granted.

The Order of Court was carried out by Deed No. 1399 of 23rd June, 1896 (P 3). The relevant portion of that deed reads as follows:—

> " . . . . Mututantrige Siman Fernando and Colombapatabendige Maria Perera to transfer and assign unto the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando all those the said allotments of the land and buildings called and known as " Siriniwasa " subject to the condition that they shall not sell mortgage or otherwise alienate the same except with the consent of the said Mututantrige Siman Fernando and Colombapatabendige Maria Perera or the survivor of them and to the further condition that the said Mututantrige Siman Fernando shall 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 that after his death and in the event of his wife the said Colombapatabendige Maria Perera surviving him she shall during her lifetime be entitled to take use and 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 the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando."

On the very same day, by deed No. 1401, Cecilia transferred to Siman for a sum of Rs. 45,000 her " one undivided moiety " in " Siriniwasa ". By deed No. 2180 of 30th June, 1900, Jane and Siman who were now the co-owners of " Siriniwasa " effected a partition of the land by which Jane took lots A, B, C of the eastern portion and Siman took lots D and E of the western portion. By deed No. 3129 of 30th November, 1905, Jane who was married at that date with the concurrence of her husband transferred to Siman her divided eastern portion of " Siriniwasa " for Rs. 75,000. By deed No. 4218 of 6th December, 1907, Siman transferred " Siriniwasa " and " Anandagiri " to his son James for Rs. 75,000 subject to a mortgage of Rs. 100,000. By virtue of the last will of James, " Siriniwasa " amongst other properties came to the trustees of the Sri Chandrasekera Trust. They conveyed the northern portion of " Siriniwasa " in extent one acre one rood and one-tenth of a perch to the defendant's predecessor in title, Richard Lionel Pereira, by deed No. 290 (P 8) of 20th December, 1924. By deed No. 340 of 20th April, 1935, Richard Lionel Pereira gifted the land in question to Carmen Sylvene Pereira, his daughter.

The learned District Judge has held that deed P 1B created a *fidei-commissum* in respect of " The Priory " and that by virtue of the proceedings under the Entail and Settlement Ordinance that *fidei commissum* attached to " Siriniwasa " and that Jane was not entitled to transfer her share of " Siriniwasa " to her father Siman and that therefore James obtained no title to the land by the conveyance of " Siriniwasa " to him by Siman. Therefore, he held that the trustees of the Sri Chandrasekera Fund had no title to convey to the defendant's predecessor in title, and that on the death of Jane in 1933, her share devolved on the plaintiffs. He also holds that the defendant is a bona fide possessor and is therefore entitled to compensation for improvements, which he assessed at Rs. 59,857.37. This appeal is from that decision.

Learned counsel for the appellant contends—

(*a*) that deed P 1B did not bring into existence a *fideicommissum* because there was no acceptance on behalf of (1) the donees, and (2) the fideicommissaries.

(*b*) that even if deed P 1B brought into existence a *fideicommissum* that *fideicommissum* has been " destroyed " by the proceedings under the Entail and Settlement Ordinance, wherein the Court authorised a transfer of " Siriniwasa " without the burden of a *fideicommissum*.

(*c*) that the application under the Entail and Settlement Ordinance has not been made by the proper party and the order made on that application is null and void.

(*d*) that in any case the defendant is a bona fide purchaser for value without notice of the *fideicommissum*.

On the question of compensation for improvements and *jus retentionis* there is no dispute. The appellant does not canvass the findings of the learned District Judge.

Now, on his first submission that a *fideicommissum* is not brought into existence by deed P 1B, learned counsel for the appellant relies on the following paragraph of the deed:—

> " And these presents further witness that Mututantrige John Jacob Cooray also of Horatuduwa aforesaid doth hereby on behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando who are 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."

He contends that Jacob Cooray, the brother-in-law of donees, had no authority in law to accept the gift nor had their brothers any legal authority to do so. He goes further and says that even if the acceptance by the brother-in-law and the brothers is sufficient there is no acceptance at all on behalf of the fideicommissaries. Without such acceptance he submits that it is open to the donor and donee to revoke or alter the terms of the gift.

The question whether there was acceptance by the immediate donees, the fiduciaries, is only of academic interest as they have by their subsequent conduct ratified the acceptance of the gift on their behalf by their brother-in-law and brothers. The question that remains for decision is whether the acceptance of the fiduciaries amounts to acceptance in respect of the fideicommissaries.

Now on this point the authorities are divided. In the case of *Carolis et al. v. Alwis* [1], Soertsz J. held that acceptance by the immediate donee is not sufficient acceptance on behalf of the fideicommissaries. He says that it is also well settled that in the case of fideicommissary donations

[1] *(1944) 45 N. L. R. 156.*

there must be acceptance by the fiduciaries as well as by the *fideicommissarii* and, as a rule, but for one or, perhaps, two exceptions, the acceptance must be in the lifetime of the donor. He relies on Perezius from whom he has quoted at length.

In the case of *Wijetunge v. Rossie et al* [1], Wijeyewardene S.P.J. dissents from the view taken by Soertsz, J. He takes the view that a donation is irrevocable even in the absence of an acceptance on behalf of children not yet *in esse*.

Pothier [2] in his treatise on Obligations sums up the views of the jurists on the question of acceptance of gifts. He poses the question thus:—

> "Hence arises another question, whether after giving you anything with the charge of restoring it to a third person in a certain time, or of giving him some other thing, I can release you from the charge without the intervention of such person, who was no party to the act, and who has not accepted the liberality which I exercised in his favour?"

Wijeyewardene J. has preferred the view of those jurists who hold the opinion that a fideicommissary donation though not accepted by the fideicommissaries cannot be revoked by the mutual consent of the donor and the fiduciaries.

I find myself unable to accept the view of those jurists. The other school of thought appeals to me as its view seems to be more in keeping with the underlying principles of our law of donations. Their view is thus explained by Pothier [2]:—

> "The reason upon which they ground their opinion is, that, the third person not having intervened in the donation, the engagement which the donatory contracts in his favour is contracted by a concurrence of intention in the donor and donatory only; and consequently may be dissolved by an opposite consent of the same parties, according to the principle that *nihil tam naturale est, quaeque eodem modo dissolvi quo colligata sunt*. The right acquired to the third person is then, according to these authors, not irrevocable, because being formed by the sole consent of the donor and donatory without the intervention of the third person it is subject to be destroyed by the destruction of this consent, produced by an opposite consent of the same parties."

It will be useful to consider what Van Leeuwen [3] has to say on the same topic.

> "A gift is perfected as soon as the donor has expressed his intention, whether in writing or verbally, even by bare agreement, and for this reason a gift at the present day gives rise to an action. But at one time it did not arise except by stipulation and by delivery. But this was changed by Justinian. With this limitation, however, that it it not considered perfected before acceptance on the part of the donee has followed, contrary to Anton, Fab., and Joann. del Costillo Soto Major, who were of opinion that it was enacted by Justinian,

[1] *(1946) 47 N. L. R. 361.*

[2] *Pothier—A Treatise on the Law of Obligations or Contracts, Vol. I, Evans' translation, pp. 43-44.*

[3] *Censura Forensis, Part 1, Book IV, Chapter 12, paragraph 16, Barber's translation, p.90.*

that by a mere gift apart from acceptance even a person ignorant of his rights may acquire, to prove which they adduce, *cum in arbitrio verb. hoc facere quod instituit.* For though the Emperor enacted there that a gift should be perfected without stipulation and delivery by a simple and bare declaration of intention, still this must be understood of such a bare intention as after acceptance and acknowledgment can give rise to an obligation and action. Since, otherwise, no one is bound to himself so as to have to persist in his bare intention, by which he is bound to the other only after consent and acceptance by the latter; and when this has not followed, the donor is perfectly free to change his bare intention."

The views of Burge [1] on this point are stated thus:—

> "It has been considered by some Jurists, that it was competent to the public notary to accept the donation for the fideicommissary, but this opinion has been controverted, and is opposed to the rule of law, *alteri stipulari nemo potest* and such a mode of acceptance was admitted only when the fideicommissary had subsequently ratified it. Unless, therefore the fideicommissary had, by himself or another accepted the donation, it was, in many cases, subject to revocation by the donor."

Burge goes on thereafter to state the cases in which the donor is not free to revoke his gift.

Learned counsel for the respondent laid great emphasis on the point that acceptance on behalf of the fideicommissaries was not necessary in the case of a "*fideicommissum in favorem familiae*". He submitted that in this instance the *fideicommissum* was "*in favorem familiae*". He relied strongly on the case of *Ex parte Orlandini and two others* [2]. In that case De Villiers J.P. adopted the view of Perezius in preference to those of Grotius and other jurists cited by Pothier. De Villiers J.P. founds his decision on an argument of Perezius the force of which, with the greatest respect to that eminent jurist, I am unable to see. He says:—

> "Now it seems to me that the argument of Perezius is unanswerable, for, if acceptance by minors and unborn persons were necessary to lend binding force to a *fideicommissum in favorem familiae*, it would follow that such a *fideicommissum* could not, in practice, be constituted by act *inter vivos*."

Now, what is a "*fideicommissum in favorem familiae*"? Voet [3] says:—

> "A *fideicommissum* can also be left to the family; and Justinian has laid down that in such a case under the term family are included not only parents and children and all relatives, but also the son-in-law and daughter-in-law to supply the place of those who have died, where the marriage has been dissolved by the death of son or daughter. But Sande points out at some length that by civil law adopted children *alumni* and freed men were included under the term *familia* when

[1] *Colonial and Foreign Laws, Vol. 2, p. 149.*
[2] *South African Law Reports, 1931, O. F. S., P. D., p. 141.*
[3] *Book XXXVI, Title I, Section 27.*

there is any question of some *fideicommissum* being left to the family and in that connection he puts the question whether women or their issue are included in the family. In section 12 he has collected the authorities who have laid down at greater length what is included under " family ", genus, *stirps*, *linea*, *parentela*, *domus*, *cippus*, and the like. Now there is also a bequest to the family when the testator forbids the alienation of a thing out of the family or directs that it should not go out of his line of descent or out of his ' blood ' ".

From the foregoing it would appear that a *fideicommissum* such as that created by deed P 1B is not a *fideicommissum in favorem familiae*, for it is a gift to the immediate donees with a prohibition against alienation and after their death to their children who are left free to deal or dispose of the property in any manner they like. This is the kind of *fideicommissum* known as *unicum*. It is binding on only one person. He who follows first after the burdened heir or legatee can with impunity transfer the prohibited property to a stranger [1].

Of the Roman Dutch Law commentators only Sande discusses at length the nature and effect of a *fideicommissum in favorem familiae*. His authority is so high that even Voet quotes him when discussing the question. I shall therefore take the liberty of citing more than one passage from his treatise on Restraints.

Sande [2] states: —

" But the *fideicommissum* is simplex and pure, if the testator has himself bequeathed the property to the family, as if he says in clear terms, ' I leave my landed property to the family.' This form of words, added to a prohibition upon alienation, has this effect, that the prohibited person cannot change the order of succession, which the law interprets as being laid down by the testator and therefore he cannot pass by a nearer and leave the property to a more remote member of the family."

" This is so except where it can be gathered from the words of the will itself that the intention of the testator was otherwise; for example, if wishing to provide for the preservation of his family, he says " I will, or I order, that the landed property be retained, remain, and be left in the family ". For from these words would be induced a real, multiplex, and perpetual *fideicommissum*, which would last as long as anyone of the family survived."

" Thus when a thing is prohibited from alienation outside the family or from going out of the name of the deceased, if this thing is alienated contrary to the will of the testator, a right of action is given to those who are members of the family and the name of the deceased." *Nomen* and *familia* are taken as synonymous. In the case of *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.

[1] [2] *Sande, Webber's translation, p. 211 et seq.*
Treatise on Restraints, Webber's translation, p. 214, etc.

It is clear to my mind from what has been said above that P 1B does not ereate a *fideicommissum in favorem familiae*. As the *fideicommissum* is not one in favour of the family and the gift has not been accepted by or on behalf of the fideicommissaries it is revocable by the mutual corsent of the donor and donee.

Now, in the instant case, what Siman and the two children Cecilia and Jane did was to revoke the deed of gift of " The Priory " and receive in exchange another gift of " Siriniwasa " subject to a new condition, namely, not to alienate the land without the consent of the donor or his wife should she survive him. In that view of the matter the proceedings under the Entail and Settlement Ordinance were not necessary, but perhaps it was thought that the safer course would be to obtain the permission of Court under that Ordinance. The fact that action was taken under that Ordinance on the footing that there was a valid *fideicommissum* which could not be revoked does not alter the true nature of the gift and its revocability. The Entail and Settlement Ordinance provides the machinery for carrying out what under the Roman-Dutch Law was permitted with the authority of the Courts.

Voet [1] observes:—

> " In addition to this, the Commentators have mostly held that the remaining assets which can be kept without deterioration may be exchanged by the fiduciary for other assets which are better and more useful, especially if it does not seem to be probable that the fideicommissary heir has any affection for the goods belonging to the inheritance; since the person in whose favour the prohibition against alienation was constituted would appear not to be deprived of any advantages, nor does an exchange of goods by which the fideicommissary heir is not prejudiced, but is benefited, appear to be contrary to the testator's desire. For though one is forbidden to alienate goods belonging to the Church or included in a dowry, yet one is allowed by law to exchange even these for others which are more useful. Hence the fiduciary is not to be prevented from acquiring servitudes for the benefit of the fideicommissary property, or from liberating it from servitudes which have been imposed on it . . . Moreover, the alienation of houses which are held subject to a *fideicommissum*, and are falling in from age, is permitted with us on an order of Court, subject to the proviso that the money obtained therefrom should be expended in the purchase of other property or some other kind of investment, and that what is so acquired should take the place of what has been alienated, and become fideicommissary property."

It would appear therefore that under the common law it is the fiduciary who is qualified to make the application for sale of fideicommissary property, and not any one else. That seems reasonable—for what interest can the donors have in the property once they have given it away? It is the fiduciaries who should decide what is in their

[1] *Book XXXVI, Title I, Section 63, Macgregor's translation.*

interests. The Ordinance contains no indication that it meant to alter the common law by authorising persons other than the fiduciary to make applications for sale or exchange of fideicommissary property.

Section 5 enacts as follows: " 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."

The question is whether the donor on deed P 1B who had a life interest comes within the ambit of the section. Is he " a person entitled to the possession or to the receipt of the rents and profits of the land "? In a sense he is such a person as he was in physical possession of the land and by virtue of the life interest reserved for himself he was entitled to the rents and profits. But is that the interest and possession contemplated in the section or is it the possession and interest of the fiduciary? Having regard to the common law on the subject and to the fact that the Ordinance is not designed to alter that law I am of opinion that a donor who has created a *fideicommissum* reserving a life interest is not entitled to make an application under the section. The rule of construction of statutes—sometimes called the golden rule—is, that the words of the statute must *prima facie* be given their ordinary meaning. But that rule has its exceptions. One of those exceptions is 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. In this view of the enactment there was no proper application before the Court and the order passed thereon was not an order under the enactment. Hence the order and the action taken thereon do not attract the consequences prescribed in the statute.

One of the consequences is that provided in section 8 that any property taken in exchange for any property exchanged under the Ordinance shall become subject to the same entail or *fideicommissum* as the property for which it was given in exchange was subject to at the time of the exchange.

While on this point I wish to say that I hold the view that where a proper application and order thereon is made under section 5 and an exchange is effected in consequence the property taken in exchange becomes the subject to *fideicommissum* by operation of section 8 without more and the parties effecting the exchange cannot escape that consequence by executing the deeds in such a way as to avoid a *fideicommissum* in respect of the land taken in exchange.

For the above reasons the appellant is entitled to succeed as there is no *fideicommissum* binding on " Siriniwasa ", which has been gifted subject to one condition, and the donees have not committed a breach of that condition. The original donor therefore obtained the entire rights of " Siriniwasa " from his two daughters Cecilia and Jane and rightly alienated it to his son who gifted it to the trustees from whom the present defendant derives her title.

In my view, therefore, this appeal should be allowed with costs both here and below.

GUNASEKARA J.—

I agree that deed No. 2110 of 4th October 1883 (P 1B) 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. I therefore concur in the order proposed by my brother.

Appeal allowed.