1957 *Present :* H. N. G. Fernando, J., and T. S. Fernando, J.

D. C. WIJESURIYA, Appellant, *and* T. S. PEIRIS *et al.*, Respondents

S. C. 146-147 (Inty.)—D. C. Panadura, 1,901

Partition action—Appeal—Several respondents—Security for costs of appeal—Quantum.

Where the plaintiff in a partition action preferred an appeal and the contesting respondents to the appeal were " more or less identical " for the reason that they all relied on one alleged defect in the plaintiff's title—

Held, that one set of costs was sufficient as security for the costs of appeal.

Fideicommissa—" Fideicommissum to a family "—" Fideicommissum graduale "—" Nude prohibition "—Will of 1861—Creation therein of a trust or fideicommissum—Probate—Is registration of it necessary ?—Registration of Old Deeds and Instruments Ordinance No. 35 of 1927, ss. 2, 11, 12—Prevention of Frauds Ordinance (Cap. 57), s. 9—Wills Ordinance (Cap. 49), s. 9—Registration of Documents Ordinance (Cap. 101), ss. 7, 8 (a) (b), 10 (2), 26—Land Registration Ordinance of 1891, ss. 16, 17.

The establishment of a fideicommissum stepwise or *graduale* does not necessarily connote an intention on the part of the grantor that the fideicommissary property should remain in the direct line in his family beyond the specified generations.

In 1861, a testator devised by Will certain property to his son " as his inheritance ". Similar bequests were made of other properties to four other sons, and Clause 12 of the Will provided as follows :—" I (the testator) nor my five children nor the children of the said five persons i.e., no person out of these three generations shall have the power to sell, mortgage, or gift the aforesaid lands and only the right to possess of these three generations shall be entitled to sell, mortgage or gift the aforesaid lands and only the right to possess and improve the same is reserved. " Clause 14 further granted full power to the testator's executors to deal with a number of lands which were not the subject of specific bequests, the testator stating in the Clause : " I trust that these two executors will arrange from these said lands the future well being of my grandsons and grand-daughters and it does not behove for the children to act against the good acts of these two or to litigate with them . . . . . "

Held, that the Will created a valid fideicommissum effective to prohibit alienation by the testator's children but not effective to prohibit alienation by the testator's grandchildren. There was not in the terms of the Will a bequest to a family, nor a prohibition against alienation outside the family, nor any express or implied designation of the testator's great-grandchildren as fideicommissaries.

Held further, that section 2 of the Registration of Old Deeds and Instruments Ordinance No. 35 of 1947 does not prevent a Will from being used to prove a trust or fideicommissum in a case where the probate has not itself been registered as provided in that section. In the present case the conditions set out in section 2 (1) (*b*), namely that the Will was referred to in some other duly registered instrument, was satisfied. It is only if application had been made under that Ordinance to register a Will that the applicant had the duty under section 3 (3) to present the probate also for registration. If, therefore, the Will in the present case did in law create a fideicommissum in favour of the great-grandchildren of the testator, the Ordinance of 1947 would have been no bar to the availability of the Will in proof of the fideicommissum, provided of course that the grant of probate had actually been made.

APPEALS from two orders of the District Court, Panadura.

Walter Jayewardena, with *Neville Wijeratne* and *N. Rodrigo*, for the 1st and 3rd defendants-appellants in Appeal No. 147 and the 1st and 3rd defendants-respondents in Appeal No. 146.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *P. Ranasinghe*, for the plaintiff-appellant in Appeal No. 146 and the plaintiff-respondent in Appeal No. 147.

G. P. J. Kurukulasuriya, with *B. S. Dias*, for the 4th and 6th defendants-respondents in both appeals.

Cur. adv. vult.

May 16, 1957. H. N. G. FERNANDO, J.—

In appeal No. 147, the appellants (who are some of the respondents in the main appeal No. 146) applied to the District Court for an order abating the main appeal, the ground of the application being that, although notices of intention to deposit *Rs. 175 as security for the costs of each respondent* to the main appeal were duly served, the amount actually deposited and accepted by the Court was only Rs. 175, and not that amount multiplied by the number of respondents. The appellants in appeal No. 147 argue that they were misled by the notices, and would have objected to the security if the notice had stated that the intention was to deposit Rs. 175 as security for the costs of all the respondents. Nevertheless that argument does not avail in a partition action. In *Ibrahim v. Bebee*[1] it was pointed out that "it has been the practice in partition actions to allow one set of costs only where the title is derived from the same source, and the interests of the claimants are more or less identical". We were not referred to any case where this decision of a bench of four Judges has been questioned. The interests of the contesting respondents to appeal No. 146 are "more or less identical"

[1] *(1916) 19 N. L. R. 289.*

for the reason that they all rely on one alleged defect in the plaintiff's title. As to the sufficiency of Rs. 175 as security for one set of costs, there can be no question. The failure of any of the present appellants to object to that amount as being insufficient security for his costs of appeal prevents that question from being now raised. Appeal No. 147 is therefore dismissed, but without costs.

The principal point taken in the main appeal involves the interpretation of the will of one Davith Rodrigo, made in 1861, whereby he devised the property in dispute to his son Bastian upon conditions to which I shall presently refer. Bastian died intestate leaving his widow and seven children one of whom was Francina. In April 1895 the widow and six of the children, claiming title to a 13/14 share in the land, that is on the basis of an intestacy, sold that share to the other child Francina. Francina in 1904 donated a half share of the land to her daughter Meraya Cecilia and her son-in-law Daniel Peiris, the latter of whom died in 1929. Meraya Cecilia was therefore entitled, after 1929, to a 3/8 share, and each of her two daughters (the 1st and 2nd defendants) to a 1/16 share each. The whole of Meraya Cecilia's interest was transferred to the 1st defendant in 1933, so that the half-share dealt with by Francina in 1904 devolved as follows :—7/16 to the 1st defendant and 1/16 to the 2nd defendant. The entire interest of the 1st defendant was transferred in 1950 to her husband the 3rd defendant.

Francina had retained a half share in the land after 1904. This half share was mortgaged in 1924 and, after a sale in execution of the mortgaged property and subsequent transactions, has now passed to the plaintiff.

The ground upon which the devolution of title as set out above was challenged in this action was that Davith Rodrigo's last will created a fideicommissum in favour of his grandchildren and great grandchildren, and that the transfer in 1895 by six of those grandchildren in favour of the 7th one (Francina) was ineffective, being in breach of a fideicommissary substitution of Davith's great grandchildren in succession to their parents.

The terms of the bequest to Bastian in the last will are that the property in question shall devolve on him "as his inheritance". Similar bequests are made of other properties to the testator's four other sons, and clause 12 of the will later provides in terms which have been translated as follows :—

> "12. I the said Davith Rodrigo nor my five children nor the children of the said five persons i.e., no person out of these three generations shall have the power to sell, mortgage, or gift the aforesaid lands and only the right to possess of these three generations shall be entitled to sell, mortgage, or gift the aforesaid lands and only the right to possess and improve the same is reserved."

It is relevant also to refer to clause 14 which grants full power to the testator's executors to deal with a number of lands which are not the subject of specific bequests, the testator stating in this clause that

"I trust that these two executors will arrange from these said lands the future well being of my grandsons and grand-daughters and it does not behove for the children to act against the good acts of these two or to litigate with them . . . . ."

The question for decision is whether these provisions in the last will should be construed as creating a fideicommissum binding not only Bastian, but also on Bastian's children, and preventing alienation inter vivos by those children. The terms of this same will were interpreted in the case of *Abeyratne v. Fernando*[1], the subject of which was a land devised to Hendrick, another son of Davith. The argument on that occasion was that Hendrick had acquired absolute title on the footing that the last will created no fideicommissum at all. Reliance was placed on the point that the testator in prohibiting alienation failed to designate the person in whose favour the prohibition was made. It was held, however, that the combined effect of the clause of devise and of clause 12 was to create a fideicommissum. Van Langenburg, A.J. said that the testator contemplated the event of Hendrick's children receiving the property "for he prohibits them from alienating the same and to my mind there is sufficient to show that the prohibition preventing Hendrick from alienating was made for their benefit." Other authorities to which we were referred establish the correctness of the view taken by this Court that there was a sufficient designation of the children of Hendrick by the device of directing expressly that those children themselves should possess and should not alienate.

The same will also came up for consideration by this Court in subsequent cases. In a judgment dated 24th October 1917 in case *No. 5868 D.C. Kalutara*, which also concerned a portion of the land devised to the son Hendrick, it was held that the land was subject to a fideicommissum in favour of Hendrick's children, but it was held nevertheless that the 5th defendant to the action had prescribed to the interests of those children. De Sampayo, J., however, remarked "it is not relevant to this case to consider how far the fideicommissum extends and what the rights of the remoter descendants of Hendrick may be."

Hendrick's remoter descendants, his grandchildren, instituted action *No. 11,589 D.C. Kalutara* in 1923 claiming that their father, who was a son of Hendrick, succeeded to a 1/4 share on Hendrick's death and that that share passed to them on their father's death, despite an alienation by the father. This claim was upheld by the District Judge, who answered affirmatively the issue whether the last will created a valid fideicommissum in favour of Davith's "grandchildren and great grandchildren to three generations." The Judge merely refers to the judgment of this Court in *Abeyratne v. Fernando* as ground for his decision. That decision itself was affirmed by this Court on 3rd March 1927, but the judgment does not set out reasons which induced this Court to the view that the fideicommissum bound the property in the hands of the testator's grandchildren.

It is, however, a judgment of two Judges of this Court in which the language of the last will now being questioned was interpreted as

[1] *(1911) 14 N. L. R. 307.*

creating a fideicommissum effective to prohibit alienation by the grandchildren. That decision is not *res judicata* for present purposes because the parties to this action are different and the subject matter is a different land. Nevertheless we should have much hesitation in placing a different interpretation upon the document unless we are compelled to conclude that the former interpretation was wrong.

The essential requirements for the creation of a valid fideicommissum are well understood and have been repeatedly stated in judgments of this Court. "No special form of words is required for its creation . . . . Any words or mode of expression may be used, if only the intention can be shown; for in an inheritance by way of fideicommissum the intention of the testator must be chiefly examined." (Van Leeuwen—Commentaries, Kotze's translation. 2nd Ed. Vol. 1 p. 376). The intention may be present despite the absence of such words as fideicommissum, fiduciary or fideicommissary, and "it is not his verbally expressed intention that is looked to, but also that intention which is tacit and gathered from conjectures . . . . as a necessary or manifest consequence from what has been expressed" (Vander Linden—Censura Forensis 1.3.7.7).

In the will under consideration there is clearly no *express fideicommissum*. The judgments in *Abeyratne v. Fernando* show clearly that the intention to create a fideicommissum binding on the devisee Hendrick was inferred by this Court from the following circumstances:—(*a*) the prohibition against alienation imposed on Hendrick, and (*b*) the desire to benefit Hendrick's children evinced by the provision that they themselves should possess and should not alienate. The property was bound in Hendrick's hands upon the well-known principle that a fideicommissum arises from a prohibition against alienation coupled with a clear indication of the persons in whose favour the prohibition was imposed (The Roman-Dutch Law of Fideicommissa—Nadaraja p. 30). As to the claim now set up for the grandchildren of the devisee Bastian, the last will undoubtedly prohibits their parents from alienating, but is there the necessary additional requisite, namely any indication that the prohibition was imposed for the benefit of the grandchildren? Mr. Walter Jayawardena has addressed to us an interesting argument in support of the view that there is such an indication. It is contended that a recognised type of fideicommissum is the "family" fideicommissum where the testator manifests the intention to fetter property for the benefit of his family and that where this intention has been manifested, the prohibition against alienation, though it may be nude or incomplete in appearance, is nevertheless effective because of the manifested intention that the prohibition should benefit the family. In the present case, it is said, the testator in establishing a fideicommissum stepwise or *graduale*, that is to say in first appointing his son and then substituting his grandchildren, manifested an intention that the property should remain in the direct line in his family, and that accordingly when the prohibition against alienation by the grandchildren is considered, it should be regarded as having been imposed to benefit the next generation in the direct line. It seems to me that this contention proceeds upon a misconception of the type of fideicommissa

which have sometimes been loosely termed "family fideicommissa". Voet 36.1.27, as translated by Gane, states that "finally a fideicommissum can also be left to *a family.*", and then refers to the persons who can be regarded as being included in the term "family". He thereafter passes to the proposition "moreover a bequest is also made to a family in the case when a testator forbids property to be alienated outside the family", or says "that it shall not go away from his line and blood". (Gane's translations, p. 370). *Prima facie* what is here stated is (i) that there can be a devise in which a fideicommissum is expressly left *to a family*, and (ii) that the same result can be achieved by implication when there is a prohibition on alienation *outside the family* or outside the testator's line and blood. In the latter case the intention to benefit the family by means of the prohibition is implied from the terms of the prohibition itself. In subsequent sections Voet deals at length with the effect and consequences of different forms of bequests "to a family" whether the bequests be of the direct type first mentioned in section 27 or of the implied type there secondly mentioned.

If it is clear that the testator's intention is such that the fideicommissum left to a family would be stepwise and permanent, that order of succession will be followed; but a devise "to a family" need not necessarily have effect stepwise and collaterals may be called to the succession in the event of a failure in the direct line (Voet idem sections 29 & 30), so that the stepwise order of succession is not a necessary characteristic of this type of fideicommissum. Hence the fact that there has been express stepwise substitution connotes no more than an intention to substitute in that order and should not be considered to be a manifestation of the same intention as is attributed to the grantor of a devise "to a family".

The view I have formed is supported by an examination of the manner in which Voet in Book 36 Title I considers fideicommissa. In those sections which precede section 27 he deals first with classification and thereafter with express fideicommissa and certain types of implied fideicommissa. In the course of classification he finds it necessary to refer in section 4 to a fideicommissum "to a family" but only for the purpose of illustrating the difference between a *simple* fideicommissum, in which the institute has no right of disposition or alienation, and the *conditional* fideicommissum, in which the institute is left with some discretion to prefer one member or degree in a family over others; but he leaves for the later section 27 consideration of the creation of a fideicommissum to a family, and in dealing with this type, as already stated, he refers first to a fideicommissum expressly left to a family and secondly to a fideicommissum impliedly left to a family by the device of the prohibition against alienation outside. There is no suggestion in Voet or in any other authority to which we were referred which supports the proposition that provision for express substitution *graduale* is to be considered as being equivalent to a bequest "*to a family*". Indeed the only purpose of the classification of the substitution *graduale* is in order to distinguish it from the type of fideicommissa in which collaterals may be called to the inheritance either because of express provision or else in the event of a failure of succession in the direct line.

The weakness of the contention we are considering is also illustrated upon a consideration of the essential nature of almost every conceivable fideicommissum. Except in the one case of a devise to A and after him specifically to B, and thereafter to C, where A, B and C are all "strangers" to the testator and to each other, it will be seen that every fideicommissum bears the characteristic that it is intended for the benefit of the family either of the testator or of the institute; in the lay sense, therefore, it would be true to say *generally that all fideicommissa are intended for the benefit of a family.* It would follow, if the respondent's contention be correct, that the construction ordinarily placed upon fideicommissa expressed to be to *a family* must be applied equally *in all cases* of fideicommissa except the remotely possible case where strangers are expressly substituted for each other. It is to be noted also that in Professor Nadaraja's book (as in other texts), what is first dealt with is the express fideicommissum, within which categories he considers the case where the family is collectively designated as the fideicommissary—p. 55. In a subsequent chapter in which tacit fideicommissa created by means of prohibitions on alienation are considered, the author refers to the case of the tacit fideicommissum created by prohibition on alienation outside the family. The principles of construction applicable to the latter case are nowhere stated to be applicable in order to extend beyond specified generations a substitution effected expressly, or to render effective a prohibition against alienation which is unaccompanied by a clear designation of the persons who are intended to be benefited thereby. None of the decided cases upholding fideicommissa to which we were referred is of assistance to the respondents; there is not in the terms of the last Will either an express substitution, nor a bequest to a family, nor a prohibition against alienation outside the family, nor any express or implied designation of the testator's great-grandchildren. In fact this particular question is nowhere mentioned or referred to by implication in the terms of the bequest.

The will under consideration, therefore, in so far as the prohibition imposed on Davith Rodrigo's grandchildren is concerned, falls within that well known class of cases where the prohibition is nude because "persons are not found indicated in respect of whom the disposition has been made by the testator" (Voet 36.1.27—Gane p. 370). I need not refer to the numerous authorities on this point which are collected in the Notes to Chapter VI of Professor Nadaraja's book.

I have now to consider a point raised on behalf of the appellant which, if good, would be decisive in his favour even on the footing that the last will did create a valid fideicommissum binding the grandchildren of the testator. The last will was executed in 1861 and was not (until a recent alteration in the law) an instrument which required registration in order to retain priority by virtue of prior execution against subsequent documents. The Registration of Old Deeds and Instruments Ordinance No. 35 of 1947 is however applicable to the Last Will; accordingly, in terms of section 2 of that Ordinance, it cannot be used to establish a trust or fideicommissum as against a person claiming upon valuable consideration under a registered instrument unless there has

been compliance with one of the conditions mentioned in that section. The principal condition so imposed is the requirement of registration either under the former law or under the Registration of Documents Ordinance Cap. 101, and neither of these requirements is satisfied in the present case. The third alternative condition contained in section 2 is that the instrument should have been *referred to in some other* duly registered instrument. This condition is satisfied in the present case because the deed of 1895 whereby Francina claims title to the entire land refers to the Last Will of Davith Rodrigo and mentions the number and date of attestation as well as the name of the attesting notary. The will itself therefore is not rendered ineffective by section 2 of the Ordinance against the interest claimed by the appellant.

However, the probate of the Will has also not been registered, and it is argued for the appellant that section 2 of the 1947 Ordinance read with section 9 of the Prevention of Frauds Ordinance prevents the admission in this case of proof of probate of the Will. The crux of the argument is that a probate is an instrument affecting land within the meaning of section 2 of the 1947 Ordinance and that an unregistered probate is subject to the disqualification imposed by that section and cannot therefore be proved in this case.

The expression " instrument affecting land " is given, through section 11 of the 1947 Ordinance, the same meaning as is assigned by paragraph (*a*) of section 8 of the Registration of Documents Ordinance (Cap. 101), and the argument in reality poses the question whether a probate falls within the definition in the paragraph aforesaid. That definition expressly mentions wills and grants of administration, but does not mention probates. But it is argued that a probate is a " judgment or order of Court affecting land " within the meaning of that expression in paragraph (*a*) of section 8 of Cap. 101.

It is undoubtedly correct that a Will is ineffective to pass title to land unless it has been duly proved (section 9 of the Wills Ordinance); but it is not equally clear that a probate for this reason is an " order of Court affecting land ", and it is still less clear whether the Legislature intended to include a probate within the latter expression as defined in paragraph (*a*) of section 8. Reference to the Land Registration Ordinance of 1891 shows that under the law which preceded the enactment of Cap. 101, the Legislature had expressly included a probate within the category of instruments which section 16 of the Ordinance of 1891 required to be registered. In view, however, of the form in which the 1891 Ordinance was drafted, doubts appear to have arisen as to whether a failure to register a probate would render it void as against subsequent instruments duly registered. Section 17 of the 1891 Ordinance which dealt with the effect of non-registration did not enumerate specifically all the instruments listed in section 16, and only dealt with the voidability of " every deed, judgment, order or other instrument as aforesaid unless so registered ". Upon this phraseology it was argued that section 17 did not avoid an unregistered probate because no mention of probates was made in that section. This view was, however, rejected by a Full Bench in *Fonseka v. Cornelis*[1]. It

[1] *(1917) 20 N. L. R. 97.*

was pointed out by Wood Renton C.J. that the expression "every deed, judgment, order or other instrument as aforesaid" in section 17 was a compendious phrase intended to catch up and include everything in section 16 that section 17 has not expressly mentioned, and that the words "as aforesaid" govern not only instruments but also "judgments and orders". So that in his opinion the words "order as aforesaid" included that type of order which is a probate. Shaw, J. and de Sampayo, J. both took the view that a probate was an "other instrument as aforesaid" within the meaning of section 17. In effect then it was clear law prior to the enactment of Cap. 101 that an unregistered probate, and consequently a will affected thereby, could be avoided on the ground of non-registration. But when the new Ordinance of 1927 (Cap. 101) came to be enacted two significant changes were made; a term of art, namely "instrument affecting land", was employed to denote registrable instruments, and within this term were included two classes distinguished according to the time of their execution. The first class, that is of instruments executed prior to the 1927 Ordinance, is mentioned in paragraph (*a*) of the definition in section 8 of Cap. 101. This paragraph is in terms identical with those employed in section 16 of the 1891 Ordinance but for one difference, namely that *the term "Will" is substituted for the term "probate"*. In regard to instruments of the class executed after the enactment of Cap. 101, paragraph (*b*) of section 8 also expressly mentions Wills but uses no phraseology which includes probates within the definition of an "instrument affecting land". In view of these changes (which must be presumed to have been made with full knowledge that the Full Court had expressly to decide the earlier disputed question whether a probate is avoided by non-registration), one must at least *prima facie* infer an intention to modify the former law of Registration. *Prima facie* then, neither paragraph (*a*) nor paragraph (*b*) of the definition in section 8 includes a probate, so that a probate would appear not to be an "instrument affecting land" within the definition. At first sight this view might be said to lead to absurdity in that the mere registration of a will without also registration of the probate, might seem sufficient to support a claim of priority on the ground of prior execution: but such an absurdity is avoided in fact by the provision in section 26 of Chapter 101 to the effect that when a will is tendered for registration, the probate together with a copy of the will shall be presented for registration. By this means the Legislature has secured that when one particular kind of "instrument affecting land", namely a will, is registered, the probate will be registered at the same time. The argument that the probate itself is "an instrument affecting land" is negatived or at least much prejudiced by the provision in section 26, for, if the Legislature regarded a probate as falling within the scope of the term "instrument affecting land" as occurring in sections 8 and 7 of Cap. 101, there would seem to be no reason to require expressly in section 26 that a probate be presented for registration. Suppose for instance that section were in its present terms but that section 26 had provided that a will would only be registered if the certificate of death of the testator is also presented for registration, then clearly the certificate

of death would be a document which must be registered under the Ordinance at the time of the registration of the will; but could the certificate for that reason be an "instrument affecting land"?

We have been referred in this connection to a recent judgment of this Court in *Mohamedaly Adamjee et al. v. Hadad Sadeen et al.*[1]. The District Judge had there found that a deed of 1916 and subsequent instruments had been duly registered but that the probate granted in 1876 of an earlier Will had not been registered, and held for that reason that the probate was void as against the interests claimed under the registered conveyances. This decision was upheld by this Court upon the authority of the case of *Fonseka v. Cornelis*[2] to which I have already referred. The fact that the latter case was a decision under the former Registration Ordinance of 1891, and that section 8 (*a*) of Chapter 101 enumerates documents executed prior to its enactment which may now fail for want of due registration, may perhaps have been overlooked. If, as I think, the document which is now required to be registered as "an instrument affecting land" is the Will, and the provision for registration of the probate at the same time is only additional, then the decision in *Adamjee v. Sadeen*[1] is correct, but for the reason that (as would appear from the judgment) *the will itself was not registered.* I consider it useful in passing to refer to the other point decided in that case, namely that a disposition by an heir of a testator gains by registration priority over the testator's Last Will. That decision too was reached upon the authority of the views expressed by de Sampayo, J. in the earlier case of *Fonseka v. Cornelis*[2], but it must be noted that in this respect section 10 of the Registration of Documents Ordinance has effected an alteration in the law whereby a will is not avoided on the ground of non-registration as against a prior disposition by an heir of the testator. The decision in the case of *Fonseka v. Cornelis*[2] would only continue to be applicable, not of its own force, but because sub-section (2) of section 10 of Cap. 101 excludes the application of the new law in cases of dispositions by heirs executed prior to the enactment of Cap. 101.

For the reasons stated above I am of opinion that section 2 of the Registration of Old Deeds and Instruments Ordinance 1947 does not prevent a will from being used to prove a trust or fideicommissum in a case where the probate has not itself been registered as provided in that section. In the present case the condition set out in paragraph (*b*) of sub-section (1) of section 2 of that Ordinance, namely that the will has been referred to in a duly registered instrument, has been satisfied. It is only if application had been made under that Ordinance to register a will that the applicant had the duty under sub-section (3) to present the probate also for registration. If, therefore, the will now in question did in law create a fideicommissum in favour of the great grandchildren of the testator, the Ordinance of 1947 would have been no bar to the availability of the will in proof of the fideicommissum, provided of course the grant of probate had actually been made.

[1] *(1954) 56 N. L. R. 345.* [2] *(1917) 20 N. L. R. 97.*

A further point which has been argued on behalf of the respondents is that shortly after the decision of this Court in 1927 as to the construction of the Last Will, the property has in fact been possessed by them on the basis of the rights understood to have been conferred on the descendants of the testator, that is on the basis of a duo fideicommissary substitution, and that by virtue of possession on this basis the defendants have acquired a title by prescription to the shares claimed by them. This matter was put in issue at the trial in the general form "(3) Proscriptive rights of parties".

Counsel for the plaintiff had very correctly stated in his closing address at the trial that if the claim based on a fideicommissum were upheld, the issue of prescription did not arise; he conceded in substance that his client could not, on the evidence, rely on possession to defeat a fideicommissum, and it was in this sense that the Judge understood the concession. But neither the Judge nor the defendants' lawyers appear to have realised that the question of prescription would arise, and should have been dealt with, in case the plaintiff's title to a half share of the land was upheld in appeal on the basis that the fideicommissum did not extend beyond the grandchildren of the original testator. There is fortunately sufficient material on record to enable us to determine whether or not the plaintiff's title has been defeated by adverse possession.

There is a considerable volume of oral evidence to the effect that Francina and her daughter Meraya Cecilia did recognise the rights of Francina's two sisters to a one-third share each on the basis of the existence of a fideicommissum. The witnesses to this alleged recognition and the alleged exercise of rights by those two sisters and their children were the 3rd defendant, Meraya Cecilia herself, Emalin Fernando (a daughter of a sister of Francina), one Simon Peiris, and P. J. Fernando (a son of the other sister Angela). As to this evidence, I would make the following observations:—

(*a*) Despite the suggestion that these rights were recognised and exercised since 1931, no single member of the family (other than Francina and her descendants) dealt in any way with any shares until 1949, when one M. T. Fernando purchased some of their interests; these interests passed with significant speed to the 3rd defendant, who also obtained a transfer of all his wife's interests at about the same time.

(*b*) Meraya Cecilia's evidence is quite inconsistent with her own dealings with the land: in 1933 she gifted to her daughter a 1/4 plus 1/8 share of the land, claiming title on the transfer to her and her husband of a 1/2 share by her mother Francina in 1904. Her explanation, that she ignored the fideicommissum because her son-in-law (the 3rd defendant) did not want entailed property, is proved to be false by the 3rd defendant himself when he says that he knew since 1931 that the other branches of the family had rights and were exercising them.

(c) The 3rd defendant and Meraya Cecilia alleged that when Francina's mortgaged half share was sold in execution in 1939, they published a printed leaflet referring to the Last Will and stating that the judgment-debtor had no title. Such a document would have been an aspersion on the title of Francina, not only to the mortgaged half-share but also to the other half-share which by 1939 had passed to the 1st and 2nd defendants, the daughter of Meraya Cecilia. The 3rd defendant's wife was at that stage entitled to a 7/16 share and she had everything to gain if the existence of the Last Will and of a fideicommissum remained undisclosed. But the 3rd defendant would have us believe that he was both so honourable and so stupid as to give public notice of the fact that his own wife's title to that substantial share was defective. The leaflet is palpably a fabrication put forward to support the conveyances very recently obtained by the 3rd defendant from some of the alleged fideicommissary heirs.

(d) Francina's sister Angela lived till 1942, but it was admitted that she never possessed her rights. The only concrete evidence of possession by her branch was that her children tried to put up a flag in 1931 during an election and were resisted by Francina. The suggestion that Angela's children were allowed to possess is contradicted by Meraya Cecilia's admission in cross-examination that " Angela's heirs did not possess this property ".

These and other features of the case, to which it is unnecessary to refer, render quite unreliable the evidence that either Francina's family or the plaintiff's predecessors ever recognised the rights of Francina's sisters, and I am unable to agree with the argument that the trial Judge should or could have properly reached any such conclusion.

I see no cause to interfere with the finding of fact that the boutique No. 3 was built and paid for by Meraya Cecilia and that the 3rd defendant is now entitled to it.

For these reasons I would allow the plaintiff's appeal and hold that he is entitled to a half share of the land. The decree under appeal will accordingly be varied as follows :—

(1) Soil shares 1/2 to the plaintiff, 1/16 to 2nd defendant, and 7/16 to 3rd defendant. No share to the other defendants.

(2) The 3rd, 4th and 7th defendants will pay to the plaintiff the costs of contest in the District Court. Subject to these modifications, the other provisions in the decree will stand. The 3rd, 4th and 7th defendants will pay to the plaintiff the costs of this appeal.

T. S. FERNANDO, J.—I agree.

Appeal No. 147 dismissed.
Appeal No. 146 allowed.