[IN THE PRIVY COUNCIL]

1957 *Present :* **Earl Jowitt, Lord Oaksey, Lord Mac Dermott, Lord Cohen and Lord Keith of Avonholm**

L. P. ABEYAWARDENE, Appellant, *and* C. S. WEST, Respondent

Privy Council Appeal No. 37 of 1952

S. C. 572—D. C. Colombo, 2,680

Donation by parents to minor child—Acceptance—Fideicommissum in favour of family —May be "single" or "recurring (multiplex)"—Acceptance of such gifts—Revocability—Entail and Settlement Ordinance (Cap 54), ss. 4, 5, 7, 8—Exchange of fideicommissary property thereunder—Effect thereof on rights of fiduciaries and fideicommissaries—Bona fide purchaser from fiduciary—His position as against the fideicommissary—Partition of fideicommissary property by the fiduciaries—Binding effect on the fideicommissaries.

Where both parents of a minor child jointly gift immovable property to the latter, acceptance on behalf of the donee by his nearest male relatives, other than his father, would be sufficient acceptance of the gift. (In the present case acceptance was by the two brothers and brother-in-law of the donees.)

A deed of gift which creates a fideicommissum in favour of the children not yet born of the fiduciary donee is a fideicommissum in favour of a family. In such a case acceptance by the fiduciary is an acceptance for his children the fideicommissaries, and the gift to the fideicommissaries cannot be subsequently revoked by the donor, even with the consent of the fiduciary, without the consent of the fideicommissaries.

A fideicommissum in favour of a family need not necessarily be a fideicommissum which goes on from generation to generation. A fideicommissum which comes to an end with the first generation of fideicommissaries, i.e., with the fiduciary's children who are free to dispose of the property as they wish, is also a fideicommissum in favour of a family. The presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation. *Carolis v. Alwis* (1944) 45 N. L. R. 156, overruled.

Where the Court authorises an exchange of fideicommissary property on an application made under the provisions of the Entail and Settlement Ordinance, the property becomes free of the fideicommissum, but the terms of the original fideicommissum are preserved and are applicable to the land taken in exchange, even though no reference is expressly made in the Order of the Court that the land is to devolve on the fideicommissaries on the cessation of the fiduciaries' interests. The Court may, however, with the consent of the fiduciaries, modify the terms of the original gift in regard to the powers of the fiduciaries in respect of their own rights and interests in the land. But that cannot affect the rights of the fideicommissaries.

A fiduciary though vested in the dominium of the property gifted has that dominium only during his life and cannot convey more than he enjoyed. On

his death, or other event, the fideicommissary becomes the owner of the property with title which must prevail even against a bona fide purchaser from the fiduciary without any notice of a defect in his title.

Where the fiduciaries, or those to whom they transfer their intersts. make a partition agreement *inter se* in respect of the fideicommissary property, the partition will be good and binding on the respective fideicommissaries.

Siman and Maria, who were husband and wife, jointly gifted to their daughters Cecilia and Jane a parcel of land known as " The Priory ". The gift was subject to a life interst in the donors and also created a fideicommissum by which, after the death of the donees, the title in the premises was to devolve on the children of the donees. As the donees were minors, the gift was accepted on their behalf by their two brothers and their sister's husband. The fideicommissries had not yet been born at the date of the gift.

By application under the Entail and Settlement Ordinance made on 17th June 1896, in which Siman and Maria were petitioners and Cecilia and Jane were respondents, the petitioners asked the Court to authorise Cecilia and Jane to convey " The Priory " to Siman free from all restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called " Sirinivasa " subject to certain conditions imposed on Cecilia and Jane as against the petitioners. All parties consented to the application which was, accordingly, allowed by the Court. The Order of the Court, however, made on 18th June 1896, did not make any reference that " Sirinivasa " should devolve after the death of Cecilia and Jane on their respective issue.

Following on the Order of Court two conveyances in respect of " The Priory " and " Sirinivasa " were executed on 23rd June 1896. On the same day Cecilia conveyed to Siman her undivided moiety of " Sirinivasa ", which she had just received from her father, in consideration of the sum of Rs. 45,000. " Sirinivasa " was thus held by Siman and Jane in undivided moieties. On 30th June 1900 they agreed on a partition and Siman conveyed his undivided share in the eastern portion of " Sirinivasa " as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited. On 30th November 1905, Jane conveyed her divided share of " Sirinivasa " to Siman. Siman thereafter, in 1907, conveyed the whole of " Sirinivasa " to his son James. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The father of the person who is the defendant in the present action became purchaser of two of these lots. When he bought them he did not look further back in the chain of title than the Order of the Court made in 1896. He subsequently donated them to the defendant. The plaintiffs, who were the children of Jane, claimed title in the present action to these two lots as fideicommissaries under the deed of gift executed in 1883.

Held, (i) that, as regards the gift of 1883, the acceptance of it by the brothers and brother-in-law of the donees who were minors was a valid acceptance on behalf of the donees.

(ii) that the gift created a fideicommissum in favour of a family. Acceptance therefore, by the fiduciary donees was an acceptance for their children the fideicommissaries, and the gift to the fideicommissaries could not be revoked subsequently by the donors, even with the consent of the fiduciaries.

(iii) that the effect of the Order of Court of 18th June 1896 was that " Sirinivasa " when received in exchange for " The Priory " was bound by the terms of the original fideicommissum of 1883. Subject, therefore, to any limitations placed upon the rights of the fiduciaries with their consent the rights of the fideicommissaries in relation to " Sirinivasa " were not affected. The effect of the Entail and Settlement Ordinance was to write the terms of the original

fideicommissum into the substituted gift and the consequences of what was done in 1883 must be considered at the date of the present action when the fideicommissaries made their claim and not in 1896 when there was none in existence.

(iv) that the fact that the defendant's father did not look further back in the chain of title than the Order of Court of 1896 and was, therefore, a bona fide purchaser without any notice of a defect in his title could not avail the defendant as against the fideicommissaries.

(v) that when the partition of "Sirinivasa" took place between Jane and her father Siman in 1900 the fideicommissum attached to each of the divided portions for the benefit of Jane's issue and Cecilia's issue respectively. Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane.

APPEAL from a judgment of the Supreme Court reported in *53 N. L. R 217*.

D. N. Pritt, Q.C., with *John Stephenson* and *L. Kadirgamar*, for the plaintiffs appellants.

Frank Gahan, Q.C., with *R. O. Wilberforce, Q.C.*, and *S. N. Bernstein*, for the defendant respondent.

Cur. adv. vult.

January 14, 1957. [*Delivered by* LORD KEITH OF AVONHOLM]—

The appellant is plaintiff for himself and as substituted for other two plaintiffs, his brothers, both now deceased, in an action brought in the District Court of Colombo for declarator that the original plaintiffs were entitled to a parcel of land in Colombo known as "Sirinivasa" and for other relief. The respondent is defendant in the action. She holds the land under gift from her father, who bought the land in dispute (on a title traceable back to the same source from which the appellant's claim is traced), and thereafter gifted it to the respondent subject to a fidei-commissum. The District Judge granted the declarator sought subject to certain conditions that it is not material here to notice. The respondent appealed to the Supreme Court which allowed the appeal with costs both there and below. From that judgment appeal has been taken, with leave of the Supreme Court, to their Lordships' Board.

The dispute turns upon the effect of a gift of land made in 1883 subject to a fidei-commissum and subsequent transactions. The material portions of the deed of gift, deed No. 2110, are in the following terms :—

"Know all men by these Presents that we, Mututantrige Siman Fernando and Colombapatabendige Maria Perera, husband and wife residing at Horetuduwa in Panadura being desirous of making some

provision for our children and in consideration of the love and affection we bear to our daughters Mututantrige Cecilia Fernando and Mututantrige Jane Fernando and for divers other good causes and considerations us hereunto moving do hereby give grant, assign, set over and assure by way of gift subject to the conditions hereinafter stated, unto the said Mututantrige Cecilia Fernando and Mututrantirge Jane Fernando (hereinafter called the donees) the following property, to wit:

(description of property)

To have and to hold the said premises with the easements, rights and appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, their heirs, executors and administrators in equal undivided shares forever subject however to the conditions following that is to say that the said Mutatantrige Siman Fernando shall during his life time 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 Colomba Patabendige Maria Perera surviving him she shall during her life time be entitled to take use and appropriate to her own use 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 *Mututantrige Cecilia Fernando* and *Mututantrige* Jane Fernando and subject also to the conditions that the said donee Mututantrige Cecilia Fernando and Mututantrige Jane Fernando 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 event of anyone of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid.

And these presents further witness that Mututantrige John Jacob Cooray also of Horetuduwa aforesaid doth hereby on behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fenando, 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.

In witness whereof we the said Mututantrige Siman Fernando and Colomba Patabendige Maria Perera and we the said Mututantrige John Jacob Cooray, Mututantrigo Alfred Thomas Fernando and Mututantrige James Fernando do set our respective hands to three

of the same tenor as these presents at Horetuduwa aforesaid, this Fourth day of October, in the year One thousand eight hundred and eighty-three.

Signed, sealed and delivered in the presence of us :

Sgd. (Illegibly).
,, (In Sinhalese).
,, JOHN J. COORAY.
,, A. J. FERNANDO.
,, JAMES FERNANDO.
,, N. M. FERNANDO.
,, L. FERNANDO.

Sgd. C. DE A. GUNARATNE,
N. P."

There is appended to this deed the notary's docquet attesting that it had been read over and explained to the parties and that they and the subscribing witnesses were all known to him, the notary.

It is not disputed that this deed was effectual to constitute a valid fidei-commissum, subject to a question at issue between the parties as to its revocability. The plaintiff and his two brothers, now deceased, were the children of Jane and so indicated as fidei-commissarii under the deed, though not born at its date. The parcel of land thus gifted was known as " The Priory ".

By application under Ordinance No. 11 of 1876 in the District Court of Colombo, made on the 17th June 1896 in which Siman and Maria were petitioners and Cecilia and Jane and James Fernando were respondents, the petitioners asked the Court to appoint James as guardian *ad litem* of Jane, who was then 19½ years of age, to authorise Cecilia and James as such guardian to convey " The Priory " to Siman free from all conditions and restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called " Sirinivasa " subject to certain conditions which need not be here set out as they are incorporated in the order of the Court next to be noticed. All parties consented to the application. The professed reason for the exchange was that it was not desirable or beneficial for Cecilia and Jane to hold in common " The Priory " and that Siman was anxious to make better provision for these two daughters. " The Priory " was valued at Rs. 45,000 and " Sirinivasa " at Rs. 90,000.

On the following day, the 18th June, the District Judge pronounced the following order :—

" It is hereby adjudged and ordered that James Fernando of Horetuduwa be and he is hereby appointed guardian of Jane Fernando (the second respondent) in this matter to represent her in these proceedings.

It is further ordered and decreed that upon the petitioners transferring and assigning unto the first and second respondents Cecilia Fernando and Jane Fernando the allotments of land (fully described in Schedule B to the said petition of the petitioner) situated at Edinburgh Crescent, Flower Road and Green Path, Colombo, and the buildings thereon called and known as "Sirinivasa" bearing assessment No. 8 subject to the conditions following, that is to say, viz., that they the 1st and 2nd respondents shall not sell, mortgage or otherwise alienate the said premises except with the consent of the petitioners or the survivor of them and that the first petitioner shall during his life time be entitled to make, 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 the second petitioner surviving him she shall during her life time 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 1st and 2nd respondents that the said Cecilia Fernando and James Fernando as guardian of the said Jane Fernando, do and they are hereby authorised and empowered to convey and assign unto the said Mututantrige Siman Fernando, the 1st petitioner, the aforesaid lands and premises called and known as "The Priory" (fully described in Schedule A in the said petition) absolutely and free from all conditions and restrictions contained in Deed No. 2,110 dated the 4th day of October, 1883, and that the said Cecilia Fernando and James Fernando as guardian as aforesaid do and they are hereby empowered and authorised to execute and deliver the necessary Deed of Conveyance of the said premises in favour of the said Mututantrige Siman Fernando absolutely and free and clear of all conditions and restrictions."

Following on this Order an exchange of lands was made by a conveyance by Cecilia and James, as guardian of Jane, of "The Priory" to Siman "freed and clear from all and every restrictions and conditions" in the Deed of Gift of 1883 and a conveyance by Siman and Maria "by way of gift" to Cecilia and Jane of "Sirinivasa" subject to the conditions, set out verbatim, contained in the said Order of Court. The respective conveyances are each dated 23rd June, 1896. On the same date by another conveyance Cecilia conveyed to Siman her one undivided moiety of "Sirinivasa", which she had just received from her father, in consideration of the sum of Rs. 45,000. By a fourth conveyance of the same date Siman conveyed to Cecilia "as a gift absolute and irrevocable" "The Priory" which had just been conveyed to him by Cecilia and Jane.

So far as "Sirinivasa" was concerned Siman and Jane held this now in undivided moieties. On 30th June, 1900, they having agreed on a partition, Siman by Deed of Indenture conveyed his undivided share in the eastern portion of "Sirinivasa" as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited.

On 30th November, 1905, by Deed of Indenture, Jane, who was now married, with consent of her husband and of her mother, Maria, conveyed

her divided share of "Sirinivasa" to Siman in consideration of the sum of Rs. 75,000. Siman thereafter by Indenture dated 6th December, 1907, conveyed the whole of "Sirinivasa" to his son James Fernando, in consideration of the sum of Rs. 175,000. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The respondent's father became purchaser, *inter alia*, of two of these lots. These are the subject matter of this action and as already indicated, were gifted to the respondent by her father subject to a fidei-commissum in favour of her issue, failing whom, her brother and his issue.

On these facts a number of difficult and important questions have been argued before the Board. No question of registration arises in the case. The appellant's case is based on the acceptance by Jane, his mother, of the gift of 1883, which acceptance he says enured to the benefit of himself and his deceased brothers as fidei-commissaries under the deed of gift. Both Jane and Cecilia were minors in 1883 and acceptance was made on their behalf by Cooray and their brothers Alfred and James. Cooray, as appears from the evidence in the case, was Jane's brother in law, married to her sister Isabella. The deed was executed before a notary who attested that he knew all the parties. Their Lordships see no reason to think that this was not a valid acceptance on behalf of Cecilia and Jane. Their natural guardians, their father and their mother, could not accept for them, because they were the donors. In similar circumstances acceptance on behalf of a minor donee by his grandmother (who was the other donee) was held good in *Francisco v. Costa and Others* [1], as was also acceptance by a brother on behalf of his minor brother in *Lewishamy v. De Silva* [2]. One of the grounds of judgment in these cases was that the donors had allowed such acceptances to be made on behalf of their minor children. Forms to be found in the Appendix to Raj Chandra's book on Fidei-Commissa disclose similar acceptances. The Supreme Court and the District Judge held that, in any event, the daughters had ratified the acceptance on their behalf by their subsequent conduct. Their Lordships do not feel called on to consider this point. In the circumstances of this case they consider that acceptance on their behalf by three of their nearest male relatives, other than their father, was sufficient acceptance of the gift to them.

There remains, however, the question whether the acceptance by Jane and Cecilia (the fiduciaries), was an acceptance for their children the fidei-commissaries. This is one of the major issues between the parties. If there was no acceptance for the fidei-commissaries the gift to them was revocable in the lifetime of the donors at any time before their acceptance and there is no doubt that the conduct of the donors and the fiduciaries in the various transactions already mentioned would amount to such revocation. The District Judge held on earlier authority in Ceylon that acceptance by Jane was acceptance for her issue. The Supreme Court on a review largely of passages from commentators on Roman-Dutch law held that there was no acceptance for the fidei-commissaries.

[1] *(1889) 8 S. C. C. 189.*

[2] *(1906) 3 Balasingham, 13.*

Their Lordships would observe that the learned jurists of the 16th and 17th centuries were far from united in their opinions on various points arising with reference to donation and fidei-commissa and this left much scope for the consolidation of debatable points by legal decision. Their Lordships also accept as a correct approach in considering the authority of the early Dutch jurists the following passage from Professor Lee's introduction to Roman-Dutch Law (4th Edn. p. 15) :

> " The works of the older writers, on the contrary, have a weight comparable to that of the decisions of the Courts, or of the limited number of ' books of authority ' in English law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course the opinions of these writers are often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is best supported by authority or most consonant with reason ; or will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life ; or, again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience. "

On the question of acceptance for or by a fidei-commissary reference was made in the Supreme Court and before their Lordships to Perezius's Praelectiones (1653) Bk. VIII Tit. LV §§7 to 12. This learned commentator opens paragraph 7 thus :—

> " The greater dispute is whether a donor who has gifted property to another with this pact and limitation that after a certain time he should restore it to some third person can in the meantime revoke this pact. " [1]

He proceeds to point out that there was a divergence of opinion on whether the third party needed to accept to prevent revocation by the donor, the majority view being that no acceptance was necessary. In subsequent paragraphs he considers special cases of events happening before the date of restoration, viz., acceptance by a notary for the third party, death of the donee, delivery by the donee of the subject of gift to the third party, death of the donor, confirmation of the gift by the donor's oath. He then comes to another case which he deals with in paragraph 12. The following is a translation of the relevant portion of this paragraph.

> " Lastly the former opinion [by which Perezius means the opinion of the majority stated in paragraph 7] would be the more correct if the gift made to one person is made in favour of a family in which the donor wishes the property gifted to remain ; for by no pact can it be revoked in respect of after-comers ; for it is sufficient in order that it may be considered a perpetual donation that the first donee has accepted it so that there is no need of a subsequent acceptance where the burden imposed on a first donee results in an action available to all as Molina says (de Hisp. primog. L. 4 c.2 n.75) because it would

[1] *Wikramanayake's translation, p. 26.*

be absurd, in order to make a fideicommissum irrevocable, to require the acceptance of infants and persons not yet born; so that as the gift cannot be revoked in respect of these it follows that the same thing must be said with regard to those who precede them lest property left to the family should go to more remote relations to the exclusion of closer ones. See Anton Gomez in L. 40 Tauri n. 34; also Molina (d.loco) who say that it has thus been decided at the present day by the laws of the King of Spain, especially L. 44 Tauri where delivery alone made to the one first called to the succession of the Majorate has the effect of making the Majorate itself absolutely irrevocable both in respect of himself and also of after-comers."[1]

Of this passage their Lordships would observe that the writer speaks of a "perpetual donation" not of a perpetual fidei-commissum. "*Satis enim est ut censeatur donatio perpetua quod primus eam acceptaverit, ulteriore acceptatione opus non sit.*" In its context their Lordships think it clear that perpetual donation here means an irrevocable donation.

Their Lordships have not had their attention directed to any other commentary of the early writers which deals with this matter as fully as Perezius has done. Mr. Jutice Basnayake in the Supreme Court quotes certain passages from Van Leeuwen's Censura Forensis (1662) and Pothier's Law of Obligations (1761). Van Leeuwen does not appear, however, to be dealing with fidei-commissa, but with donations generally and indeed would seem to exclude fidei-commissa as appears from the following passage (iv.12.18): "But there is a doubt whether a gift can be conferred on anyone through an intermediate person, as it verges on a fidei-commissum, which cannot be created by gift or other disposition inter vivos, nor can it hold good". This view that a fidei-commissum cannot be created by gift *inter vivos*, if at one time doubtful, does not now prevail in Roman-Dutch law. But the passage would seem to exclude Van Leeuwen as an authority on the problem with which their Lordships are concerned. Pothier was not of course an authority on Roman-Dutch law. He did not accept the doctrine of *jus quaesitum tertio* but he did recognise gifts made *sub conditione* or *sub modo*. In this connection he poses the question (Law of Obligations, Evans translation, Vol. I, p. 39):

"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."

Here again, as did Perezius, he sets out the two conflicting views of learned writers on this question without arriving at any conclusion. Their Lordships are then left in the position that, so far as has been shown, there is nothing in the older writers more definite than the passage quoted from Perezius.

[1] *Wikramanayake's translation, p. 30.*

In connection with this passage from Perezius there was canvassed before this Board—a matter which entered into the ratio of the judgment of the Supreme Court—whether the gift in the present case is a gift made in favour of the family, "*si donatio concernat favorem familiae*". The view of the Supreme Court was that it was not a gift in favour of the family because it came to an end with the first generation of fidei commissaries, that is with Jane's children who were free to dispose of the property as they wished. What the Court required was a fidei-commissum enduring indefinitely from generation to generation, in other words a perpetual fidei-commissum. Reliance for this view was placed particularly on certain passages in Sande's Treatise on Restraints on Alienation (1633) (Webber's translation). Their Lordships are unable to draw the same conclusion from the passages in question when taken in their context with other passages. The material passages are to be found in Part III, Chapter V of the treatise and their Lordships will quote more fully from this chapter than was done in the Supreme Court. Chapter V is headed "What fidei-commissum is induced from this prohibition upon alienation". The writer first considers two types of fidei-commissum which he calls conditional and simple or absolute. Broadly the distinction is between a prohibition of alienation outside the family (conditional) and a direct bequest such as "I leave my landed property to the family" coupled with a prohibition against alienation (simple and absolute). It is to be observed that the writer is speaking of testamentary dispositions and not of gifts *inter vivos* but that would not appear to be material. The importance of the distinction was in the results that might follow and Sande discusses these very fully. Sande clearly favours restricting restraints on alienation as much as possible. In paragraph 10 he says:

> "And in case of doubt a testator should not be considered to burden his descendants with the perpetual and indefinite fideicommissum, by a prohibition restraining the heir from alienating. And a substitution made in favour of a family, of descendants, or of several persons under a collective name, takes place in the highest grade which survives at the time when the condition arises, and it is not extended to the lower grades unless the testator has expressly so willed."

He returns to this point in paragraph 11:

> "But the point we are discussing is not in what order succession to a fideicommissum to a family takes place, but whether a testator, by a simple prohibition against alienation outside the family, wishes to induce a perpetual fideicommissum among the members of the family, and to make this apply to many, so that one after another, and so on, as long as a single member of the family survives, is considered to be burdened by fideicommissary substitution. We say it is not so, because in cases of doubt a direct substitution rather than an oblique and fideicommissary one is presumed."

Sande elaborates the matter further in paragraphs 13, 14 and 15 which, to preserve the context their Lordships quote in full :—

" 13. The argument which the supporters of the opposite view take up is very weak. They say, since persons of different grades are described under a collective term, and since they therefore cannot be admitted to the inheritance all at the same time, but must succeed in the order of succession, one after the other, that the term must have some extended meaning. This is quite true ; but the extension is one not of time, but of grades, so that many grades are called to the fideicommissum, which, however, rest only in the first grade of those who are admitted, and is not extended from that to lower grades ; and thus many grades may be called, but only one can be said to be admitted.

14. Since this is what takes place when a fideicommissum is expressly bequeathed to a family, it would much rather take place in a tacit fideicommissum, which is induced by interpretation from a prohibition against alienation outside the family. for otherwise a tacit fideicommissum would induce a greater multitude of fideicommissa than an express one. Therefore a fideicommissum which is implied from a prohibition upon alienation is binding only on one person (unicum), and therefore if he, who has succeeded by virtue of such tacit fideicommissum to the estate on account of alienation which has been made by another, afterwards alienates the same estate to a stranger he would do so with impunity.

15. 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, so that it may never go out of the family. " For from these words would be induced a real, multiplex and perpetual fideicommissum, which would last as long as any one of the family survived. And therefore, even although the landed property has once been left in the family, yet it would be against the will of the testator that it should at any time thereafter go out of the family. "

Sande concludes Chapter V with the passage : " The truer view is that when the testator wills that his goods remain in his family and his name *in perpetuo*, then the fideicommissum is never closed but is indefinitely extended. "

Consideration of the effect of prohibitions of alienation in favour of a family will be found in others of the early commentators. Their Lordships would quote only one passage from Voet's Commentaries on the Pandects (1698–1704) dealing with Fidei Commissa (Maegregor's translation) XXXVI. 1.28 :

" Where a fideicommissum is left to a family the nature and effect of such a bequest is not the same in every case. For the bequest may be of such a kind that the fideicommissum is a single one ; and,

where it has operated once, or where there has been one restitution to the family, the fideicommissary obligation is determined; nor is the person who by virtue of such a restitution to the family has acquired the property or the inheritance obliged after his death to restore it to another member of the same family, but he is able to transfer it to a stranger by act *inter vivos* or by last Will. But on the other hand, it may be a recurring (multiplex) fideicommissum, circulating as it were throughout the family, with the result that the person to whom in the first instance restitution has been made as being one of the family is bound to restore the inheritance to another member of the family, and he again to a third member, and so on, so long as there are members of the same family surviving."

Their Lordships are unable to extract from these passages that a fidei commissum in favour of the family is confined to a fidei commissum which goes on from generation to generation. The writers seem to contemplate a fidei commissum which comes to an end with the first generation as being a fidei commissum in favour of the family. The question whether it is perpetual or not will depend on the language used by the testator, or donor. Nor can their Lordships see any reason why it should be so limited. When the gift in this case was made Jane was a child. It would be impossible for any issue of hers to accept for very many years. The reason given by Perezius that "it would be absurd, in order to make a fidei commissum irrevocable, to require the acceptance of infants and persons not yet born" is as valid in the case of her children as it would be in the case of children to come into existence in a perpetual fidei commissum. No doubt the same could be said of a fidei commissum to stranger beneficiaries yet unborn. But a donation in favour of the family is an exception and the presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation.

The great weight of authority derived from legal decision in Ceylon until the decision in the present case supports that view. In a matter in which so much was left open by the early commentators their Lordships attach great weight to a current of legal decision in a country in which fidei commissa are extensively resorted to by its inhabitants, are part of its law and become frequent subject of consideration by its Courts. The earliest authority to which their Lordships were referred is the case of *Perera v. Marikar*[1]. The facts and judgment are concisely set out in the head-note:

"A father conveyed certain houses by post-nuptial settlement to his married daughter, subject to the condition that she should enjoy the same for her life with restraint on anticipation or incumbrance, and that after her death they should be enjoyed by her heirs and descendants in perpetuity. The daughter accepted this gift. Afterwards, the daughter having as yet no issue, the father made a will by which he devised the same houses to the daughter absolutely, and died, and his

[1] *(1881) 6 S. C. C. 135.*

executor executed a conveyance of the houses in favour of the daughter, her heirs, executors and her assigns for ever. After the father's death a son, the plaintiff, was born to the daughter.

Held, (dissentiente Burnside, C.J.), affirming the decision of the district court, that the plaintiff, when he came into esse had an interest in the houses, which could not be defeated by any act of the testator subsequent to the settlement, and consequently that plaintiff, on establishing that he was the son of the settlor's daughter, was entitled to recover the houses in ejectment from defendant, who claimed through a person to whom the daughter had conveyed the houses after the executor's conveyance to her."

The judgment of the majority of the Court (Clarence and Dias, JJ.), was delivered by Mr. Justice Clarence. He refers to Voet and Perezius and quotes from the passage in Perezius already quoted by their Lordships. He then proceeds:

"I find, therefore, the Roman-Dutch Jurists, so far as their hypothetical reasoning or imaginary cases go, favouring what seems to me the common sense view, that where a voluntary family settlement is made, by which somebody benefits immediately and other classes contingently on their being born and living to inherit the settlement, takes effect in favour of these future classes immediately on its taking effect, qua the immediate participator: and for these reasons I think that the decision of the learned district judge in upholding the plaintiff's demurrer must be affirmed."

It has been said in a later case (*Mudaliyar Wijetunga v. Dunalaye Rossie et al.*)[1] that *Perera v. Marikar* was not a case of a perpetual fideicommissum but a fidei commissum unicum. But the point, in their Lordships' view is immaterial as the ratio of the judgment in the passage quoted from Clarence J. is not, in their Lordships' view, dependent on the character of the fidei commissum so long as it is in favour of a family. The decision was a decision of the full Court. It has been followed in a series of cases which their Lordships find it unnecessary to examine at length. None so far as their Lordships have noted was a case of a perpetual, or multiplex, fidei commissum. The cases constitute a very long train of authority.

In *Soysa v. Mohideen*[2] it was argued that the Perezius exception must be confined to the case of a *familia* which includes other people besides children and descendants. De Sampayo A.J. said of this argument, "But no such distinction is intended, and the reasoning applies even more strongly to a fidei commissum, in favour of a family in the narrower sense of a man's own children and descendants. Perezius means to lay down generally that acceptance by the immediate donee, who is the head of the family, is valid acceptance on behalf of all those who follow him, and that, then, the entire donation is considered *perpetua* or at once complete in respect of all the succeeding beneficiaries." In referring here to

[1] (1946) 47 N. L. R. 361 at 370.

[2] (1914) 17 N. L. R. 279.

"descendants" the learned judge appears to mean children of the fiduciaries because in that case the gift was to three nephews and a niece and their issue with a devolution over failing issue. In *Abeyesinghe v. Perera*[1] where the fidei commissum was clearly confined to the legitimate children of the fiduciary, Chief Justice Wood Renton regarded *Soysa v. Mohideen* as a precedent and followed it. *Perera v. Marikar* and *Soysa v. Mohideen* were followed in *Ayamperumal v. Meeyan*[2]; *Fernando v. Alwis*[3]; *Wijetunga v. Rossie et al.*[4]; and *Vallipuram v. Gasperson*[5], which were all cases where the fidei commissary heirs were confined to children of the fiduciary donees. Reliance was placed by Counsel for the respondent on decisions in a contrary sense in *De Silva v. Thomis Appu*[6] and *Carolis v. Alwis*[7]. In the latter case Soertsz J. found himself able to distinguish the case in hand from *Perera v. Marikar* and *Mohideen v. Soysa*. For the reasons already given their Lordships think he was in error in thinking that the ratio of the decision in *Perera v. Marikar* proceeded on the view that it was a perpetual fidei-commissum. He also seems to have been in error in thinking that *Perera v. Marikar* was not a full Court decision.

The same view has been taken in South Africa in a case which is indistinguishable on its facts from the present case and on grounds substantially the same as those which appealed to the judges of the Ceylon Courts who followed the precedent of *Perera v. Marikar*. See *Exparte Orlandini & Others*[8]. Much stress, however, was placed by the respondent on a recent case in the Supreme Court of South Africa, *Crookes and Another v. Watson and Others*[9]. This was a case of an *inter vivos* trust, declared irrevocable, by which the settlor gifted certain shares to two trustees under trust to hold the same for the purposes, *inter alia*, of paying his daughter, on her attaining 25 years of age, the net income up to £1,000 per annum, to accumulate any balance of income and on the daughter's death to distribute the trust fund among her lawful issue equally, whom failing among her surviving brothers and the issue of any deceased brother and failing surviving brothers among her next of kin. The trustees were empowered to realise the shares and invest the proceeds. In the trust deed the trustees declared that they accepted the gifts in trust and the trust mentioned. After the daughter had reached the age of 25 years the settlor proposed to amend the trust deed to the effect of paying her £5,000 out of the trust fund and paying her the whole of the net income. The daughter's husband and her brothers consented for themselves and as guardians of their minor children. A curator *ad litem* was appointed to represent unborn issue and other unascertainable beneficiaries. The decision of the majority of the Court (Centlivres, C.J., Van den Heever, J.A. and Steyn, J.A., *diss.* Schreiner, J.A. and Fagan, J.A.) was that the ultimate beneficiaries acquired no rights under such a trust until they accepted and that the trust was revocable till accepted. It would appear that the daughter was regarded as having accepted the benefit conferred on her. The Court below had held that the trust was

[1] *(1915) 18 N. L. R. 222.*
[2] *(1917) 4 C. W. R. 182.*
[3] *(1935) 37 N. L. R. 201 at 226.*
[4] *(1946) 47 N. L. R. 361.*
[5] *(1950) 52 N. L. R. 169.*
[6] *(1903) 7 N. L. R. 123.*
[7] *(1911) 45 N. L. R. 156.*
[8] *[1951] O. P. D. 111.*
[9] *(1956) 1 S. A. L. R. 277.*

"a contract for the benefit of third parties having the effect of a fidei-commissum" and that "in the case of the settlement of property in a family the acceptance of the first donee enures for the benefit of and is considered an acceptance by all the donees". One member of the lower Court was prepared to support the judgment also on an additional ground which seems to have appealed to the minority in the Supreme Court but which it is not material to notice here. The English law of trusts, it should be noted, does not prevail in South Africa and an *inter vivos* trust appears to be regarded as a contract entered into between the settlor and the trustees for the benefit of third parties which in general may be revocable before acceptance by the third parties. The Court dealt *inter alia* with the question whether what was called the Perezius exception applied to exclude the general rule that acceptance was necessary. For various reasons the Supreme Court held it did not. The shares were not gifted to the daughter but to the ultimate beneficiaries who took them free of any fidei-commissum. The daughter took only the income up to £1,000 per annum and her acceptance of that could not be regarded as an acceptance by her of the corpus on behalf of the ultimate beneficiaries. The shares might be sold and so it could not be said that they came within the conception of Perezius and other authorities of a family settlement by which "the subject matter of the donation is inalienable and must remain intact". Their Lordships are unable to find in the judgments of the majority any clear indication that in their view the Perezius exception is confined to the case of a perpetual fidei-commissum in favour of the family. Van den Heever, J.A. (p. 296), would appear to come nearest to that view. Centlivres, C.J. (p. 289) merely says, "In other words where there is a settlement in favour of a family and the first member of the family accepts, his acceptance enures for the benefit of all succeeding members of the family". It appears to their Lordships that the ratio of the judgment did not require any consideration of whether the Perezius exception was confined to a perpetual fidei-commissum. The judgment did not bear to overrule the earlier case of *Orlandini* where it was not so limited. Their Lordships are unable to take the view that the decision is in conflict with the long tract of decision in Ceylon which, in any event, their Lordships think for the reasons stated should prevail.

If there was an irrevocable fidei-commissum of "The Priory" in favour of Jane's children by virtue of the gift and acceptance of 1883, the next question is whether that applies to "Sirinivasa" as a result of the proceedings that took place in 1896, when "The Priory" was exchanged for "Sirinivasa". Mr. Justice Basnayake in the Supreme Court took the view that these proceedings were not initiated by the proper parties, but this view was not supported by counsel for the respondent before the Board. Their Lordships would only observe that they fail to understand why Siman as a person entitled to the possession and receipts of the rents and profits of "The Priory" as usufructuary should not come under the express language of section 5 of the Entail and Settlement Ordinance, 1876, as a person entitled to petition the Court and in any event the fiduciaries, Cecilia and Jane, were consenting parties to the Order made.

A more important question is what was the effect of the Order of the Court. It directed, in accordance with the terms of the application that "the first and second respondents [Cecilia and Jane] shall not sell, mortgage or otherwise alienate the said premises except with the consent of the petitioners [Siman and Maria] or the survivor of them". No reference was made, as in the original gift, to the premises devolving after the death of Cecilia and Jane on their respective issue. Their Lordships would refer here to the provisions of sections 4, 7, and 8 of the Ordinance of 1876, so far as relevant. These are as follows :—

"4. Whenever any immovable property is now or shall hereafter be held under or subject to any entail, fidei commissum, or settlement, whereby the alienation of such property is prohibited or in any way restricted, it shall be lawful for the District Court of the district in which such property is situate, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under such entail, fidei commissum, or settlement, and subject to the provisions and restrictions hereinafter contained, from time to time to authorize a lease, exchange, or sale of the whole or any part or parts of such property, upon such terms and subject to such conditions as the said court shall deem expedient. . . . .

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

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

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

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

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

8. Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become subject to the same entail, *fideicommissum*, or settlement, as the property for which it was given in exchange was subject to at the time of such exchange."

In their Lordships' view it is clear from these provisions that the purpose and intendment of the Ordinance was to preserve in the event of

any sale or exchange of premises subject to a fidei commissum the terms of the fidei commissum and to apply these to the land taken in exchange or to the price of the premises sold which was to be treated as a *surrogatum* of the original gift. In the present case it is section 8 that applies and, in their Lordships' opinion, "Sirinivasa" when received in exchange for "The Priory" must be taken to have been held in terms of the original fidei commissum. This was the view also of the District Judge and of Mr. Justice Basnayake in the Supreme Court. It was argued for the defendant that the prohibition on alienation imposed on the fiduciaries except with the consent of their parents was a relaxation of the absolute prohibition imposed in the original gift and so defeated the fidei commissum, but for the reasons already given this would be contrary to the terms of the Ordinance and if such is the construction of the Order the terms of the Ordinance in their Lordships' view must prevail. But, in their Lordships' opinion, the better view is that the Order affected only the powers of the fiduciaries in respect of their own rights and interests in the land in question and it may be that, as they consented to the Order, it was competent to modify the terms of the original gift in this respect. But that could not affect the rights of the fidei commissaries.

It was argued that on the law as it was understood in 1896 there was no acceptance binding the donors and the fiduciaries in a question with the fidei commissaries then unborn, and that it was open to the donors and the donees and the Court to alter the terms of the original gift to the effect of cutting out, or revoking the gift to, the fidei-commissaries. Their Lordships are unable to hold, as already indicated, that this was understood to be the law in 1896 or that the Court in 1896 gave any consideration to the question. But in any event the effect of the ordinance of 1876 was to write the terms of the original fidei-commissum into the substituted gift and the consequences of what was done in 1883 must be considered to-day when the fidei commissaries make their claim and not in 1896 when there was none in existence.

It was further argued that the respondent, or her father who purchased the property, need not look further back in the chain of title than the Order of the Court in 1896 and was entitled to rely on the terms of that Order. Their Lordships are unable to assent to the argument in view of the imperative terms of section 8 of the Ordinance. Reference was made to the case of *Mirando v. Coudert*[1] in support of the respondent's contention. In their Lordships' view that case has no application to the circumstances here. That was a case where property had been sold many years previously under the Ordinance No. 11 of 1876. There were some irregularities in the procedure when the property was ordered to be sold and the Court apparently thought that it had been subject to a fidei-commissum. But the result was that until set aside the order could be regarded as a sale under section 7 of the Ordinance which would discharge the property of the fidei-commissum. The purchaser was

[1] *(1916) 19 N. L. R. 90.*

held to have acquired a free and absolute title unless the whole proceedings were rescinded. Their Lordships see no reason to doubt the soundness of that decision. The ratio of this decision would apply, in their Lordships' opinion, to "The Priory" which was exchanged free of any fidei-commissum for "Sirinivasa" but it could not affect "Sirinivasa" which was taken under burden of the fidei-commissum.

It was said also that the defendant's father was protected as being a *bona fide* purchaser without any notice of a defect in his title. Their Lordships are prepared to assume that the defendant's father was such a purchaser. But this cannot avail the defendant. Fidei commissa have long been recognised in the law of Ceylon and, apart from any question of prescription, or of prior registration in a case where a conveyance has been obtained from a fiduciary who may be taken to hold on an alternative title of intestacy, they have been held to prevail against a *bona fide* purchaser. A fiduciary though vested in the dominium of the property gifted has that dominium only during his life and cannot convey more than he enjoyed. On his death, or other event, the fidei commissary becomes the owner of the property. The doctrines of English law have no play in this sphere. This has already been recognised by this Board in the case of *Abdul Hameed Sitti Kadija v. De Saram* [1].

The remaining point in the appeal concerns the partition of "Sirinivasa" which took place between Jane and her father in 1900. When Cecilia conveyed to Siman her undivided moiety of "Sirinivasa" on 23 June, 1896, she parted with the dominium and, in their Lordships' opinion, with all her rights and interest in the property. So long as she held her undivided share she could have made a partition agreement with her sister Jane and it is conceded that in such an event the fidei commissum would have attached to each of the divided portions for the benefit of Jane's issue and Cecilia's issue respectively. See *Abdul Cader v. Habibu Umma* [2]. In their Lordships' opinion Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane. He was a co-owner with Jane and had all the rights of a co-owner so long as Cecilia was alive, otherwise there was no one who could effect a partition with Jane. This was the view taken by the District Judge. It was suggested that there was no evidence that Cecilia was alive when the partition was made. But it is clear from the proceedings in the Courts below that it was the common assumption that Cecilia was alive and the District Judge held that the partition was good and binding on the fidei commissaries on that assumption. The Supreme Court did not have to deal with the question of partition on the view that it took of the question of acceptance. But it is clear that no point was taken for the respondent on appeal to the Supreme Court touching the question of Cecilia's being dead. Nor is the point taken in the respondent's case on appeal to this Board. The inference is that it was well known that Cecilia was alive at the date of the partition. But on any view their Lordships would not be prepared to allow the point to be taken now.

[1] [1916] *A. C. 208.*

[2] *(1926) 28 N. L. R. 92.*

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the judgment and decree of the Supreme Court and to restore the judgment and decree of the District Court. The respondent must pay the costs of the appeal to this Board and of the appeal to the Supreme Court of Ceylon.

Appeal allowed.