The following is the judgment cited by counsel:—

WANNIGASURIYA *v.* BALASURIYA.

October 6, 1910. HUTCHINSON C.J.—

The plaintiffs claim Rs. 3,000 principal, being the balance of a sum of Rs. 4,000 alleged to have been received by the defendant from his mother (the plaintiffs' grandmother) in February, 1902, for distribution amongst the plaintiffs, and interest thereon from February, 1902, amounting with the principal to Rs. 6,000. They say that the defendant accepted the Rs. 4,000 so entrusted to him, and promised the plaintiffs to give them property to the value of Rs. 4,000, and to invest the money for them and get them interest at 15 per cent. per annum; and that he paid to the first plaintiff out of the principal Rs. 660, and to the second plaintiff Rs. 340. So that, if that is true, each plaintiff was originally entitled to Rs. 1,333.33⅓ principal; and the first plaintiff is now entitled to Rs. 673.33⅓ and some interest, the second plaintiff to Rs. 993.33⅓ and some interest, and the third plaintiff to Rs. 1,333.33⅓ and some interest.

The defendant replied that the plaint disclosed no cause of action, as there was no privity of contract between the plaintiffs and him. He denied the receipt of the money and that he promised to give the plaintiffs property to the value of Rs. 4,000 or to invest any money for them and get them interest as alleged, and denied that he paid the Rs. 660 and Rs. 340 as alleged.

Amongst the issues settled were:—

(1) Did Baba Hamine (defendant's mother) entrust Rs. 4,000 to him to be held in trust for the plaintiffs?

(5) Did the defendant accept it and promise to invest it for the plaintiffs as averred in the plaint?

(6) Was the Rs. 1,000 paid by the defendant to the plaintiffs, or was it paid by Baba Hamine?

(7) Is the action prescribed?

The District Judge found that the defendant's mother gave him Rs. 4,000 to be invested for the plaintiffs, and that he afterwards paid Rs. 1,000 to the first two plaintiffs. He did not think that any prescription "has run at all against a trust of this kind," and added, as (perhaps) an additional reason, that there was no date fixed for the execution of the trust. And he gave judgment for the plaintiffs for the amount claimed.

The learned Judge says that he is convinced that what the plaintiffs say is correct. There is no reason why we should dissent from that finding; both the plaintiffs and the defendant are probably quite unworthy of credit, but perhaps, on the whole, the plaintiffs' version of what took place in February, 1902, is substantially true. What, then, is it that they say? The second plaintiff in his evidence says that their grandmother told the defendant to lend out Rs. 4,000 at interest for them, and out of the principal and interest to buy them a house and garden, and that she had previously given him notes and bonds to the value of Rs. 4,000; that he paid the witness and his

1912.

*Fernando v. Fonseka*

brother (probably meaning the elder brother) Rs. 1,000, and nothing more; that he promised to buy them a house and garden (when or where he promised is not specified), and so they waited. One of their witnesses, the defendant's brother, deposed that he was present in his mother's house, with all the plaintiffs, when his mother asked the defendant (who had the notes and bonds) to lend out Rs. 4,000 for the plaintiffs, and later to buy a house and land with the money and interest. The first plaintiff was at that time (February, 1902) about 22; the second plaintiff about 20 or 21; the third plaintiff about 14 or 15.

According to the narrative, therefore, which the Judge accepted, and which we must accept, there was a family arrangement in February, 1902, when the mother instructed the defendant who was her favourite son and one of the executors of her late husband's will, under which she was entitled to the property, to distribute the bulk of it (which was in the defendant's custody) amongst her children and the plaintiffs (the children of a deceased daughter) in certain shares, and to hold Rs. 4,000 for the benefit of the plaintiffs and to invest it for them (not to pay them any specified rate of interest, but to invest it), and afterwards to buy for them a house and garden with the principal and interest; and the defendant assented. The defendant says through his counsel that this merely constituted him his mother's agent for the purpose and gave no right to the plaintiffs, and that there was no contract between him and the plaintiffs (one of whom was then a minor, and perhaps another was also still a minor), and that only the mother or her representative—she being now dead—could enforce the arrangement as regards the Rs. 4,000. If that is the right view of the transaction, the mother could have revoked her instructions to the defendant and demanded the Rs. 4,000 and interest back from him at any time before he had paid it over to the plaintiffs. But I do not think that that is the right view. I think that the defendant accepted a trust for the benefit of the plaintiffs, and that the trust must be interpreted according to the rules of the Roman-Dutch law as to *fidei commissa*. We have then to consider whether the claim of the plaintiffs is barred by the Prescription Ordinance, or rather, whether the claim of the first two plaintiffs is so barred; for the third plaintiff was a minor until 1908 or 1909, and this action was commenced in December, 1909.

Section 6 does not apply, for it only refers to an action on a bond conditioned for the payment of money or for the performance of any agreement or trust or for the payment of penalty; and the opinions expressed by this Court in the case of *Assauw et al. v. Fernando* (*1905*) *1 Bal. 174*], that the section enacts that no action shall be maintainable for the performance of "any agreement," except within ten years from the date of "the breach of the condition," appears to me to be founded on a misreading of it; and even if we accepted that opinion, the section would have no application, because there is here no "instrument" and no payment of interest and no "breach of the condition" and no "condition."

Section 8, however, enacts that no action shall be maintainable for the recovery of any movable property, . . . . . or for any money received by the defendant for the use of the plaintiff, unless within three years from the time when the cause of action arose. There is no express exception in the case of *fidei commissa*. The cause of action of each plaintiff arose when he came of age; if he had sued then, he would have been entitled to his share of the money; or he could have sued within three years after an acknowledgment in writing or after a part payment. Here there was no such acknowledgement, and there is no evidence as to the dates of the part payments to the first two plaintiffs. But there is a decision of this Court in *Antho Pulle v. Christoffel Pulle* [(*1889*) *1 N. L. R. 120*], that the Prescription Ordinance does not apply to an action against a trustee by a person claiming to recover money due to him from the trustee under the trust. We must follow that decision, and must hold that this action is not prescribed.

With regard to the rate of interest allowed, the defendant did not agree to pay any definite rate, but only to invest the plaintiffs' money at interest. The only evidence as to what interest he may have made is that he is a money lender, and that his lowest rate of interest is 15 per cent. The District Court has allowed 15 per cent., and I do not think that that is unfair.

I would dismiss the appeal with costs.

WOOD RENTON J.—

I am not prepared to differ from the finding of the learned District Judge on the facts of this case. The only points that remain, therefore, for consideration are whether the respondents' claim is prescribed, and whether or not that part of the judgment under appeal, in which their claim is allowed with interest at 15 per cent., can be maintained. On the first of these points, although I am not sure that I should have come to the same conclusion myself, I think that we are bound by, and ought to follow, the case of *Antho Pulle v. Christoffel Pulle* [*(1889) 1 N. L. R. 120*], in which it was held by Burnside C.J. and Clarence J. that a trustee, receiving money on behalf of his *cestui que trust*, cannot set up a plea of prescription in bar of the claim of such *cestui que trust*. In the present case the learned District Judge has held that the defendant-appellant had received the money here in suit in trust for the plaintiffs-respondents. No issue of minority was raised at the trial, and under these circumstances I would hold that the respondents' claim is not prescribed. As the matter was fully argued before us, I desire to say that, if it were necessary to decide the point, I should not be prepared to follow the case of *Assauw et al. v. Fernando* [*(1905) 1 Bal. 174*], in which it was held that the period of limitation affecting trusts is to be found in section 6 of Ordinance No. 22 of 1871. In my opinion the words in that section, "the performance of any agreement of trust," must be read in conjunction with the earlier clause, "any bond conditioned." I think that this is clear from the last words of the section itself, "or of the breach of the condition."

As regards the question of interest, I do not see any evidence of an agreement on the part of the appellant to pay interest at 15 per cent.; and certainly the fact that he is a money lender, and that 15 per cent. is his lowest rate of interest, would under ordinary circumstances be insufficient to justify the learned District Judge in condemning a litigant to pay more than the legal rate of interest.

But, in view of the finding of the District Judge that the appellant is practically in the position of a trustee, I agree to the formal order proposed by his Lordship the Chief Justice dismissing the appeal *simpliciter*.