1946 *Present :* **Wijeyewardene S.P.J. and Jayetileke J.**

MUDALIYAR WIJETUNGA, Appellant, *and* DUWALAGE ROSSIE *et al.*, Respondents.

274—D. C. Kalutara, 23,236.

Fidei commissum *in favour of a family—Entail and Settlement Ordinance (Cap.), 54, ss. 2, 3*—Donatio inter vivos—*Acceptance by the fiduciary donee—Absence of acceptance on behalf of children not yet* in esse—*Revocability—Right of fiduciary to claim compensation for improvements from fideicommissaries.*

A deed of gift in favour of C contained a clause prohibiting C from selling, mortgaging or otherwise alienating the gifted property and proceeded to say that upon C's death the property should devolve upon "all her (C's) children being heirs descending from her and those who have obtained authority as her executor or administrator". There was an acceptance by C of the gift to her subject to the conditions and restrictions set out in the deed.

Held, that the deed created a valid *fidei commissum* and that the *fidei commissarii* were "the children of C being heirs descending from her".

Such a fideicommissary donation, which "involves the benefit of the family", is irrevocable even in the absence of acceptance on behalf of children not yet *in esse*.

Held, further, that a fiduciary is entitled, as against fideicommissaries, to the same rights of compensation for improvements as any other *bona fide* possessor and to the retention of the *fidei commissum* property until compensation is paid, and that a purchaser from the fiduciary is in the same position as the fiduciary.

APPEAL from a judgment of the District Judge of Kalutara.

Two persons, Nandiris and Siyaneris, were entitled to a land in equal shares. By deed P 3 of 1906, Nandiris gifted his half share to Carlina, on the eve of her marriage, subject to certain conditions (*vide* head-note). By deed P 2 of 1911, Siyaneris sold his half share to Nandiris. By deed D 3 of February 8, 1919, Nandiris sold the entire land to E. C. de Fonseka. By deed D 1 of March 22, 1918, Nandiris purported to cancel the conditions subject to which the gift P 3 was made and to gift the half share absolutely to Carlina. Carlina, by deed D 6 of March 24, 1918, conveyed the half share to Nandiris. In satisfaction of a hypothecary decree entered against E. C. de Fonseka in 1935 the entire land was sold to the defendant under deed D 4 of 1941. Carlina died in 1923 leaving as her children the four plaintiffs, the eldest of whom was born in 1910. The plaintiffs sued the defendant for declaration of title in respect of a half share of the land and the District Judge entered judgment in favour of the plaintiffs declaring them entitled as *fidei commissarii* under the deed of gift P 3.

The questions of law which were considered in appeal were : (1) whether the reference to the fideicommissaries in P 3 made it impossible to say with certainty who the fideicommissaries were ; (2) whether P 3, if it created a valid *fidei commissum*, was revoked effectively by D 1 ;

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(3)whether the defendant was entitled to claim compensation for improvements admittedly effected by E. C. de Fonseka; (4) whether the defendant was entitled to a right of retention until such compensation was paid to him.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *H. W. Jayewardene*), for the defendant, appellant.—It is submitted that the terms of the deed are insufficient to create a valid *fidei commissum*. Even assuming there is a valid *fidei commissum* it has been revoked before its acceptance by the fideicommissaries. A *fidei commissum* cannot be revoked, firstly, if it is a perpetual *fidei commissum*, and, secondly, where there is a vested right. There could be acceptance by the fideicommissary or someone authorised to accept on his behalf.

[JAYETILEKE J.—Why can't the fiduciary be authorised to accept?]

Yes, even the fiduciary can be authorised, but Carlina's acceptance is on her own behalf. That acceptance cannot be regarded as acceptance on behalf of persons who were not even in contemplation at the time. Even where there is an acceptance on behalf of one not *in esse*, it has to be ratified later by that person after he comes into existence. Such an acceptance is devoid of legal effect at the moment of acceptance. Ratification after coming into existence is the minimum requirement for giving it legal effect. The mother or some one else on behalf of the children must accept after they come into existence; there must be a new act of acceptance.

In *Soysa et al. v. Mohideen*[1] de Sampayo J. gave a very broad interpretation to fideicommissary gifts to a family and applied it to a two-generation *fidei commissum*. Under Roman-Dutch law a *fidei commissum* in favour of a family need not be accepted. In *Carolis v. Alwis*[2] Soertsz J. disagreed with Sampayo J. on this point. What Perezuis says is that in a donation in favour of a family there is no need of a subsequent acceptance by the others; he does not say that such an acceptance by the immediate donee is sufficient acceptance for all those who may come into existence in the future, viz., the fideicommissaries. Every perpetual *fidei commissum* is not a *fidei commissum* in favour of a family, but every *fidei commissum* in favour of a family is a perpetual *fidei commissum*. A *fidei commissum* in favour of a family is one in which the property cannot go outside the family; a family *fidei commissum* can go to collaterals. In a *fidei commissum* in favour of a family one does not require acceptance except acceptance by the original donee.

[JAYETILEKE J.—What is a *fidei commissum* in favour of a family?]

Perezius' words are "in favour of the family in which the property is to remain". Under the term "family" are included sons-in-law and daughters-in-law to supply the place of those who have died, adopted children and even freedmen. There is a bequest to a family when the testator directs that it should not go out of his line of descent or out of his "blood"—See *Mc. Gregor's Voet*, Bk XXXVI *title 1, Sec. 27 at p. 67*. At p. 163 of *45 N. L. R.* Soertsz J. is referring to a *fidei commissum* in favour *only* of the donee's children or grandchildren by representation. The head of the family is either the father or the grandfather.

[1] *(1914) 17 N. L. R. 279.* [2] *(1944) 45 N. L. R. 156 at p. 158–160.*

Lascelles C.J. says that in the case of fideicommissaries "*in utero*" or *esse*, either they themselves or some one authorised on their behalf must accept for them. Then he says that fideicommissaries not *in esse* at the time of execution need not accept irrespective of the *fidei commissum* being one in favour of the family or a perpetual *fidei commissum*. It is submitted that this latter view is incorrect. Sampayo J.'s view is that where the donee is the head of a family of which the fideicommissaries are present or future members acceptance by the donee is sufficient acceptance for them whether they are "*in esse*" or not. Soertsz J. says that the necessary condition is that there should be a perpetual *fidei commissum*. My own submission is that Perezius is contemplating a donation granted in favour of the donor's family. A *fidei commissum* in favour of a family is a perpetual *fidei commissum* but not *vice versa*; and both cannot be treated in the same way.

The word "assigns" is used in the translations of the deed. When the word "assigns" is used in the sense that after the donee's death it is to go to the donee's assigns, then indefiniteness arises and there is no *fidei commissum*. It would be treated as a mere notarial flourish only when "assigns" is used earlier in the text in the grant made to the fiduciary—*Amaratunga v. Alwis*[1], followed in *Appuhamy v. Mathes*[2]. In *Salonchi v. Jayatu*[3] where the words "descending heirs and authorized persons" were used it was held the deed did not create a valid *fidei commissum*. In *Silva v. Silva*[4] de Sampayo A.J. interpreted "bhara-karaya" as "assigns".

[WIJEYEWARDENE S.P.J. drew attention to the words පොල්මෙ ඇත්මිනිස්ත්‍රාසිකාරදිවූ බලේලත් සියල්ලත්ඩත් which means "such as those who obtained authority as her executor or administrator."]

If the meaning is administrators and executors, then one has to see whether it refers to Caroline's administrators and executors or to the donor's executors. One cannot say that it should go to the descending heirs and in the same breath to one's estate. It is therefore submitted that there is no clear designation of beneficiaries.

In *Robert v. Abeywardena*[5] de Sampayo A.J. discusses what is sufficient to constitute a *fidei commissum* in favour of a family.

[WIJEYEWARDENE S.P.J.—In view of the provisions in the Entail and Settlement Ordinance, a *fidei commissum multiplex* in favour of a family may be inoperative.]

Yes, it would be inoperative, but the rules, and especially the rule regarding acceptance, which were applicable to such *fidei commissum* will remain. It is submitted that the doctrine regarding acceptance of a *fidei commissum* to a family cannot be extended to acceptance by unborn fideicommissaries in a simple *fidei commissum*. The case of *Perera v. Marikar*[6] is a perpetual *fidei commissum* case and can be distinguished from the present case.

In any event the trial Judge has held that the appellant has made the plantations; he is a *bona fide* possessor and is entitled to compensation and to a *jus retentionis*.

[1] *(1939) 40 N. L. R. 363.*
[2] *(1944) 45 N. L. R. 259 at 261 to 262.*
[3] *(1926) 27 N. L. R. 366.*
[4] *(1914) 18 N. L. R. 174 at 177.*
[5] *(1912) 15 N. L. R. 323.*
[6] *(1884) 6 S. C. C. 138.*

L. A. Rajapakse, K.C. (with him *A. C. Gunaratne, J. M. Jayamanne* and *T. B. Dissanayake*), for the plaintiffs, respondents.—The case in 6 S.C.C. 138 already cited governs the present case. In 45 N. L. R. 156 Soertsz J. disagreed with the view expressed in this case. A judgment of a Divisional Bench remains a Divisional Bench decision although one Judge dissents—*Vide* § 51 (1) of the Courts Ordinance and *Appu Sinno v. Girigoris*[1]. The case of *Jane Nona v. Leo*[2] discusses fully the force of Full Court and Divisional Bench decisions. 6 S. C. C. 138 was a three-Judge decision. At that time a complement of three Judges constituted a Full Court. Perezius' and Voet's views have been considered in this case; and Perezius' view has been consistently followed by our Courts since then. In *Soysa v. Mohideen*[3] de Sampayo J. took the view that a fiduciary could accept on behalf of the fideicommissaries—*Vide* also *Ayamperumal v. Meeyan*[4]. Soertsz J. refers to both these cases in the 45 N. L. R. case. The 45 N. L. R. case is distinguishable from the present case: the fideicommissaries who claimed were "*in esse*" in that case; that is not so in the present case. It is submitted that the view taken by Soertsz J. at the bottom of page 160 of 45 N. L. R. that fideicommissaries *in futuro* have to accept after they come into being is incorrect.

The ordinary *fidei commissum* should be accepted by the fiduciary as well as fideicommissaries; the exceptions to this rule are:—

(1) perpetual *fidei commissa*, (2) gifts to a family already referred to, and (3) acceptance by Notary on behalf of absentee donee—Vide *2 Burge 149*.

In these cases acceptance by the fiduciary donee is sufficient acceptance for the fideicommissaries. "*Agen pawatha ena daru urumakkāra*" are the words used in the deed and these words are sufficient to show the donor's intention to constitute a donation in favour of the family, since it is a reference to her uterines—*Pinnwardene v. Fernando*[5].

Acceptance may be by any mode; there is no special mode of acceptance. The revocation was in 1918 and at that time all five children were *in esse* and, furthermore, the mother is in possession of the property, and such possession should be construed to be possession subject not only to the conditions but also to the benefits conferred by the gift. Adopted children and foster children are included in the term "familia"—See *Sande on Restraints Part III., Chapter 6, paragraphs 3 to 6 (page 225)*.

As regards *jus retentionis* and compensation, conceding that the plantation was made by the appellant, a *bona fide possessor* should have the *possessio civilis, i.e.*, any *possessio* which starts with *justa causa*; but in the present case it is not so; the appellant has shut his eyes to facts and claims to be a *bona fide* possessor. The case of *De Liverav. Abeysinghe*[6] is in point. The decision in *Dassanayake v. Tillekeratne*[7] is not correct. A *mala fide* possessor cannot claim compensation for useful improvements—*Livera v. Abeyesinghe*[8]. The appellant cannot have a *jus retentionis* as against the fideicommissaries—See *Mendis v. Dawood*[9].

[1] *(1914) 3 Bal. Notes 20.*
[2] *(1923) 25 N. L. R. 241.*
[3] *(1914) 17 N. L. R. 279.*
[4] *(1917) 4 C. W. R. 182.*
[5] *(1919) 21 N. L. R. 65.*
[6] *(1917) 19 N. L. R. 492 (Pr. Council).*
[7] *(1917) 20 N. L. R. 89.*
[8] *(1914) 18 N. L. R. 57 at page 60.*
[9] *(1920) 22 N. L. R. 115.*

H. V. Perera, K.C., in reply .—Perezius' view is correct, but it is not proper to extend those p inciples further. The term "family" need not be used in the donation. One should consider what a family is in common parlance. The 6 S.C.C. case refers to a perpetual *fidei commissum*. Although a *fidei commissum* in favour of a family is a perpetual *fidei commissum* all p< -petual *fidei commissa* are not *fidei commissa* in favour of families.

Where a man, believing that it is his own, improves a land which is some one else's then he is a *bona fide* possessor. A constructive knowledge cannot be imputed to such a possessor merely because he did not make inquiries, which he should have made.—*Wille's Principles of South African Law at page 353*. A fiduciary or his estate can claim compensation as against the fideicommissaries for beneficial expenditure upon property, the subject of the *fidei commissum—Lee's Introduction to Roman–Dutch Law (3rd Edition), Appendix J at foot of page 443* and *Du Plessis v. Est. Meyer* [1]. This is supported by the view in *Dassanayake v. Tillekeratne* [2]. A usufructuary's position is the same as that of a fiduciary and compensation could be recovered—*Jasohamy v. Podihamy* [3] and *Brunsden's Estate v. Brunsden's Estate and others* [4].

Cur. adv. vult.

August 12, 1946. WIJEYEWARDENE S.P.J.—

This is an action for declaration of title brought by the plaintiffs against the defendant in respect of a half share of a land called Panditha Udumukelle.

Two persons, Nandiris and Siyaneris, were entitled to the entire land in equal shares. By deed, P 3 of 1906, Nandiris gifted his half share to Carlina subject to certain conditions. By deed, P 2 of 1911, Siyaneris sold his half share to Nandiris. By deed, D 3 of February 8, 1919, Nandiris sold the entire land to E. C. de Fonseka. By deed, D 1 of March 22, 1918, Nandiris purported to cancel the conditions subject to which the gift P 3 was made and to gift the half share absolutely to Carlina who by deed, D 6 of March 24, 1918, conveyed the half share to Nandiris. In satisfaction of a hypothecary decree entered against E. C. de Fonseka in 1935 the entire land was sold, and at the sale the defendant became the purchaser and obtained in his favour the deed, D 4 of 1941. Carlina died in 1923 leaving as her children the four plaintiffs, the eldest of whom was born in 1910. I may observe at this stage that no issue was framed at the trial with regard to the prescriptive rights of parties.

The present appeal is by the defendant against the decree entered by the District Judge declaring the plaintiffs entitled to a half share of the land as *fidei commissarii* under the deed of gift, P 3.

The questions of law that have to be considered on this appeal are—

(1) Did P 3 create a valid *fidei commissum* ?

(2) If P 3 created a *fidei commissum*, was such *fidei commissum* revoked effectually by D 1 ?

[1] *S. A. L. R. (1913) C. P. D. 1006 at page 1018.*
[2] *(1917) 20 N. L. R. 89.*
[3] *(1943) 44 N. L. R. 385.*
[4] *S. A. L. R. (1920) C. P. D. 159 at page 171.*

(3) Is the defendant entitled to claim compensation for improvements admittedly effected by E. C. de Fonseka ?

(4) Is the defendant entitled to a right of retention until such compensation is paid to him ?

The deed, P 3, is written in Sinhalese. It is a gift to Carlina on the eve of her marriage. It contains a clause prohibiting Carlina from selling, mortgaging or otherwise alienating the gifted property. It then proceeds to say that upon her death the property should devolve upon certain persons who were designated as " all her (Carlina's) children being heirs descending from her and those who have obtained authority as her executor or administrator ". The Sinhalese words are—අැගෙන් පැවැත එන දරු ඵරුම්කාර ඉපැල්ම අත්මිනිස්නාසිකාරදිවූ බඹල්ලන් සියල්ලන්ගෙන්.

I am unable to uphold the contention of the appellant's Counsel that the reference to " those who have obtained authority as her executor and administrator " in P 3 makes it impossible to say with certainty who the *fidei commissarii* are. The answer to that argument is found in the following passage from the judgment of Pereira J. in *Wijetunga et al. v. Wijetunga* [1] :—

> " What the deed means is that, alternatively, that is to say, in default of heirs the property is to vest in executors or administrators. In default of heirs, Alvino, as *fiduciarius*, would, of course, be absolute owner of the subject of the *fidei commissum*, and a disposition by him of the same by will would then have full effect, and thus the use of the words, ' executors ' and ' administrators ' (the latter implying administrators *cum testamento annexo*) could be explained away without doing violence to the language employed, and in a manner that gives effect to the obvious intention of the grantor to create a *fidei commissum* ".

I hold that P 3 created a valid *fidei commissum* and that the *fidei commissarii* are " the children of Carlina being heirs descending from her. " I shall consider now the question whether Nandiris could have revoked the gift to the *fidei commissarii* created by P 3.

The deed, P 3, shows that Carlina accepted the " said gift " under the deed. That is clearly an acceptance by Carlina of the gift to her subject to the conditions and restrictions set out in the deed. It is, however, argued on behalf of the appellant that Carlina's acceptance was only an acceptance on her behalf and that, in the absence of an acceptance by the *fidei commissarii*, the donor was entitled to revoke the gift to the *fidei commissarii*. The appellant's Counsel relied on the following passage from Voet 39.5.43 (de Sampayo's Translation) :—

> " Undoubtedly, in the absence of acceptance by the fideicommissary or in his name by a notary or other person in conformity with our law, the better opinion is that the donor may change his mind in regard to the *fidei commissum* just as a change of mind is admissible in regard to the donation itself, as explained in above number 13, before the donee has accepted it ".

[1] *(1912) 15 N. L. R. 493.*

But this general rule as laid down by Voet is not accepted without qualification by Perezius :—

" 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. The majority hold the view that the donor is not permitted to revoke the pact even if there has been no acceptance by him in whose favour it was made. This they prove from d. 1.3.h.t. which gives an immediate *actio utilis* to the third party on whom the benefit of the liberality is bestowed so that, since he has acquired a right—for this apparently cannot be denied if he is entitled to the *actio*—the donor will not be permitted to revoke the pact and limitation because by so doing he would be taking away from another without his consent a right which he has acquired which the law does not allow. They prove also the same opinion from 1. 1. ff. *Qui sine manumiss.* where Paulus says if a slave has been put up for sale on these terms that after a certain time he should be manumitted, even if the vendor changes his mind he can yet seek his liberty because what was once his wish ought not later to displease him nor should a pact annexed to a gift to the advantage of another be revoked without his consent. Gomez (d.loco n.30) ; Rod. Suarez (*ad 1. quoniam in priorib. decl. legis Regni, octavo quaeritur*) ; Fachinaeus (*lib. 8. contr. cap. 38*) ".

"The former opinion (*i.e.*, the opinion that the gift cannot be revoked) 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 (*1.69. Sec. 3ff. de leg.2*) where the burden imposed on the first donee results in an action available to all as Molina says (*de Hisp. primog. 1.4.0. 2n. 75*) because it would be absurd, in order to make a *fidei commissum* irrevocable, to require the acceptance of infants and persons not yet born ", (Perezius Bk. 8, Tit. 55, Sec. 7 and 12 ; Wikramanayake's Translation).

Pothier who discusses the conflicting views of the jurists on this question sets out as follows the reasons for the view of those belonging to the school of Perezius :—

" The clause of the act of donation which contains the charge imposed upon the donatary, includes a second donation, or a fideicommissary donation by the donor to the third person. This second donation, without the intervention of the person in whose favour it is made receives its full perfection by the first donatary accepting the donation subject to the charge, since by that acceptance he contracts, in favour of the third person without the intervention of the latter in the act, an engagement to accomplish the charge. From this engagement arises a right, which is acquired by the third person, to demand that the charge shall be accomplished ; this right is irrevocable, and it shall be not in the power of the donor to discharge the first donatary in prejudice of the right acquired by the third person ; for the clause which includes the second or fideicommissary donation, making part of

an act of donation *inter vivos*, the fideicommissary donation included therein is of the same nature, and consequently is a *donatio inter vivos*, and consequently irrevocable. It ought then to be no longer in the power of the donor to revoke it, by discharging the first donatary from the charge imposed upon him, and from the engagement which he has contracted in favour of the second. With regard to the rules of law relied upon in support of the opposite opinion, *Quaeque eodem modo dissolvuntur quo colligata sunt. Quae consensu contrahuntur consensu dissolvuntur* ; these rules only apply as between the contracting parties ; and not in prejudice of any right acquired by a third person. This results from the last law *ff. de pact.* which decides that the surety who has acquired a legal exception (*un droit de fin de non recevoir*) by an agreement between the creditor and the principal debtor, cannot be deprived of that right by an opposite agreement of the same parties ". (Pothier on Obligations Part I., Chapter I., Article 5, Section 73 ; Evans' Translation).

At this stage it is desirable to consider what kind of a gift is indicated by Perezius when he speaks of " a gift made to one person which is made in favour of a family in which the donor wishes the property to remain".

While dealing with testamentary *fidei commissa* left to a family Voet (36.1.27) discusses the definition of " family " according to Justinian. He then proceeds to consider two kinds of such a *fidei commissum*—*fidei commissum unicum* and *fidei commissum multiplex*—and says :—

" The bequest may be of such a kind that the *fidei commissum* 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*) *fidei commissum*, 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.

The first kind of bequest, where the terms of the *fidei commissum* are completely satisfied by a single act of restitution and the fideicommissary is not obliged to make a further and repeated restitution, seems to take place when the testator, in unqualified terms, by means of words which have special reference to the person (*concep is in personam*) of the heir, has prohibited the appointed heir from alienating the property or inheritance out of the family, without any further directions, or has ordered him to leave the estate to the family " (Voet 36.1.28. Mc Gregor's Translation.)

On the above passage in Voet and in view of Sections 2 and 3 of the Entail and Settlement Ordinance, I hold that the gift to be considered in this case is a fideicommissary donation which " involves the benefit of the family " as mentioned by Perezius.

The view favoured by Perezius that such a donation is irrevocable even in the absence of an acceptance on behalf of children not yet *in esse* appears to me to be the more reasonable view.

An identically similar question was decided in *Ex parte Orlandini and two others* (South African Law Reports (1931) Orange Free States Provincial Division, page 141). In that case Mrs. Orlandini gifted a property in equal shares to Daniel Brink and Stephenus Brink with the condition that at the death of each of them his share shall " devolve on his children born or still to be born of his now existing marriage ". At that time Daniel Brink had two minor sons and Stephanus Brink one minor son. Mrs. Orlandini and Daniel Brink and Stephanus Brink presented a petition to Court for the revocation of the *fidei commissum* about three years after the execution of the deed of gift. The Court consisting of Sir J. E. R. de Villiers, Judge-President, and Mr. Justice Fischer disallowed the application and in the course of his judgment de Villiers J.P. said—

" Now it seems to me that the argument of Perezius is unanswerable, for, if acceptance by minors and unborn persons were necessary to lend binding force to a *fidei commissum in favorem familiae*, it would follow that such a *fidei commissum* could not, in practice, be constituted by act *inter vivos* . . . . The only question which remains is whether the *donatio* made to Daniel and Stephanus Brink falls within the principle stated by Perezius. The reference by him (in the passage quoted) is to a case where a donation made to an individual ' involves the benefit of the family, the donor wishing that the property should remain in the family '. It seems to me that in the present case the transfer of the land to Daniel and Stephanus Brink, on condition that they may not dispose of it but that on the death of each it is to go to his children born or to be born of his existing marriage, falls within the description of a ' *donatio* involving the benefit of a family, within which the donor wishes it to remain '. The reasoning of Perezius also applies, for here too we have minors, and unborn issue of Daniel and Stephanus' existing marriages. It must therefore be held, in accordance with the passage quoted from Perezius, that upon the acceptance of the *donatio* by the first two donees (Daniel and Stephanus) the *fidei commissum* became effective and binding as a whole. It can therefore not be revoked without the consent of the fideicommissaries "

There are certain local decisions on this point and the conflicting views expressed by various Judges create some difficulty. The earliest case is *Weerakkodage John Perera v. Avoo Lebbe Marikar*[1]. In that case the property was granted by Juan to his daughter Anna subject to the condition that she should not alienate or encumber it and that after her death it should be enjoyed " by her heirs and descendants in perpetuity under the bond of *fidei commissum* ". Anna accepted the gift. Sometime afterwards, but before any children were born to her, Juan devised the property absolutely to Anna by a last will. Anna conveyed the property to the defendant whose title was disputed in that case by the

[1] *(1884) 6 Supreme Court Circular 138.*

plaintiff, a son of Anna born after Juan's death. It was held that the plaintiff was entitled to succeed and Clarence J. who accepted and acted upon the opinion of Perezius said—

> " I find, therefore, the Roman-Dutch jurists, so far as their hypothetical reasoning or imaginary cases go, favouring what seems to me the commonsense 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."

The Counsel for the appellant questioned the soundness of this decision on the ground that it would be " intolerable " for the unborn to be bound by the contracts of the living. That no doubt is a principle which would readily be accepted in case of contracts where there is even a possibility of the contract being prejudicial to the interests of the unborn. But I fail to see how under our law a gift could ever be burdensome to children not *in esse* and why in the case of such a contingency—if such a contingency could arise—the fideicommissary donees could not free themselves from that burden. It was then contended that the case of *Weerakkodage John Perera v. Avoo Lebbe Marikar* (*supra*) could be distinguished as the *fidei commissum* in that case was a perpetual *fidei commissum*. I am unable to accept that contention based on the use of the words " in perpetuity ". Professor Lee dealing with Perpetual *fidei commissa* at page 384 of his Introduction to Roman-Dutch Law (Third Edition) says—

> ' The testator, then, may tie up the property for ever if he pleases. But the mere use of the word " perpetual ", or the like, is not sufficient to produce this result '.
>
> ' Thus, if he says—" I will that my goods after the death of my first heir shall descend to my next of kin then in being, and that they shall always go from one to the other of my blood relations, and shall not at any time pass outside my family ", these words will not be sufficient to tie up the property beyond the fourth generation inclusive, unless he goes on to add that : " the *fidei commissum* shall not at any time or in any event whatsoever come to an end ", or other words of like import '.

Moreover as stated earlier by me we have the authority of Voet that a *fidei commissum* in favour of a family may be a *fidei commissum multiplex* or a *fidei commissum unicum* and there is also the additional fact that at present, even if a donee uses language sufficient to create a perpetual *fidei commissum*, the Entail and Settlement Ordinance will render nugatory any restraint on alienation for a longer period than " the lives of persons who are in existence or *en ventre sa mere* at the time when such . . . . deed . . . . is executed and are named . . . . in such . . . . deed . . . . and the life of the survivor of such persons. "

It was also submitted that the decision had not the binding authority of a Full Court decision. As the appellant's Counsel appeared to question

the correctness of the statement of the Editor of the Law Reports that it was the judgment of Clarence J. and Dias J. that was delivered by Clarence J., I examined the original judgments kept at the Supreme Court Registry and found that the statement in the Law Reports was correct as the judgment delivered by Clarence J. had been signed both by Clarence J. and Dias J. while a separate dissenting judgment was given by Burnside C.J. In 1884 the Supreme Court consisted of a Chief Justice and two Puisne Justices, and, therefore, the decision in *Weerakkodage John Perera v. Avoo Lebbe Marikar* (*supra*) would be a full Court decision binding on us (vide *Jane Nona v. Leo* [1] and *Appu Sinno v. Girigoris* [2]).

Soysa et al. v. Mohideen [3] was a decision of a Bench of two Judges on the question of the revocability of a fideicommissary donation where the *fidei commissarii* were not *in esse* at the date of the execution of the deed. In that case the Supreme Court followed with approval the decision of Clarence J. and Dias J. in the earlier case which was regarded as a binding authority.

Carolis et. al. v. Alwis [4] is again a decision of a Bench of two Judges and the Court had to consider there a similar question. The plaintiffs in that case who claimed as *fidei commissarii* were minors at the time of the execution of the deed of gift (*vide* page 161). This Court expressed in that case a view that even where the *fidei commissarii* were not *in esse* the *fidei committens* could revoke the deed if there was no acceptance on behalf of the *fidei commissarii*.

There is, as mentioned earlier by me, a conflict of views among the Roman-Dutch Jurists on the necessity of an acceptance on behalf of *fidei commissarii* not *in esse* to make a fideicommissary donation irrevocable. But as pointed out by Professor Lee (*vide* An Introduction to Roman-Dutch Law, Third Edition, page 16) where the opinions of the Jurists are at variance or bear an archaic stamp the Courts adopt the view supported by authority or most consonant with reason.

For the reasons given by me I hold that the question now under consideration must be answered in the negative.

I agree with my brother Jayetileke—(*a*) that the defendant is entitled to claim compensation at Rs. 250 an acre in respect of improvements and (*b*) that the defendant has the right to retain possession of the property until his claim is satisfied.

The District Judge has given the plaintiffs damages at Rs. 20 per month from November 4, 1941, till they are restored to possession. In view of our decisions on the questions of compensation and *jus retentionis* the plaintiffs would have a right to claim damages at Rs. 20 a month only from the date when the defendant's claim to compensation is satisfied.

I affirm the decree of the District Court subject to the modifications indicated by me in the two preceding paragraphs.

The appellant will pay the respondents the costs of this appeal.

[1] *(1923) 25 N. L. R. 241.*
[2] *(1914) 3 Balasingham's Notes of Cases 20.*
[3] *(1914) 17 N. L. R. 279.*
[4] *(1944) 45 N. L. R. 156.*

JAYETILEKE J.—

I have had the advantage of reading the judgment prepared by my brother. I entirely agree with that judgment and do not find it necessary to add any words of my own.

There remains only the question whether the defendant is entitled to set up any claim for compensation for improvements against the plaintiffs who are the fideicommissaries. It is admitted that the land was planted with budded rubber by E. C. de Fonseka after he purchased it from Nandiris on D 3. There are no grounds for holding that E. C. de Fonseka did not believe that he had good title to the land when he planted it. He had a deed in his favour which purported to give him title from the fideicommissaries and the probability is that he planted the land in the *bona fide* belief that he was the owner.

The authorities indicate that a fiduciary is entitled to compensation for useful improvements effected by him from the fideicommissaries. In *Livera v. Abeysinghe* [1] it was held that a purchaser from a fiduciary could not claim compensation for useful improvements effected by him from the fideicommissaries. There was an appeal in that case to the Privy Council and the judgment of the Privy Council is reported in 19. N. L. R. at page 492. The Privy Council did not decide the question whether a fiduciary could claim compensation for useful improvements effected by him from the fideicommissary, but it held, on the facts, that the appellant was a trespasser and that he could not, therefore, be regarded as a *bona fide* improver. In *Dassanayake v. Tillekaratne* [2] it was held that a fiduciary is entitled to the same rights of compensation for improvements as any other *bona fide* possessor and to the retention of the property until compensation is paid, and that a purchaser from a fiduciary is in the same position as the fiduciary. In *Du Plessis v. Estate Meyer and others* [3] Searle J. said—

> "No case has been quoted in which the Court has laid down the principle that a fiduciary or his estate can claim as against fidei commissaries for the beneficial expenditure on the property, the subject of the fideicommissum. But the Roman-Dutch Law authorities are certainly in favour of the view that he can do so".

In *Brunsden's Estate v. Brunsden's Estate and others* [4], Kotze J. said—

> "It was generally conceded that a fiduciary was entitled to compensation for improvements effected by him and Voet 36.1.6., and *Du Plessis v. Meyer* were referred to in support of it. We may take it that a fiduciary is entitled to have expenses and improvements which a *bona fide* possessor is entitled to claim".

I would, accordingly, hold that the defendant is entitled to compensation for the improvements effected by his predecessor and to retain possession of the land till he is paid the compensation. The trial Judge has not assessed the compensation, but Counsel suggested that thea mount should be fixed by us. On the question of assessment the general rule is that the

[1] *18 N. L. R. 57.*
[2] *20 N. L. R. 89.*
[3] *1913 Case Supreme Court Reports 1006 at page 1018.*
[4] *1920 Case Supreme Court Reports page 159 at page 171.*

improver is entitled to the cost of the improvement or the present value of it whichever is less. Having regard to the price of land planted with rubber at the time of the institution of the action I think it would be advantageous to the plaintiffs to pay the cost of the improvement which I would fix at Rs. 250 per acre. I agree with the order made by my brother.

Decree varied.