Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dona Maria Abeyesekera Hamini, widow of Don Paules Gomes Abeyesinghe, Dona Leysa Abeyesekera Hamini, and Joseph Martinus Perera v. *Daniel Tillekeratne, from the Supreme Court of the Island of Ceylon; delivered* 26*th February* 1897.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

Simon Gomes Appohami and Maria Regina Perera Hamini, two Cinghalese spouses, executed a joint will disposing of their whole estate real and personal, in November 1858, at which time their issue consisted of one unmarried daughter, and the three children of a daughter deceased. The marriage was dissolved by the death of Simon Gomes in 1865. His widow died in the year 1873.

By the will it was provided that all the property belonging to the testators, after payment of the debts which they had incurred, should be possessed by the survivor of them; after which "the three children of Ana "Catherina Gomes Lama Ettena (the deceased

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"of our two children) viz.:—Dona Johana
"Maria Abayasekera Hamini, son of John
"Paulus Abayasekera Appohami, and Dona
"Leisa Abayasekera Hamini, these three and
"our second daughter Maria Marsina Gomes
"Lama Ettena; the three children of the
"aforesaid daughter, and the second daughter
"shall divide into two and inherit according to
"custom, and they and their descendants possess,
"without interruption. Furthermore, if there
"remain any balance still due after our paying
"the said debt during our lifetime from the
"income of the property, the same shall be paid
"by selling the lands situated beyond the gravets
"of Colombo. Should there be a balance still
"remaining due, it is directed that the same
"shall be paid by selling a land situated at
"Colombo which the children do not wish to
"retain; and moreover after the said debt is
"satisfied, the other lands within the gravets of
"Colombo are created *fidei commissum*, so that
"they may not be sold, mortgaged or in any
"way alienated, and in order that the said power
"(*fidei commissum*) may be effectual, we direct
"that the heirs shall pay to Saint Joseph's
"Church at Colombo the sum of five shillings
"annually." Two other bequests are made by
the will; but the passage quoted contains the
whole provisions which have any bearing upon
the matter of this appeal.

At the death of the surviving testator, all the
descendants appointed *nominatim* to take in
that event were alive, with the single exeeption
of John Paules, the grandson, who had died in
November 1868, leaving an only child Isabella.
Upon the determination of the surviving spouse's
usufruct, it appears that probate of the will was
obtained, and that thereafter their daughter
entered into possession of the moiety destined
to her, whilst one third share of the remaining

moiety was possessed by each of their two surviving grandchildren, and by their great grandchild Isabella who took the share of which her father was the institute.

Isabella died unmarried and intestate in October 1873, and the share which she had enjoyed was taken possession of, and was held by the Appellants Dona Maria and Dona Leysa, her paternal aunts, until August 1892, when the present action was brought against them, before the District Court of Colombo, by the Respondent, who is married to the widow of the deceased John Paules. The action is in the nature of an ejectment suit; and the Plaintiff's title consists of letters of administration duly appointing him to administer the estate of his step-daughter Isabella. His success must therefore depend upon his being able to establish that, at the time of her death in 1873, a beneficial interest in the one third of the moiety which is in question had vested absolutely in Isabella, and was descendible to her heirs *ab intestato*.

The Judge of the District Court, Mr. D. F. Browne, dismissed the action with costs; the learned Judge holding that the descent of the share in dispute continued, after the death of Isabella, to be governed by the *fidei commissum*. On appeal to the High Court, his decision was set aside, and judgment entered for the Respondent, by Lawrie and Withers JJ., who were of opinion that the share had vested absolutely in Isabella, unaffected by the trusts of the will. The case was heard, in review, by a full bench consisting of Lawrie and Withers, JJ., together with Mr. D. F. Browne acting as a puisne judge, when, all the learned Judges retaining their original views, the order of the High Court was confirmed.

The present appeal having been heard *ex parte*, their Lordships think it right to notice

that, in his first judgment, Mr. Justice Lawrie directed attention to the fact that neither in the Respondent's plaint, nor in the defence is there any averment to the effect that the lands in controversy are situated within the gravets of Colombo, although, if not so situated, they would not be within the terms of the *fidei commissum.* There is no doubt a defect of averment upon that point; but, on the other hand, the pleadings of both parties appear to their Lordships to be expressly framed upon the assumption that the lands are within the *fidei commissum,* and that according to its construction one way or another, the rights of the litigants must be determined. Their Lordships also find that Mr. Justice Withers, in his original judgment, states, that "the lands referred to are "within the gravets of Colombo, and are "admittedly the subject of a *fidei commissum*"; and, that the opinions delivered, on a rehearing, by the three learned Judges, all proceed upon that footing. In these circumstances, their Lordships are satisfied that the Appellants are entitled to have the case disposed of, upon the same footing, in this appeal.

Apart from the provisions of certain ordinances enacted by the Governor of Ceylon with the advice and consent of the Legislative Council, to which they will subsequently refer, the conflicting claims of the Appellants and the Respondent appear to their Lordships to depend, not upon any disputed principle of the Roman-Dutch law, but upon the construction of that part of the will which regulates the destination of that moiety of the testators' estate which was devised to the three children of their deceased daughter, and their descendants. If the will constitutes three *fidei commissa,* severally applicable to the shares destined to each of these children, the Respondent would be entitled to

prevail; because, in that case, the descendants of John Paules having become extinct in her person, the share of Isabella was unaffected by any substitution, and therefore belonged to her in fee. On the other hand, if the entire moiety was the subject of the *fidei commissum*, the right of Isabella was, at the time of her death, burdened with a substitution in favour of the institutes and the lineal descendants of the institutes, and no interest in the share which she enjoyed passed to her heir-at-law. There being no controversy raised in this suit with regard to the moiety possessed by Maria Marsina, the daughter of the testators, it is unnecessary to consider whether both moieties of the estate are included in the same *fidei commissum*, or are the subjects of separate *fidei commissa*.

Their Lordships have had little difficulty in coming to the conclusion that, according to the terms of the will, the entire moiety settled upon grandchildren is made the subject of one and the same *fidei commissum*. The bequest is not in the form of a disposition of one third share of the whole to each of the institutes, but of a gift of the whole to the three institutes jointly, with benefit of survivorship, and with substitution of their descendants. Following the terms of the gift, the substitution must be read as referring to the whole estate settled upon the institutes as a class. The words "and inherit according to custom" were obviously not meant to imply that the estate was to devolve in terms of law, so as to defeat the interests of heirs-substitute. They refer to the succession, not of the substituted heirs, but of the institutes, and simply indicates that the shares bequeathed to them are the same which they would have taken had there been no will. Their Lordships are accordingly of opinion, that no right

of succession could arise, on her decease, to the heirs-at-law of Isabella who were not in the direct line of descent from the testators, so long as any person was in existence, who could show a title either as an institute or as a substitute under the provisions of the will.

It appears to have been argued in the Court below on behalf of the Respondent, that assuming the effect of the will to be that which their Lordships have just indicated, the law has been altered by ordinances relating to the rights of joint tenants, so as to give Isabella an absolute fee of the third share which she possessed. The ordinances relating to the matter of joint tenancy are, No. 21 of 1844, No. 10 of 1863, and No. 7 of 1871. Mr. Justice Lawrie does not refer to or rely upon any of these enactments as a ground of judgment; but Mr. Justice Withers was of opinion that, under the provision of the ordinance of 1844, the destination of the will must be regarded as a devise to tenants in common, *sine jurs accrescendi.*

Section 7 of the first of these ordinances enacts that when the owner of any landed property, or of an undivided share or interest in any such property shall die, after the ordinance shall commence and take effect, and two or more persons become co-proprietors of undivided shares or interests in such property, whether under the will of such deceased owner, or as his heirs-at-law, it shall be the duty of the executor or administrator to make partition of the property among all the persons entitled to shares or interests therein, whether as devisees, or heirs-at-law of the deceased.

Section 2 of the Ordinance of 1863, provides that, when landed property shall "belong in common" to two or more owners, it shall be competent to one or more of such owners to

compel a partition of the property, and also that, if partition be impracticable, the Court may direct a sale.

Section 3 of the Ordinance of 1871, enacts that all property, whether moveable or immoveable, which any persons shall be possessed of, or entitled to, in equal undivided shares, as trustees, shall be held by such persons as joint tenants, with the right or quality of survivorship between or amongst them, in the same manner as subsists between or amongst joint tenants by the law of England; notwithstanding anything by the Ordinances No. 21 of 1844, and No. 10 of 1863, to the contrary provided.

Not one of these enactments professes to deal with or alter the law of *fidei commissum;* and, in their Lordships' opinion, they cannot be construed as having that effect. The first and second of them appear to be limited to cases in which the persons interested, whether as joint tenants or as tenants in common, are full owners, and are not burdened with a *fidei-commiss;* and, even if they were not held to be so limited, the partition which they authorise would not necessarily destroy a *fidei commissum* attaching to one or more of the shares before partition. The Ordinance of 1871 has no bearing upon the point, its enactments really being intended to prevent a lapse of trust title and administration, in the event of the death of one of a body of trustees holding equal undivided shares, although their title may not be that of joint tenants.

Their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to restore the judgment of the District Court Judge, with costs to the Appellants in both Courts below. The Respondent must pay to the Appellants their costs of this appeal.