Judgment 19 1778

No. 41 of 1970

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN

JOSEPHINE MARY ALOYSIA MORAIS — Defendant-Appellant

AND

FRANCESCA VICTORIA — Plaintiff-Respondent

CASE FOR THE RESPONDENT

RECORD

1. The Defendant-Appellant abovenamed (hereinafter called the Appellant) appeals from the judgment and decree of the Supreme Court dated 11th July 1968 whereby the Supreme Court dismissed with costs the appeal of the Appellant from the judgment and decree of the District Court of Colombo dated the 17th March 1965 whereby the District Court declared the Plaintiff- Respondent abovenamed (hereinafter called the Respondent) was entitled to certain lands and premises in respect of which the Respondent as Plaintiff sued the Appellant and decreed that the Appellant be ejected from the said lands and premises and whereby the Appellant was further ordered to pay to the Respondent damages for wrongful possession of the said lands and premises.

p.172 LL 12-43
p.157 L1-
p.166 L29
p.137 L1-
p.153 L.20

2. In the suit from which the Appeal arises, the Respondent as Plaintiff instituted proceedings against the Appellant as Defendant by filing a Plaint dated the 13th May 1963 in which the Respondent prayed inter alia (a) that

p31 L1-
p63 L20

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she be declared entitled to the lands and premises described in Schedules "A" to "M" to the Plaint, (b) for the ejectment of the Appellant from the said lands and premises (c) for judgment in a sum of Rs. 70,165/20 as accrued damages from 1st June 1960 to 30th April 1963 and continuing damages at Rs. 2,004/72 per month from the 1st May 1963 until the said lands and premises were restored to the Respondent.

p63 L21-p64 L39

3. The Appellant contested the said action and in her answer dated the 16th September 1963, prayed for the dismissal of the Respondent's action with costs.

p 71 L1-p 74 L6
p.111 L.16-21

4. The parties went to trial upon twenty three issues, but the Appellant stated by Affidavit to the Supreme Court, in connection with an application for the directions of the Supreme Court in regard to the printing of the record for the purposes of this appeal, that the appeal to Her Majesty in Council would be canvassed only on two grounds, stated by the Appellant as follows:-

"(a) In view of District Court Colombo Case No. 9929/L instituted earlier between the same parties, the Respondent's action was barred;

(b) The Will marked as Document P10 in the case creates only a Trust and not a fidei commissum and that the two belonged to 2 different systems of law and could not be worked together."

The Respondent accordingly withdrew his application for the inclusion of certain documents in the printed record.

5. The issues relevant to the above-mentioned two grounds, which are now relevant to this appeal, are as follows, and were answered by the Learned District Judge in the manner set out below:-

p142 LL4-6

Issue No. 1 Was Mariam Morais, the owner of the land described in the schedule to the plaint upon the deeds set out in paras 2, 14, 24, 34, 46, 55, 65, 75, 85 and 95 of the plaint?

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	Answer:	Yes	p142 L7
	Issue No. 2	Did the said Mariam Morais die leaving a Last Will bearing No. 1080 of 8th September 1917?	p142 LL8-9
	Answer:	Yes	p142 L10
	Issue No. 3	Did the said Mariam Morais by the said Last Will bequeath all the rest and residue of his properties including the properties described in Schedules A to J of the plaint to the three trustees referred to in the said Last Will upon the trusts and subject to the conditions set out therein?	p142 LL 11-15
	Answer:	Yes	p142 L16
	Issue No. 4	Was the said Last Will admitted to Probate in D.C.Colombo Testamentary Case No. 6237?	p142 LL17-18
	Answer:	Yes	p142 L19
	Issue No. 5	Did the executors and/or Trustees appointed under and in terms of the said Last Will No. 1080 purchase in exercise of the powers vested under the said last will and become the owners of the properties described in the schedule K, L and M of the plaint upon the deeds, set out in paragraphs 107, 117 and 127 of the Plaint?	p142 LL20-25
	Answer:	Yes	p142 L26
	Issue No. 6	Did the said executors and/or Trustees convey on Deed No.1208 of 21st September, 1933, the lands and premises described in schedules A to M of the plaint to Louis Anthony Morais, subject to the terms and conditions contained therein?	p142 LL27-30

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p142 L31	Answer:	Yes
p142 LL32-37	Issue No. 7	Was the said Louis Anthony Morais as the fiduciary under and in terms of the said last will and/or in terms of the said Deed No.1208 and his predecessors in title in possession of the said lands and premises described in schedules A to M of the plaint undisturbedly and uninterruptedly by a title adverse to and independent of the defendant and others?
p142 L38	Answer:	Yes
p143 LL24-25	Issue No.13	Is there any prohibition in the Will of Mariam Morais against forced alienation or alienation in invitum?
p143 L26	Answer:	Yes; against all kinds of alienation.
p145 LL1-3	Issue No.20	Has the plaintiff instituted proceedings No. 9929/L of this Court for the recovery of certain properties mentioned therein on the basis of the Last Will of Mariam Morais?
p145 L4	Answer:	Yes
p145 LL5-7	Issue No.21(a)	Has the Plaintiff omitted to sue in District Court, Colombo No. 9929/L in respect of all the lands mentioned in the schedule to the plaint in this case?
p145 LL8-9	Answer:	No. Not within the meaning of Section 34 Civil Procedure Code.
p145 LL10-12	Issue No.21(b)	Has the Plaintiff in District Court Colombo No. 9929/L intentionally relinquished her claim in respect of the lands described in the schedules to the plaint?
p145 L13	Answer:	Does not arise

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Issue No. 21 (c)	If (a) and/or (b) is answered in the affirmative, can the Plaintiff maintain this action?	p145 LL14-15
Answer:	Does not arise	p145 L16
Issue No. 22	Does Last Will No. 1080 (P10) create only a trust?	p145 L17
Answer:	No.	p145 L19
Issue No. 23	If so, can the Plaintiff maintain this action?	p145 L20
Answer:	Does not arise.	p145 L21

6. The facts relevant to the Appeal as found by the District Judge are set out in paras 7 to 14 below.

7. Marianu Morais was the original owner of the properties described in Schedules A to J annexed to the Plaint and died on 8th September leaving Last Will marked P10 in the Case. p137 LL5-6 p57 L27-p61 L36

8. By the said Last Will Marianu Morais bequeathed all the rest and residue of his properties including the properties described in Schedules A to J of the Plaint to three Trustees upon certain trusts and subject to the following conditions:- p137 LL6-9

"Upon Trust to convey the immovable property belonging to my trust estate to my said son Lewis Anthony Morais on his attaining the age of Thirty five years on the 25th day of July 1933 subject to the following reservations restrictions and conditions that is to say that the said Lewis Anthony Morais shall in no wise sell mortgage or otherwise alienate or encumber the immovable property belonging to my said Trust Estate or any portion thereof but shall only have possess and enjoy the rents issued and profits arising and accruing therefrom during the terms of his natural life and that at his death the said immovable p178 LL7-38

property shall devolve on his lawful son or sons only (if more than one in equal shares) absolutely but if there be no lawful son surviving him at his death then and in that event the same shall devolve on his lawful daughter or daughters (if more than one, in equal shares) absolutely the lawful issue of a deceased son or daughter taking the share to which his her or their parent would have become entitled if living. But in the event of the said Lewis Anthony Morais dying without leaving any lawful issue or other descendants surviving him then and in that event the said immovable property shall devolve absolutely on the heirs of the said Lewis Anthony Morais Provided however that in the event of my said son Lewis Anthony Morais dying before attaining the age of thirty five years I direct my trustees to convey the immovable property belonging to my trust estate to the lawful son or sons only (if more than one, in equal shares) of my said son Lewis Anthony Morais absolutely upon his or their attaining the age of twenty one years and in the meantime to administer the trust estate in their absolute discretion but if there be no lawful son or sons surviving him then to the daughter or daughters (if more than one, in equal shares) of my said son Lewis Anthony Morais absolutely upon her or their attaining the age of twenty one years or marrying whichever event first occurs and in the meantime to administer the said trust estate in their absolute discretion the lawful issue of a deceased son or daughter taking the share to which his or her or their parent would have become entitled if living and in the event of my said son Lewis Anthony Morais leaving no lawful issue or other descendants surviving to the lawful heirs of the said Lewis Anthony Morais absolutely.

p178 L39-
p139 L6

Upon trust to convey and transfer over all the movable property belonging to my said trust including the unexpended income of the said trust to my son the said Lewis

Anthony Morais on his attaining the age of twenty five years or in the event of my said son dying before attaining the age of thirty five years to convey and transfer the same to the lawful son or sons (if more than one in equal shares) of the said Lewis Anthony Morais upon his or their attaining the age of twenty one years and in the meantime to hold and administer the same in their absolute discretion or in the event of their being no lawful son or sons surviving him then to the daughter or daughters (if more than one in equal shares) of the said Lewis Anthony Morais absolutely upon her or their attaining the age of twenty one years or marrying whichever event first occurs and in the meantime to hold and administer the same in their absolute discretion the lawful issue of a deceased son or daughter taking the share to which his her or their parent would have become entitled if living and in the event of my said son Lewis Anthony Morais leaving no lawful issue or other descendants surviving then to the lawful heirs of the said Lewis Anthony Morais absolutely."

9. The said Last Will was admitted to Probate in District Court Colombo Testamentary Case No. 6237 on 10th June 1918 (P22) — p181 L12-p182 L4

10. The Trustees in terms of the said Trust purchased the lands described in Schedules K to M to the Plaint and thus became the legal owners of the lands and properties to be held upon the Trusts and subject to the conditions in the said Last Will. — p137 LL31-34; p61 L37-p63 L18

11. The Trustees by Deed No. 1208 of the 21st September 1933 (P6) conveyed the lands and premises described in schedules A to M to the Plaint to Lewis Anthony Morais the Fiduciary under the conditions and terms of the said Last Will subject to the following terms and conditions that is to say that the said Lewis Anthony Morais shall in no wise sell mortgage or otherwise alienate or encumber the said — p137 LL34-44; p184 L1-p95 L46; p57 L28-p63 L18; p187 LL12-26

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properties and premises hereby conveyed or any portion thereof but shall only have possess and enjoy the rents issues and profits arising and accruing therefrom during the term of his natural life and that at his death the said properties and premises shall devolve on his lawful son or sons only (if more than one in equal shares) absolutely but if there be no lawful son surviving him at his death then and in that event the same shall devolve on his lawful daughter or daughters (if more than one in equal shares) absolutely the lawful issue of a deceased son or daughter taking the share to which his, her or their parent would have become entitled to if living but in the event of the said Lewis Anthony Morais dying without leaving any lawful issue or other descendants surviving him then and in that event the said property and premises hereby conveyed shall devolve absolutely on the heirs of the said Lewis Anthony Morais.

12. After the conveyance referred to in para. 11 above, Lewis Anthony Morais entered into possession of the lands and premises described in Schedules A to M to the Plaint.

p57 L28-p63 L18

13. The Respondent was the only surviving child at the death of Louis Anthony Morais on the 2nd September 1958.

p141 LL35-38

14. On the 23rd/25th July 1962 the Respondent instituted proceedings in D.C. Colombo Case No. 9929/L for the recovery of certain properties (Not included in the Schedules A to M of the Plaint in the present case) on the basis that she was entitled to the properties under the said Last Will of Mariam Morais (P-10)

p138 LL23-26

15. As regards the first of the two questions arising on this Appeal namely, whether the institution of D.C. Colombo Case No. 9929/L operates as a bar to the action from which this Appeal arises, the Learned Trial Judge gave the following reasons for answering the issue in the Respondent's favour:-

"In an early case reported in 17 N.L.R. page 56 at 60 it has been observed that section 34 "is directed to secure the exhaustion of the relief in respect of a cause of action

p138 L39-p139 L11

and not to the inclusion in one and the same action of different causes of action even though may arise from the same transaction". In this case there are 13 different lands, and in Case No. 9929/L of this Court there are 3 lands which are the subject-matter of this action. The Plaintiff is the same and the cause of action is on the basis that the Plaintiff is the owner of the lands, and that the Defendant has not merely denied the right of the Plaintiff to each of these lands, but is in unlawful occupation of these properties, causing damage to the plaintiff. Thus it is clear that a cause of action has accrued to the Plaintiff in respect of each of these lands and that, therefore, she is entitled to sue the Defendant for reliefs and remedies in respect of each of these causes of action. The mere fact that 13 lands have been included in one and 3 lands in another action does not necessarily show that the Plaintiff has abandoned or relinquished her claim for relief in respect of the lands mentioned in the subsequent action, that is the instant case, I, therefore, find that the objection raised on this ground fails. I am of the view that section 34 cannot be said to apply to the circumstances under which these two actions had to be instituted by this Plaintiff against this same Defendant for reliefs in respect of the various properties referred to therein. Issue 21 (a), (b) and (c) has, therefore, to be answered against the Defendant."

16. As regards the second question arising on this Appeal namely, whether the Will (P10) created only a Trust and not a fideicommissum that the two, belonging to two different systems of law, could not be worked together, the District Judge gave the following reasons for deciding this question in favour of the Respondent:-

"The relevant portion of the will (P10) could be split up into two parts. The p139 LL17-30

properties of Mariam Morais were bequeathed to the 3 trustees referred to above with certain obligations attaching to it, the principal obligation being that the Trustees shall hold these properties for the benefit of a third party, namely, Lewis Anthony Morais, until he attained the age of 35. Thus there can be no question that these properties were conveyed to the Trustees not absolutely, but subject to the conditions embodied therein. That it has been so intended is clear from the fact that the Trustees did faithfully carry out the obligations imposed on them and on Lewis Anthony Morais, the son of Mariam Morais, attaining the age of 35 they executed the deed 1208 (P6) in his favour. This deed (P6) that had been executed by the 3 Trustees in favour of Lewis Anthony Morais that is relied on by the Plaintiff as creating a fidei commissum in her favour.

p139 LL31-39 Mr. Kanagarajah for Defendant submits that there is no fidei commissum, but a trust that had been created in the Last Will (P10). In fact, the three sons-in-law are referred to as Trustees and the properties are referred to as the Trust Property. He further submitted that if a trust is recognised in this document one cannot take it that a fidei commissum also has been created in the same instrument. He relied on the provisions of the Trust Ordinance and on certain authorities for the purposes of showing that the trust properties vest in the Trustees absolutely, and that any element of a fidei commissum cannot be brought into such an instrument.

p139 L40-p140 L13 I have had the advantage of a full and a very helpful discussion by both sides. I have considered these submissions and the authorities referred to with care. The authority reported in 58 N.L.R. page 494 appears to me to support the contention of Mr. Ranganathan that an instrument such as this where there are two parts one imposing a trust obligation on the Trustees to carry out a certain act on the happening of a certain event, the existence of a trust

obligation does not permit the Trustees to have the property absolutely, but to carry out the obligations imposed on them by the instrument. The question is whether this deed 1208 (P6) executed on the basis of the Trust obligations imposed on them by Last Will (P10) creates a valid fidei commissum, as maintained by the Plaintiff. The obligation imposed by Mariam Morais, on the Trustees was that he should convey the properties to his son, Lewis Anthony Morais, on his attaining the age of 35, subject to the condition that he shall not sell etc., but that on his death it shall devolve on his sons and if such sons are not available, on his daughters. This obligation the Trustees have faithfully carried out by the execution of the deed P6. The necessary prohibition is there; prohibition against alienation is there and all the necessary ingredients for a valid fidei commissum are to be found in this document. It was submitted by Mr. Ranganathan that the concept of fidei commissum is not found in the English system of law and that therefore the submissions made by Mr. Kanagarajah on that basis cannot apply to the circumstances of this case. I agree

On a consideration of the relevant passage referred to above in the last Will (P10) it is quite clear that Mariam Morais did not give these properties to the three trustees absolutely, but that when he gave them he imposed the obligation that it should be conveyed to his son, Lewis Anthony Morais and the manner in which the transfer should be effected is also shown in unmistakable terms in the Last Will (P10) and it is this obligation that these Trustees have carried out by the deed P6. As I have earlier stated, this deed P6 creates a valid fidei commissum and the necessary prohibitions are there and I do not think in all these circumstances that the position taken by the Defendant can

p140 LL14-25

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succeed, even though it appears on the face of it that reference to a trust is made in the last will (P10). I hold that the deed P6 creates a valid fidei commissum in favour of the Plaintiff."

17. The Appellant's Appeal to the Supreme Court from the said Judgment and Decree of the District Court came up for hearing before
p157 LL1-10 Sirimanne J and de Kretser J. Sirimanne J with whom de Kretser J. agreed held in favour of the Respondent on both questions of law relevant to this Appeal.

18. As regards the first of these questions Sirimanne J gave the following reasons for holding in favour of the Respondent:-

p158 LL8-10 " In regard to the first of these grounds - the argument was based on the provisions of section 34 of the Civil Procedure Code. The relevant part of that section reads as follows:-

p158 LL11-14 (1) every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

p158 LL15-21 (2) If a Plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with leave of the Court obtained before hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

p158 LL22-25 Admittedly the Plaintiff had filed District Court Colombo 9929/L some months before this action, against the Defendant claiming three other lands on the same title. The cases

had come up for trial together, and that case had been laid by until this case is decided.

The argument for the Appellant on this point was based mainly on the decision in the Indian Case of M. Khalil Khan and other vx. Mahbub Ali Mian and others (1949 A.I.R. Privy Council 78). The facts in that case were briefly as follows: One R.B., a Mohammedian lady died leaving two properties referred to as the Shajahanpur property and the Oudh property. There were three sets of persons who claimed to be her heirs, who may be referred to as K, M and A. In mutation proceedings (unknown to our law) the Oudh property was registered in the name of A for the purposes of these proceedings. Such registration does not affect title but apparently enables the person registered to possess the property. M then filed suit No. 5 against K and A in respect of that property. K also filed suit No. 8 in respect of the same property against M and A. Both suits were heard together and K's claim to be the heir was upheld. K then filed another suit against M in respect of Shajahanpur property. It was held by the Privy Council that the second suit was barred by Order 2, Rule 2 of the Indian Code, as this property was not included by K in suit 8 referred to above. Order 2, Rule 2, is identical with section 34 of our Civil Procedure Code except for the word "suit" being used in India for the word "action". This decision undoubtedly supports the contention of the Defendant.

p158 LL26-44

But it has to be observed that the Indian Code is different from ours in certain respects. For instance actions such as suit 5 and suit 8

p159 LL1-24

referred to above could not have been filed under our law, for there would be a misjoinder of Defendants and causes of action, unless it could be shown that the Defendants were acting in concert to keep the plaintiffs out of possession which is not the case in these two suits as the different sets of Defendants were claiming against each other. The terms of order 1, rule 3 of the Indian Code (to which I shall presently refer) are wide enough to maintain such actions. Under section 14 of our Code all persons may be joined as Defendants against whom the right to any relief is alleged to exist in respect of the same cause of action. Our Courts have consistently held that when a Plaintiff claims a declaration of title to a land on one title and alleges that the Defendant, deny his title, are in possession of separate and defined portions of that land - it would be a misjoinder of defendants and causes of action to institute one action, unless it can be shown that the Defendants were acting in concert to deprive the Plaintiff of possession of the entire land (see, for example, Lowe vs. Fernando, 16 N.L.R. 398). Further, in regard to actions for declaration of title, under section 35 of our Code no other cause of action can be joined except claims in respect of mesne profits or arrears of rent, damages for breach of contract under which the property is held, or consequential on the trespass which constitutes the cause of action or claims by a mortgagee to enforce remedies under the mortgage. It is perhaps significant that in the corresponding section of the Indian Code the words "damage consequential on the trespass which constitutes the causes of action" have been omitted.

Order 1 Rule 3 of the Indian Code is in the following terms: "All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise". It was against this background that Their Lordships, in the Indian case had to examine the meaning of the term "cause of action" (in order 2, rule 2) which they pointed out was not defined. Having stated that the cause of action means every fact which will be necessary for the Plaintiff to prove if traversed in order to support his right to the judgment, they said at page 86 "having regard to the conduct of the parties Their Lordships take the view that the course of dealing by the parties in respect of both properties was the same and the denial of the Plaintiff's title to the Oudh property and the possession of the Shajahanpur property by the Defendants obtained as a result of that denial formed part of the same transaction". Our Code defines "cause of action" as "the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury."

p159 LL25-43

The "cause of action" in a suit for declaration of title to land flows from the right of ownership. This right applies to a particular thing. Lee (Roman Dutch Law, 5th Edition) says at page 121. "Dominion or ownership is the relation protected by law in which a man stands to a thing which he may (a) possess (b) use and enjoy (c) alienate. The right to possess implies

p 159 L44-
p 160 L7

the right to vindicate, that is to recover possession from a person who possess without title to possess derived from the owner". "The cause of action" in an action for declaration of title to a piece of land flows from the right of ownership of that particular piece of land. It consists of the denial of the title of the owner to that land, and his being prevented from possessing that land. The two acts together constitutes the wrong for which redress may be sought. In respect of each different land, therefore, there is a separate cause of action.

p160 LL8-23

The rei vindicatio action, as known to our law, must be brought against the person in possession. Maasdrop says (Volume 11, 5th Edition) at page 101, the fact that the property in question was in the possession of the defendant at the time when the cause of action accrued is of the very essence of the action, and it is therefore necessary for the Plaintiff to allege such possession in his declaration and to establish it by evidence ..... "Unlike in India, the mere denial of the basis on which the Plaintiff claims title does not give rise to a cause of action unless the Plaintiff is also kept out of possession, - and, the act of keeping the Plaintiff out of possession is different in the case of different lands. Section 34 enacts that the Plaintiff must make his whole claim in respect of a cause of action, e.g. where a defendant denying his title, keeps the Plaintiff out of possession of a whole land, if the Plaintiff chooses to sue in respect of only part of that land, he cannot sue the same Defendant again for the balance. Or, again, if the Plaintiff fails to claim the damages consequence of the Defendant's trespass, he cannot claim those damages later.

p160 LL24-27

There is, however, no objection to the Plaintiff uniting in one action several

different causes of action against the same defendant in accordance with section 36 of our Code, as has been done in the present case. But the cause of action, as stated in respect of each land is different.

I do not think that the explanation to section 207 supports the inference (as submitted by Counsel for the Defendant) that the cause of action in relation to different lands claimed on one title is the same. That section enacts that a decree passed by Court is final between the parties to it. Such a decree would, of course, be based on a judgment which decides the matters put in issue between the parties at the trial. The explanation goes on to say that every right of property (to take an example which could have been put in issue between the parties to the action, whether put in issue or not also becomes a res judicata on the passing of the decree provided those rights could have been put in issue upon the cause of action for which the action was brought. The whole contention for the plaintiff (which in my opinion is correct) is that his rights to land A (for example) cannot be put in issue upon a cause of action which has accrued to him in respect of land B. p160 LL28-40

This contention must not be confused with the undoubtedly correct proposition, that once an issue (e.g. that of heirship to a particular person) has been decided, then the decision on that issue is res judicata in respect of every different cause of action where the same issues arises between the same parties. p160 LL41-44

It was on this principle that the case of Dingiri Menika vs. Punchi Mahattaya (13 N.L.R. 59) was decided. In that

case the Plaintiff claimed a number of lands by paternal inheritance. In an earlier case she had claimed one land on the same title against the same defendant. It was decided there (on the strength of a decisory oath) that as she had married in deega she was not entitled to inherit from her father. That decree was, therefore res judicata on the question whether the Plaintiff is entitled to inherit from her father or not, and the decision in that case, with respect, was correct. It is true that in the course of that judgment one of the learned Judges remarked that for the purposes of determining whether or not two causes of action are the same one has to look at the media on which the Plaintiff asks for judgment. If by this remark it is meant that there is but a single cause of action against the same disputant in respect of different lands claimed from the same source, I must with great respect disagree.

p161 LL12-16

The other case, Samitchi vs. Peiris (16 N.L.R. 257) relied on by the Appellant was decided on the same principle. The learned Judges were there dealing with the question of res judicata and the effect of section 207 on a consent order. Their minds were not directed to the meaning of "cause of action" in relation to a land."

19. On the same question de Kretser J in a separate judgment set out the following additional reason for rejecting the Appellant's contention on this point :-

p162 LL21-28

In regard to the bar imposed by the provisions of section 34 of the Civil Procedure Code, I am of the view that the words "He shall not afterwards sue in respect of that portion" found in Section 34 (2) refer to the filing of a second action after first one has been concluded. It is only after a first action is concluded that a Plaintiff gets fixed to a position in regard to

the claim in that action, which is irretrievable, for up to that time any error or omission in setting out the whole of the claim on the cause of action can be rectified - e.g. by amending the plaint.

It appears to me that there is a pointer to the correctness of this view in Section 34 itself, for section 34 (2) runs on as follows :- " .... a person entitled to more than one remedy in respect of the same cause may sue for all his remedies but if he omits (except with the leave of Court obtained before the hearing) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted." p162 LL29-34

It will be noted that the bar operates only after the hearing of the first case for until that point of time the Plaintiff can omit with the leave of court any particular remedy he wishes to leave out. p162 LL35-37

20. On the 2nd question arising in this Appeal Sirimanne J rejected the Appellants case for the following reason :-

"One must not lose sight of the fact that when construing a last will the primary duty of the court is to give effect to the testator's intention. On reading the Will it is abundantly clear that the testator desired that these properties should pass to his son Lewis Anthony when the latter reached the age of 35 years, and that after his death they should devolve on his child or children. This fact is not seriously denied, but it was urged for the Defendant that though the intention was clear, yet the testator had failed to achieve what he intended. p161 LL21-27

It was submitted that if the Will only created a Trust with the three executors as trustees, then Lewis Anthony would p161 LL28-36

get the properties absolutely, and that his title was in no way fettered. In other words, that the prohibition against alienation in deed P6 was ineffective. It was argued that the trustees (who derived no benefit from the lands) should not be looked upon as fiduciaries - that such a construction would lead to the recognition of a "fidei commissum purum", which is now looked upon only as a historical curiosity. But I see no necessity for such an approach when construing the terms of the will. Indeed that is not, - and never was - any part of the Plaintiff's case.

p161 LL37-40

Keeping in mind again that the paramount duty of a Court is to give effect to the testator's intention, we have to ask ourselves the question whether that intention has been clearly expressed, and if so, whether there is any legal impediment inthe way of giving effect to it.

p161 L41-
p162 L4

As Counsel for the Plaintiff pointed out, in order to achieve what he desired, the testator created a Trust with the executors as trustees, and his own son Lewis Anthony as the beneficiary. When the deed P6 was executed by the trustees in favour of Lewis Anthony, the Trust was at an end. The Testator had directed however, that the transfer to Lewis Anthony should be subject to certain conditions. There are no limitations placed on the directions which the author of a Trust may give his trustees and the trustees are bound to carry out those directions.

p162 LL5-11

It is true that these directions are such that when given effect to they create what we call a 'fidei commissum' with Lewis Anthony as fiduciary. Is there then, any rule of law which compels us to say "We refuse to give effect to the testator's clear intention?". I can see none; and I can see no objection to a testator in order to give effect to his wishes creating

a trust and directing that the beneficiary, when he becomes the owner, should take the properties subject to a fidei commissum in accordance with his directions.

21. It is respectfully submitted that the judgments of the District Court and of the Supreme Court are right for the reasons stated therein.

10 22. It is respectfully submitted that the Appeal of the Appellant be dismissed with costs both here and below for the following among other

R E A S O N S

1. BECAUSE the judgments of the Courts below are right for the reasons stated therein and should be affirmed.

2. BECAUSE Indian Decisions have no application in relation to the interpretation
20 of section 34 and related sections of the Civil Procedure Code of Ceylon, since there are significant differences between the Civil Procedure Codes of the two countries and the decisions of the Supreme Court of Ceylon are therefore the relevant decisions for this purpose.

3. BECAUSE the Ceylon decisions followed by the Supreme Court in their interpretation of section 34 and related sections are right.

30 4. BECAUSE in any event, the Judgment of the Privy Council in the case of Mohamed Khalil Khan and others v. Mahbub Ali Mial and others (Privy Council Appeal No. 12 of 1945) reported in A.I.R. (1949) P.C. 78 is distinguishable.

5. BECAUSE the Trust created by the Last Will P10 does not preclude the operation of the fidei commissum also created thereby.

E.F.N. GRATIAEN

L. KADIRGAMAR

No. 41 of 1970

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN

JOSEPHINE MARY ALOYSIA MORAIS

Defendant-Appellant

AND

FRANCESCA VICTORIA

Plaintiff-Respondent

CASE FOR THE RESPONDENT

LEE & PEMBERTONS
11 South Square,
Gray's Inn
London W.C.1.