1896.
August 11 and 18.

DIAS *v.* KAITHAN *et al.*

D. C., Colombo, 7,223.

Fidei commissum—*Gift to children not yet born.*

A gift in the following terms :—" The above properties, movable and immovable, I gift to K and his sister P, the children of my sister, chiefly to be possessed by them from this date, and that in future neither I nor my heirs could at any time revoke or alter this deed, nor do we can (*sic*) dispute it ; but the children of my said sister chiefly can possess, and their children and grandchildren in generations,"—*held*, not to create a *fidei commissum*, but that the gift was one to a class composed of the named donees and their uterine brothers and sisters then in being, and those who might come into being, each to have his or her share, free to dispose of the moment that it vested, the share vesting on the child on its coming into existence.

Quœre, however, whether the law allows a gift to children *en ventre* or not *en ventre* and unborn.

THE facts of the case sufficiently appear in the judgment.

Wendt and *Pereira*, for appellant.

npayo, for respondents.

18th August, 1896. WITHERS, J.—

It seems to me difficult to construe this deed of gift without knowing the circumstances existing at the date of the donation, and the events which have happened since. It is a gift *in præsenti* for good cause of certain movable and immovable properties (described in the documents) " to one J. M. Don Kaitan Appuhami and his " sister J. M. Dona Prolentinahamine, the children of my sister " before referred to, " chiefly to be possessed by them and their uterine " brothers and sisters by making a correct division of shares, or to " do anything they please with them ; and I, the said donor, have " empowered all the children of my said sister to be possessed by " them from this date, and that in future neither I nor my heirs " could at any time revoke or alter this deed, nor do we can (*sic*) " dispute it, but the children of my said sister chiefly can possess, " and their children and grandchildren in generations." The ordinary meaning of uterine is born of the same mother but by a different father, but this may be an incorrect translation, and uterine may mean here born of the same womb by the father of the two named children and no other father. Were there any children in existence begotten by a former father of the named donees' mother ? Was any child *en ventre* of the parents of the donees at the time of the deed of gift ? If " uterine " here means children of the same womb by the same father, was the next child conceived after the date of

1896. *August 11 and 18.*

WITHERS, J.

the gift? What children has the mother borne since, and who have had possession of the movables and immovables?

Is this a gift to an existing class, *i.e.*, to two living donees and a child *en ventre*, or is it a gift to the named donees and any brother or sister who may be conceived and born after the date of the gift, and then as each member of the class comes into being, is he immediately vested under this instrument with his share of the donated properties?

Again, can there be a gift to a child *en ventre* or not *en ventre*? Or again, is this a gift by way of *fidei commissum* to the named donees and other children who may be born during the marriage of the named donees' parents, or who may be born of the same mother by a subsequent marriage or marriages? As regards the question of *fidei commissum*, the District Judge has held that it is not necessary that there should be restrictive or prohibitive words against alienation in order to constitute a *fidei commissum*.

He compares the terms of this instrument with the terms of an instrument declared by this Court to constitute a *fidei commissum* —the words there were, "shall and may not sell or alienate, but "be possessed by her children and their descendants"—and says that the language of the present instrument is much more strong and clear than the language just recited.

I take the Roman-Dutch Law to be that laid down by Acting Chief Justice Fleming in the case of *Bastian de Silva v. K. U. Sadris*, reported *7 S. C. C., p. 135*:—

"An inheritance may no doubt be entailed either by express "words or by an apparent intention on the part of the donor or the "testator to entail it, but when express words are not made use of "and the least doubt exists as to the intention, judgment is given "(*Van Leeuwen, bk. III., chapter 8, section 4*) in favour of the free "inheritance and against the entail, because all hereditary encum-"brances are odious, and can suffer no extension."

For my part I confess that I do not see in the language of this instrument a desire that the properties should be tied up for three or more generations.

In the absence of any restraint or alienation, I read the concluding words of the above extract from the deed of gift to signify the entire abandonment of the properties of the donor by him and his, and an absolute surrender to the donees and theirs, words of full *dominium*.

The subject of this gift being household furniture, as well as lands, one would require a clearer declaration of trust for generations than in the case of lands alone which can be tied up for generations.

1896.
August 11 and 18.

WITHERS, J.

I take the gift to be an absolute gift intended to have immediate effect to a class composed of the named donees and their uterine brothers and sisters then in being and those who might come into being, each to have his or her share free to dispose of the moment that it vested, the share vesting on the child on its coming into existence.

That, I take it, was the donor's intention; whether that was effected depends upon the validity of such a gift according to our law, a point which was not very fully argued.

With this expression of our opinion as to the nature of the gift and the intention of the giver, the case will go back to the District Judge to hear and determine the case on its merits, including the question in whose favour does the deed of gift, as I have described it, operate.

This will involve an inquiry into the facts existing at the date of the instrument and subsequent facts; such as in the after birth of "uterine" brothers and sisters and the actual enjoyment of the properties, and may be perhaps a reconsidered translation of the document.

LAWRIE, J.—I agree.