

1930

*Present* : Dalton S.P.J. and Lyall Grant J.

GURUSINGHA HAMINE *v.* PATH-  
UMMA NATCHIYA *et al.*

114—*D. C. (Inty.) Galle, 27,800.*

*Fidei commissum—Gift to children and their generations — Dowry — Indication of persons to be benefited.*

Where by a deed of gift property was donated to the three sons of the donors in equal shares, and it was further provided as follows: "That the said three donees at no time shall sell, mortgage, or lease out for a period of over ten years the said interests hereby gifted, that their children and grandchildren's generations shall possess, and it is hereby authorized that the said interests could be gifted as dowry portions to their children",—

*Held*, that the deed did not create a valid *fidei commissum*.

**A** PPEAL from a judgment of the District Judge of Galle.

*L. A. Rajapakse*, for second, third, and fourth defendants, appellants.

*N. E. Weerasooriya*, for plaintiff, respondent.

September 9, 1930. DALTON S.P.J.—

In this partition action the plaintiff sought to partition the land between himself and the first defendant. The appellants intervened and claimed the

whole of the land on a deed of gift. The learned Judge dismissed their intervention, from which order they appeal. In my opinion the appeal must be dismissed.

It is conceded that if the deed of gift (exhibit 4 D1 of 1871) does not create a *fidei commissum*, the appellants have no case. The learned Judge found that the deed did create a valid *fidei commissum*, but dismissed the intervention on the grounds. In my opinion his conclusion that the deed created a *fidei commissum* was wrong.

The deed purports to donate the property in equal shares to the three sons of the donors. It appears in the first clause of the deed to be an absolute gift. The deed then goes on to say that the donees shall at no time sell, mortgage, or lease the property for a longer period than ten years. This prohibition against alienation however is qualified by the provision that they may give it away at any time as dowry to any of their children. There is lastly a brief, bald, statement that "their children and grandchildren's generations shall possess".

In my opinion there is here no clear designation of the persons in whose favour the prohibition was made. It cannot be stated with any certainty that the donees have pointed out the persons to be ultimately benefited. That there was some confusion on this point is clear from appellant's case, for in respect of one donee the descending line has come to an end and the claim is then made through collaterals.

I do not think it can be said that it is clear from the deed what the donors intended to bring about. I feel quite unable to say that any clear intention to create a *fidei commissum* is disclosed. If it be an absolute gift to the donees and their heirs, then the former take an unfettered title. The qualified prohibition against alienation would not of itself prevent that. That the children and grandchildren of the donees are the persons designated as the persons to

whom the property is to go after the death of the donees is inconsistent with part of the appellants' case. In any case it is not stated when these persons are to possess. It might possibly be after a gift as dowry has been made in their favour by one or more of the donees. In the event of any doubt the presumption is against a *fidei commissum*. There is in my opinion very considerable doubt in this case, and therefore in my opinion the trial Judge's finding on this point must be reversed. It is not necessary then to go into the other questions raised on the appeal.

The appeal must be dismissed with costs.

LYALL GRANT J.—I agree.

*Appeal dismissed.*

