1954 *Present :* Sansoni, J., and Fernando, A.J.

M. KRISHNAPILLAI, Appellant, *and* A. S. MANICAM, Respondent

S. C. 349—D. C. Batticaloa, 553/L

Fideicommissum—Gift to bride and bridegroom and the children of the bride's womb for ever—Construction—Prohibition against alienation out of the family.

When A was about to marry B, A's father donated certain lands to them "by way of dowry" and the deed further provided that they shall "take charge of their properties and their rights and they and their children by her (A's) womb shall enjoy the possession of these properties according to their wish for ever."

Held, that the deed did not create a fideicommissum in favour of the children of A and B. There was no implied prohibition against alienation out of the family.

APPEAL from a judgment of the District Court, Batticaloa.

S. Nadesan, Q.C., with *S. Sharvananda* and *C. Manohara*, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *T. Velupillai*, for the plaintiff respondent.

Cur. adv. vult.

September 16, 1954. SANSONI, J.—

The only question for decision on this appeal is whether the dowry deed of gift P1 dated 14th December, 1915, created a fideicommissum in favour of the plaintiff-respondent. He is the only child of his mother Thangapillai and his father Arulapapillai. When his parents were about to get married Thangapillai's father donated certain lands to them "by way of dowry" and the deed further provided that they shall "take charge of their properties and their rights and they and their children by her (Thangapillai's) womb shall enjoy the possession of these properties according to their wish for ever". Arulapapillai died after the marriage; his widow then married the defendant-appellant; thereafter she died in 1948. The plaintiff-respondent brought this action claiming the entirety of the lands donated in the deed P1 on the basis that the deed created a fideicommissum in his favour.

The learned District Judge decided that the deed created a fideicommissum because, in his opinion, " the intention of the donor was that these properties should never go out of the family and hence there was an implied prohibition against alienation out of the family and the fidei commissarii had been clearly designated as the donees' children and their descendants from generation to generation ". His attention does not appear to have been drawn to the case of *Kurunathappillai v. Sinnapillai* [1], which was also a case heard in the District Court of Batticaloa. In that case a deed of gift containing the following clause was considered : " The garden, house, well and plantations of this value shall for ever from this day be possessed and enjoyed by them and the children of the womb of the said Sinnatankachi from generation to generation as dowry ". Middleton, J. and Grenier, J. held that these words did not create a fideicommissum. Middleton, J. said in the course of his judgment " In a case decided by Mr. Justice Withers on the 26th September, 1898, (171 C. R. Batticaloa 1150), almost identically the same words were employed and that learned judge, who must have had considerable experience in construing documents of this description, said that he could find there no words of prohibition or precatory words indicating that those to whom the gift first came should hand it over to those who came after. In the present case the same observations, it seems to me, apply ". He also quoted with approval the words of Wendt, J. in *Ibanu Agen v. Abeyasekara* [2] : " Where the intention to substitute another for the first taker is expressed or is to be gathered by necessary implication from the language of the will, a fideicommissum is constituted ". Grenier, J. said : " It seems clear to my mind on a careful consideration of the words in this deed that there was absolutely no intention on the part of the grantor to impose any kind of burden on the property which he had dowried to the plaintiff. Indeed it seems to me that the fact of the property in question being dowried property rendered it highly improbable that the grantor would have imposed a fideicommissum on it ". With respect, I think that these reasons are quite sufficient to justify a finding that the deed in question did not create a fideicommissum, in view of the similarity of the wording of the two deeds.

Mr. Chelvanayakam argued that there was a clear indication of a gift over to the children of the donees but I am unable to agree with him. While mention is made of the children, they are not mentioned as beneficiaries whose rights are to accrue in succession to the immediate donees, for I cannot find a clear indication of a fideicommissary obligation having been imposed by the donor upon the donees for their benefit; nor is it reasonably clear when their rights, if any, are to vest in them—see *Pabilina v. Karunaratne et al.* [3]. Both these requirements are essential to the existence of a valid fideicommissum. The children might well have been referred to merely to indicate the motive for the gift, seeing that the contemplated marriage was the consideration for the gift.

I do not think it is necessary to refer in detail to the authorities cited by Mr. Chelvanayakam. It is sufficient to say that in my opinion the

[1] *(1907) 3 Balasingham 194.* [2] *(1903) 6 N. L. R. 344.*
[3] *(1918) 50 N. L. R. 169.*

wording of the documents construed in the cases of *Sitti Kadija v. de Saram* [1] and *Noordeen v. Badurdeen* [2] is not comparable with the wording of the deed in this case. As so often happens in these cases the difficulty lies not in ascertaining the principles, but in applying the principles to the particular document under consideration.

For these reasons I would set aside the judgment of the learned District Judge and hold that the deed P1 did not create a fideicommissum.

The plaintiff-respondent is therefore declared entitled only to an undivided one fourth share of the lands in dispute. He is not entitled to ejectment of the defendant-respondent or to damages. He must pay the defendant-respondent the costs of this action in both Courts.

FERNANDO, A.J.—I agree.

Appeal allowed.