1920.

Present: Ennis J. and Loos A.J.

PERIS *v.* SOYSA, *et al.*

103—D. C. Kalutara, 8,233.

Fidei commissum—*Sale to four persons with direction that land shall not be sold to outsiders.*

By a deed of conveyance executed in consideration of a sum of money S. conveyed a land to four children of his sister, their heirs, or legal representatives, with a direction that if it became necessary to sell or mortgage, it should be done among the four grantees, " and shall not be sold or mortgaged to any outsider. "

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

THIS was an action brought by the plaintiff for a partition of a defined portion of land called Godaporagahawatta, situated at Kaludewala, within the jurisdiction of this Court. The plaintiff claimed title to an undivided 62/396 shares of the land, alleging that the same originally belonged to one Hennedige Selestina Soysa upon deed of conveyance No. 18,184 dated January 23, 1886. Selestina Soysa sold the said 62/396 shares to one Mudalidewage Charles Peiris, her intended husband, upon deed No. 13,845 dated June 25, 1895, who in turn sold the said 62/396 shares to this plaintiff upon deed No. 4,912 dated July 27, 1917. The defendants 1, 2, 3, 4, 5, 6, 7, 8, 10, and 11 filed answer denying the plaintiff's right to the shares claimed by him, alleging that the deed No. 18,184 dated January 23, 1886, contained a prohibition against alienation, except amongst the four persons mentioned in the deed.

The District Judge made the following order :—

Siman Silva, by his deed 18,184 of 1886, gifted certain property to four of his sister's children, viz., Hendrick $\frac{1}{6}$, Salman $\frac{1}{6}$, Francina $\frac{2}{6}$, and Selestina. $\frac{2}{6}$ Selestina conveyed her $\frac{2}{6}$ by deed No. 13,845 of 1895 to Charles Peiris, who by deed No. 4,912 of 1917 conveyed to plaintiff.

The objection is raised by defendants that the deed of gift of 1886 created a valid *fidei commissum*, and that, therefore, plaintiff's title is bad.

The prohibition in the deed is that the donees shall not sell or mortgage the property to any other but themselves. In *15 N. L. R. 323* it was held that a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of the members of the family. The donees got a right of ownership, subject to the right of presumption on the part of the other shareholders, and plaintiff's title is therefore bad. The action is dismissed, with costs.

R. L. Pereira, for plaintiff, appellant.

March 5, 1920. ENNIS J.—

This was an action for partition, in which the plaintiff claimed 62/396 shares. His claim was disallowed. It appears that one Simon Silva in 1886 executed the document No. 18,184 in favour of Hendrick Soysa, Salmon Soysa, Francina Soysa, and Selestina Soysa, conveying one-half of the land, excluding one-thirty-third. Selestina was to take one-third of this, and the plaintiff's claim is for this one-third of a half, minus the one-thirty-third, which share Selestina sold to Charles Peiris in 1895, who sold to the plaintiff. It further appears that Selestina, after the execution of her deed in favour of Charles Peiris, married Charles Peiris. The document No. 18,184 is headed a deed of conveyance. Then there is a note that the consideration was Rs. 200. It is to be observed that the original document has not been filed in the case, but a certified copy and translation has been produced to us on appeal. The document then proceeded to grant the lands to the four persons named, who are said to be the children of Simon Silva's sister. Later on in the deed they are referred to as purchasers, and the grant is made to them, their heirs, or legal representatives absolutely, with a direction that if it became necessary to sell or mortgage, it should be done among the four grantees, " and shall not be sold or mortgaged to any outsider." The learned Judge has held that this direction has created a *fidei commissum*, and he relied on the case of *Robert v. Abeywardene*. [1] I confess that I find some difficulty in that case, but the document in the present case is not on all fours with the document in that case. In that case there was an express condition that nobody outside a certain circle

[1] *(1912) 15 N. L. R. 323.*

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could obtain any right. The present document relates only to sale or mortgage to an outsider, and does not refer to any other right. The document does not specify what is to happen in the event of a sale or mortgage to an outsider. The document, it is to be observed, is not a sale, but a conveyance, and whether by way of gift or on sale it is impossible to say. It must, therefore, be read strictly, and the Roman-Dutch rule of law in connection with such claims is that there is no *fidei commissum*, unless the persons to be benefited are clearly designated. Juta, in his *Law of Wills in South Africa* (*p. 106*), says that if a testator prohibits his heirs from alienating property left, and says nothing more, such a prohibition is termed *nudum*, and is of no force or effect, and the case of *In re Lourenz* [1] supports the principle laid down by Juta. In our own reports there is the case of *Nugara v. Gonsal*, [2] where it was held that the words in a will that the children should not be at liberty to mortgage, sell, or encumber the property during their lifetime did not create a *fidei commissum*. I find myself unable to agree with the learned Judge that the document in question in this case creates a *fidei commissum*. The persons to be benefited are not clearly designated.

I would accordingly set aside the decree, and send the case back for further proceedings. The first to the eighth and the tenth and eleventh defendants should pay the costs of the appeal.

LOOS A.J.—I agree

Set aside.

[1] *S. A. Law Reports, Cape Div., L. 1912, p. 643.*

[2] *(1912) 14 N. L. R. 301.*