1896.
October 28.

HORMUSJEE *v.* CASSIM.

D. C., Colombo, 6,600.

Fidei commissum—*Prohibition against alienation not followed by designation of party to be benefited—Ordinance No. 11 of 1876, s. 3.*

By a deed dated the 18th November, 1887, the owner of certain immovable property gave it "as a gift absolute and irrevocable to "his son M, his heirs, executors, administrators, and assigns," subject to the condition that M should "not be at liberty to sell, "mortgage, or otherwise alienate the property gifted, but possess "the same during his life"—

Held, that the deed did not create a *fidei commissum* for the benefit of the family of M.

Held further, that in consequence of section 3 of Ordinance No. 11 of 1876 the words of restriction mentioned above did not even impose a condition binding upon the donee.

THE facts of the case appear in the judgment of BONSER, C.J.

Dornhorst, for appellant.

Layard, A.-G., and *Wendt*, for respondent.

28th October, 1896. BONSER, C.J.—

The only question in this case is as to the construction of a deed of gift dated the 18th day of November, 1887.

By that deed the owner of certain immovable property in Colombo gave it as a gift absolute and irrevocable to his son Mohamado Cassim Markar, his heirs, executors, administrators, and assigns, subject to two conditions, the first of which was that the donor reserved to himself the right of possessing the premises during his life, and after his death the same were to devolve on his said son; and then came the words which have been much discussed in argument, "and he shall not be at liberty to sell, mort-"gage, or otherwise alienate the same, but possess during his life," and the deed ended with a declaration by the donee, that "he thank-"fully accepted the foregoing gift subject to the above conditions." It was argued that a *fidei commissum* was created for the benefit of the family of the donee. But so far as I understand the authorities a prohibition against alienation, without declaring in whose favour such prohibition is made, is of no obligatory force

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(*Vanderlinden, p. 63*). But a nice question might have arisen whether these words of restriction, though not creating a *fidei commissum*, did not impose a condition binding upon the donee, were it not for the express words of Ordinance No. 11 of 1876. Section 3 of that Ordinance provides that "where the will, deed, "or instrument in which any prohibition, restriction, or condition "against alienation is contained does not name, describe, or "designate the person or persons in whose favour, or for whose "benefit such prohibition, restriction, or condition is provided, "such prohibition, restriction, or condition shall be absolutely "void."

No words can be plainer than these, and the result is that the condition against alienation is null and void, and must be struck out of the deed.

It was attempted to be argued by Mr. Dornhorst that the words of the gift—"heirs, executors, administrators, and assigns"—were words of description or designation of the person in whose favour the condition was provided. But that argument cannot be sustained. The word "assigns" means any person in the world to whom the donee may be pleased to assign the property, and it cannot be contended that this condition was intended to benefit the whole world.

That being so, I am of opinion that the deed of gift to Cassim Markar conveyed an absolute interest in this property, and therefore the plaintiff who claims under him has a good title.

The appeal will be dismissed with costs.

LAWRIE, J.—

I retain the opinion I expressed in D. C., Galle, 47,862 (*7 S. C. C. 135*), but this is a stronger case, because here the deed of gift was executed since the passing of the Ordinance No. 11 of 1876. The deed in the Galle case was an old deed.