1905.
September 25.

[IN REVIEW.]

AYSA UMMA *v.* NOORDEEN *et al.*

D. C., Colombo, 13,476.

Fidei commissum—"*Gift absolute and irrevocable*"—"*Heirs, executors, administrators, and assigns*"—*Persons to be benefited.*

A M L executed a deed of gift dated 4th January, 1873, containing the following clause: "I, A M L, for and in consideration of the natural love and affection which I have unto my grandsons C L M and A L ..... have given, granted, assigned, transferred, and set over unto them, their heirs, executors, administrators, and assigns, as a gift absolute and irrevocable ..... to have and to hold the said premises with all and singular the appurtenances thereunto belonging, and valued at Rs. 4,000, unto the said C L M and A L, their heirs, executors, administrators, and assigns, subject to the following conditions, viz., that the said C L M and A L, or their heirs, executors, administrators, and assigns, and their children and grandchildren, and the children and grandchildren of the heirs and assigns, shall not sell, mortgage, or encumber the said premises at any time, but hold and possess the same; and the rents, produce, and income thereof shall not be held liable to be attached, seized, or sold for any of their debts; but they shall be able to give and grant the said premises or any part thereof in dowry for their female children, also subject to the aforesaid conditions and restrictions."

Held (confirming the judgment of the Supreme Court in appeal), that the above clause did not create a valid *fidei commissum.*

Hormusjee v. Cassim (2 *N. L. R.* 190) followed.

D. C., Colombo, 59,578 (*Grenier* (1873), 28), referred to.

THE judgment of the Supreme Court in appeal reported in 6 *N. L. R.* 173 was heard in review preparatory to appeal to His Majesty in Council.

Dornhorst, K.C., and *Sampayo, K.C., for the* appellants.

Bawa, for the respondents.

Cur. adv. vult.

25th September, 1905. WENDT, J.— 1905. September 25.

We have to consider in review, preparatory to appeal to the Privy Council, the judgment of this Court, dated 22nd December, 1902, dismissing the plaintiff's appeal against the judgment of the District Court, dated 26th November, 1900. The sole question submitted to this Court, both upon the original appeal and at the present hearing in review, is whether the deed No. 7,161, dated the 4th January, 1873, whereby one Ahammadu Lebbe Ossen Meera Lebbe conveyed certain landed property in gift to his two grand-nephews, Casy Lebbe Marikar and Ahamadu Lebbe, created a *fidei commissum*, the appellants admitting that, if that question be decided in the negative, they must fail. The donees are both dead, and the first plaintiff (wife of the second plaintiff) is the sole surviving child of Casy Lebbe Marikar. As such she claims to be entitled to an undivided half of the property subject to what is called the " condition " against alienation. The defendants, the executors of the last will of Ahammado Lebbe, were said to be in possession of the entirety of the premises to the exclusion of plaintiffs. The defendants pleaded that upon the true construction of the deed of gift it conveyed an absolute title to the donees, that Casy Lebbe Marikar's moiety devolved *ab intestato* on his widow, two daughters, and brother, and that first plaintiff's present interest was only 28-96ths. One Neina Marikar (defendants averred) was in occupation of the property in question since November, 1894, when defendants had closed their testator's estate, and he was made an added defendant in the action. The District Judge held that there was no *fidei commissum*, that the deed took effect as an unfettered transfer of the *dominium* to the donees, and that (as appears to have been agreed upon in the event of the Court so finding) first plaintiff was entitled to 28-96ths only of the property.

The deed in question is in the English language and follows, in outline, an English form of conveyance. The material parts are set out in the judgments of Moncreiff and Middleton, JJ. The words out of which the contention between the parties arises are to be found in the *habendum*. Up to that point there is only a " gift absolute and irrevocable " to the donees, " their heirs, executors, administrators, and assigns." The mention of assigns expressly contemplates what would have been implied in the absolute gift, that the donees could transfer the property by assignment to any one they please. Then comes the *habendum* to the donees, " their heirs, executors, administrators, and assigns " subject to the following condition, viz., " that the said Cader Cando Casy Lebbe Marikar and Cader Cando Ahamado Lebbe or their heirs, executors, administrators,

1905. *September 25.* WENDT, J.

and assigns, and the children and grandchildren of their heirs and assigns shall not sell, mortgage, or encumber the said premises at any time, but hold and possess the same; and the rents, produce, and income thereof shall not be held liable to be attached, seized, or sold for any of their debts, but they shall be able to give and grant the said premises or any part thereof in dowry for their female children, also subject to the aforesaid conditions and restrictions." Having, in the first instance, contemplated and sanctioned the assignment of the property by the donees, this condition forbids sale, mortgage, or encumbrance, but in the very prohibition again recognizes the validity of any assignment imposing the same restraint on the assigns.

If the donees were merely fiduciaries their "estate," if such it could be called, would terminate with their lives. What interest then could their executors and administrators take in the land? Yet these are also comprehended in the prohibition. Then, who are the persons or class whom the *fidei commissum* was intended to benefit, and whose interests the prohibition against alienation was designed to protect? Were they children and grandchildren *ad infinitum*, or were they "heirs?" The difference is important because under the Mohammedan Law of Succession, which applies to these parties, the heirs of a descendant might include not only his children, but also his widow, his parents, and his brothers and sisters. Finally, the restriction on dealing with the property applies as well to assigns (who may be utter strangers to the donor and to the immediate objects of his bounty), and could it be argued that the intention was to secure the succession to the "heirs" or "children and grandchildren" of these strangers? The argument that the term "assigns" is referable to the power of setting the property in dowry is not admissible, because that power is reserved not only to the immediate donees, but to their assigns as well, who are comprehended in the pronoun "they."

So far as our own decisions go, no authority in favour of appellant's construction of the deed has been produced, while the case of *Hormusjee v. Cassim* (2 *N. L. R.* 190) is as nearly as possible a direct authority the other way. In D. C., Colombo, 59,578, (*Grenier* (1873), 28), the parties appear to have been agreed that, if the Roman-Dutch Law applied, there was a good *fidei commissum*, and it was, therefore, unnecessary for the Court to consider the question.

For these reasons, I think no valid *fidei commissum* was created by the deed in question, and therefore I would confirm the judgment of this Court under review, with costs.

1905.
September 25.

GRENIER, J.—

This case has been brought before us in review preparatory to an appeal to His Majesty in Council. The judgment of this Court which was pronounced by Moncreiff and Middleton, JJ., clearly sets out the grounds on which the appeal was originally dismissed. The simple question in the case is whether deed No. 7,161, dated the 15th January, 1863, created a valid *fidei commissum*. The deed is very inartistically worded, and I cannot gather from it any intention on the part of the grantor to impress a *fidei commissum* on the property in question. Whatever may have been the instructions that the grantor gave the notary who drew up and attested the deed, it is plain, to my mind, that the words employed by the notary do not indicate any intention on the part of the grantor to create a valid *fidei commissum*.

Mr. Justice Middleton has rightly pointed out that the case of *Hormusjee v. Cassim* (2 *N. L. R.* 190) seems to be almost on all fours with the present case. Chief Justice Bonser, one of the Judges before whom that case was argued, pointed out that the words " heirs, executors, and assigns " were not mere words of description or designation, and that the words " assigns " meant any person in the world to whom the grantee may be pleased to assign the property. These words occur in the present deed, and I am therefore of opinion that the grantor has failed to impress any valid *fidei commissum* on the property in question.

Mr. Dornhorst referred us to a case reported in *Grenier* (1873), *part* 3, *p.* 28, in which the following clause occurred in a deed *inter vivos*, whereby the grantor transferred certain landed property to his brother " as a gift absolute and irrevocable unto the said Idroos Lebbe, his heirs, executors, and administrators." The *habendum* clause ran as follows:—" To have and hold unto the said Idroos Lebbe, his heirs, executors, administrators, and assigns for ever, subject, however, to the conditions and restrictions following: that is to say, that the said Idroos Lebbe shall not sell, mortgage, or otherwise alienate the said premises hereby conveyed to him, or any portion thereof, but that the same shall be held and possessed by him during his natural life, and after his death the same shall devolve on his heirs in perpetuity, who shall likewise hold the same under the like restrictions as aforesaid."

It was argued by Mr. Dornhorst that the words I have just quoted differ very little in substance from the words of the deed in question in this case, and that no point was made either in the Court below or in appeal that the deed of gift did not create a valid *fidei commissum*, but that it appears to have been assumed that it did.

1905. *September 25.* GRENIER, J.

I hardly think that in these circumstances we can consider ourselves bound by the judgment of this Court which proceeded on other grounds to the extent of holding that the deed now in question did create a valid *fidei commissum*.

For the reasons I have given, I would confirm the judgment of this Court.

LAYARD,, C.J.—I see no reason to interfere with the judgment of this Court, which has been brought before us in review.