1903.
February 13 and 24.

MUSTAPHA LEBBE *v.* MARTINUS.

D. C., Colombo, No. 14,218.

Guardian and ward—Right of guardian to sell property settled on the ward—Necessity of order of Court—Power conferred by parents of ward on guardian to sell at his discretion.

A guardian can sell the immovable property of his ward only (1) when a sale is necessary for the payment of debts, (2) for the maintenance of the ward, and (3) when a sale is clearly for the benefit of the ward; but such sale is not valid if not sanctioned by the Court.

A, by deed of gift, transferred certain immovable property to the children of Mr. and Mrs. B, and empowered Mrs. B to sell it, if necessary for the benefit of the donees, and invest the proceeds in the purchase of another property, or deposit the same in a bank in favour of the donees. Mrs. B sold the property to C and spent the money.

Held, that as the sale took place without the previous sanction of the Court, whose duty was to see that the price was fair and the sale manifestly for the advantage of the ward, the sale to C was void, notwithstanding the power given by the donor to Mrs. B to sell the property at her discretion.

THE plaintiff prayed that an undivided half of a certain land be declared the property of one Sella Natchia, and as such liable to be sold in execution of the decree in plaintiff's favour obtained in suit No. 13,861 of the District Court of Colombo.

It appeared that the property in claim belonged to one Paulu Perera by purchase at a Fiscal's sale in 1886, and that he conveyed it to one Bernard, who gifted it to the children of one Martinus and his wife Josephine. The defendants were their children, two of them being minors at the time, and the other unborn.

This deed of gift contained the following provision:—"I, the said J. Don Alexander Bernard, do, by these presents, authorize and empower the said Josephine Sara Louisa Martinus with full power to sell and dispose of the said property hereby given and granted, if she shall see it necessary and expedient for the advantage and benefit of the said donees: Provided, however and it is hereby expressly declared that she shall, with the proceeds of such sale, purchase another property in its stead as soon as possible in favour of the said donees, or deposit the same in any of the banks in favour of the donees."

Acting under this power Josephine Martinus, by her deed dated 8th February, 1897, sold and transferred the property to Sella Natchia, the execution-debtor. With the proceeds Josephine did not buy another property for the donees, as required by the deed

but professed to carry out the other alternative, by depositing each child's share in the Ceylon Savings Bank under his or her name. The depositor was registered as Mrs. Josephine L. M. Martinus.

It appeared from the depositor's books that, within seven months of the deposits, they were withdrawn from time to time, presumably by the depositor, the mother, and only Re. 1, Rs. 5, and Re. 1 remained to the credit of each of the books. In 1898 Josephine died.

The question before the Court was whether, under the circumstances, Sella Natchia got a valid title to the three-sixth shares belonging to the defendants under the conveyance No. 2,733 in her favour.

The Additional District Judge (Mr. Felix Dias) held as follows:—

"It is quite manifest that the object of the donor was to benefit the children alone, and not to put any power in the hands of their mother to benefit herself by appropriating any part of the proceeds of the sale. It was the duty of the purchaser of property burdened with such a trust as this one was, to see the donor's directions fully carried out, leaving no chance for their being defeated. I note that in this matter the purchaser's lawyer was fully alive to the responsibility of the purchaser to see the purchase money properly disposed of, but I fear that he has set to work in the wrong direction by depositing (or allowing the mother to deposit) the shares of these defendants in the Savings Bank in a manner which entitled the mother to withdraw the money at her pleasure. This was quite contrary to the spirit of the intention of the donor as disclosed in paragraph 6. The money should have been deposited in a bank 'in favour of the donees;' that is to say, in their own name, so that no one but themselves, or their curator appointed by a competent Court, would have been able to touch it. The present deposits by the mother 'on behalf of' the donees cannot be said to have been deposits 'in favour of the donees' as directed by the donor.

"Under the circumstances I hold that under deed No. 2,733 no title passed to Sella Natchia in respect of the half share claimed by the defendants, and dismiss the plaintiff's action with costs."

The plaintiff appealed.

The case was argued on the 13th February, 1903, before Layard, C.J., and Moncreiff, J.

Bawa, for appellant. The deed of gift required the mother Josephine Martinus, if she thought fit, either to buy another property or to deposit the price in favour of the minors. She

1903. *February 13 and 24.*

complied with this requisition by depositing the money in the name of each child in the Ceylon Savings Bank. There is no evidence that she drew out the money. If that were really so, the remedy of the minors would be against the Bank. The vendee of Josephine Martinus should not suffer. She sold the property in pursuance of an express power given in the deed of gift. As the discretion to sell was given to her it was not necessary to obtain the sanction of the Court for such a purpose. The sale to Sella Natchia is therefore valid.

H. Jayawardene, for respondent. The Court takes upon itself the protection of all minors, and does not allow alienation of their property without its sanction. *Ex parte Corbet* (*3 S. C. C. 46*). It is true there was an express power given to sell, but the guardian cannot ignore the Court, which is the upper guardian of the minors. Alienation by the guardian must be under the supervision of the Court. Grotius' *Opinions, p. 466; 2 Thomson's Institute, 55; Perera v. Perera, 3 Browne, 150;* Voet, *Buchanan's Translation p. 42.*

Bawa, in reply, cited *Theobald, p. 365.*

24th February, 1903. LAYARD, C.J.—

The admitted facts of this case material to the decision of this appeal are as follows:—One Bernard gifted the premises, the subject of this suit, to the first and second defendants and three others, all children of one Martinus and his wife Louisa, and to any other children that might be born to Martinus and his wife thereafter. The third defendant is a child of theirs, born subsequent to the execution of the deed of gift. The donor of the premises appointed the mother Louisa guardian of her children, and entrusted to her the management of the property gifted until the children should attain the age of majority, and empowered her "to sell and dispose of the said property hereby given and granted, if she shall see it necessary and expedient for the advantage and benefit of the said donees: Provided however, and it is hereby expressly declared, that she shall with the proceeds of such sale purchase another property in its stead as soon as possible in favour of the said donees, or deposit the same in any of the banks in favour of the donees."

The mother Louisa, purporting to act under the power above recited, sold the property to one Sella Natchia. With respect to the shares of the purchase money due to the three defendants, Louisa opened three separate accounts in her own name on behalf of each of the three defendants in the Ceylon Savings Bank, and

deposited their respective shares to the credit of the accounts so opened. Within seven months of such deposit the sums so deposited were withdrawn, presumably by the mother, as the defendants are still minors, and there remains to the credit of one of the accounts so opened Re. 1 only, and to the remaining account Rs. 5 only.

The plaintiff sued Sella Natchia and obtained a money decree in his favour, and caused the Fiscal to seize the premises referred to above under the writ issued in pursuance of that decree.

The three defendants thereupon claimed an undivided half of the premises, and their claim was upheld.

The plaintiff brought the present action to have it declared that the whole of the premises seized were liable to be sold as the property of Sella Natchia under plaintiff's writ.

The District Judge has held that the moneys should have been deposited in the Savings Bank in favour of the defendants: " that is to say, in their own names, so that no one but themselves or their curator appointed by a competent Court would have been able to touch " the moneys. The deposits by the mother in her own name " on behalf of " each of the defendants cannot, he finds, be treated as deposits " in favour of the donees ", and he dismisses the plaintiff's action with costs.

Counsel for respondent supports the judgment of the District Judge for another reason than that given by the Judge, on the ground that the guardian of a minor cannot alienate the immovable property of the ward without the express sanction of the Court, and cites in support of his contention the judgment of Cayley, C.J., in *re Hider, ex parte Corbet (3 S. C. C. 46)* and of Middleton, J., in *Perera v. Perera (3 Browne's Report, 150)*. It is a clear principal of the Roman-Dutch Law that a minor's immovable property cannot be alienated without the decree of a Court of competent jurisdiction. (Grotius' *Introduction, lib. 1, chap. 8, section 6; V. D. Keessel, Nos. 130 and 131;* Vanderlinden's *Institute, 106;* Henry's *Translation; Groenewegen De Legg Ab. Code 1, tit. 71, p. 631;* Van Leeuwen's *Commentaries, English Translation, p. 96; Voet., lib. 27, tit. 9, section 6.*)

Cayley, C.J., in *3 S. C. C. 46,* held that the jurisdiction of the old Weeskamer referred to in *Grotius* is for many purposes vested in the District Court, and that that Court holds in matters relating to the sale of a ward's immovable property the same position as the " Ordinary Judge " mentioned by Van Leeuwen and Grotius.

The appellant's counsel contends that the mere power given by the deed to the guardian to sell, if she sees it necessary and expedient for the advantage and benefit of the minors, dispenses

1903.
February 13 and 24.
——
LAYARD, C.J

with the sanction of the District Court. Notwithstanding the insertion of that power in the gift to the minor it appears to me just as necessary for the Court to see that the price is a fair one, and that the sale is manifestly for the advantage of the wards. I have not been referred by appellant's counsel to any authority to support his proposition that the sanction of the Court is dispensed with in a case such as the present, and I cannot find any such authority.

The sale to Sella Natchia in respect of the half share claimed by the defendants having taken place without the sanction of the Court is void, and I would affirm the judgment of the District Judge dismissing plaintiff's action with costs.

As I hold that the sale of the defendant's property to Sella Natchia was void for want of the express sanction of the Court, it is unnecessary for me to express any opinion as to whether the reasons given by the District Judge for arriving at the same conclusion are correct or not. Appellant must pay the costs of this appeal.

MONCREIFF, J.—

Don Alexander Bernard, by deed of gift, transferred certain immovable property to the children of one Martinus and his wife Louisa. He appointed the wife guardian and entrusted her with the administration of the estate for the benefit of the donees until they attained majority. He also gave her power to sell the property subject to certain conditions, " if she saw it necessary and expedient for the advantage and benefit of the donees ".

Now, under our law a guardian can only sell or encumber the immovable property of the wards—

(1) When sale is necessary for the payment of debts;
(2) For the maintenance of the wards;
(3) When sale is clearly for the benefit of the wards;

and then only on an order from the Court.

Here the guardian had no estate. She was merely a manager with a power to sell. The question is whether the power was one to do something which the law has absolutely forbidden to be done without the sanction of the Court. I think it was. The restriction of leave to sell to the cases above-mentioned implies that what the Court will refuse to permit cannot be sanctioned by any other authority. No system of trusts is allowed to further a course which is in contradiction to the policy of the law. The plain policy of the law is that guardians shall not sell the property of their wards without the leave of the Court, and that policy is contravened by the power conferred by the deed of gift upon the guardian in this case. I agree that the sale to Raja Sella Natchia passed no title, and that the appeal should be dismissed with costs.