1956 *Present :* Gratiaen, J., and Gunasekera, J.

A. R. M. CASSALY, Appellant; *and* A. R. M. BUHARY *et al.*, Respondents

S. C. 76—D. C., Galle, 5,000 L

Minor—Power of curator to sell minor's property—Fideicommissum—Unborn potential fideicommissaries—Right of an existing fideicommissary to sell his spes*—Courts Ordinance (Cap. 6), s. 69 (1)—Civil Procedure Code, ss. 582* et seq.

Sale of a minor's property by his curator without the proper sanction of the Court is *ipso jure* void. If the minor subsequently seeks to vindicate title to that property, the burden is on the alienee to show that the Court's sanction for the sale was validly obtained.

A person donated certain property to his son, A, subject to a fideicommissum in favour of such children of A as would be alive at the time of A's death. Before the class of potential fideicommissaries was yet capable of ascertainment and when A had three sons, one of whom was a minor, application was made to Court by a person to be appointed curator of the estate of the minor under Chapter 40 of the Civil Procedure Code " for the purpose of selling the rights of the said minor's one-third share " of the property. The application was allowed after a perfunctory inquiry, and in April 1925 the curator purported to convey to X " all the right, title, interest, claim and demand whatsoever " of the minor in the property. The fiduciary, A, did not die until 25 years later, in 1950.

Held, that the burden of proving that the Court had interposed its consent to the purported sale of the minor's interests in the property was not discharged. In the first place, the minor was not at that time vested with the undivided one-third share which alone had been authorised to be sold. Secondly, authority to sell a minor's property cannot validly be granted without reference to a specified consideration. Finally, the person appointed as curator had not obtained the sanction of the Court to dispose of the mere *spes* which was all that the minor did enjoy in 1925 ; the authority to sell the future contingent interest of a ward of the Court cannot validly be granted unless " the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries ". For these reasons the sale to X was of no force or avail against the minor.

[1] *(1952) 54 N. L. R. 181.*

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *Felix R. Dias*, for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *Sir Ukwatte Jayasundere, Q.C.*, and *S. K. Rodrigo*, for the 3rd and 4th defendants-respondents.

C. Ranganathan, with *P. Naguleswaram*, for the 1st defendant-respondent.

No appearance for the 2nd defendant-respondent.

Cur. adv. vult.

March 28, 1956. GRATIAEN, J.—

This action was instituted under the Partition Ordinance in respect of a property situated in Galle on the basis that the plaintiff and the 1st defendant owned it in equal shares. The 3rd and 4th defendants, who are minors, intervened in the action through their guardian-ad-litem (the 5th defendant) and objected that the property belonged exclusively to them. Another intervenient (the 2nd defendant) asserted a right to be compensated for certain improvements effected on the property, but his claim was rejected and no longer arises for consideration.

The property in dispute had admittedly belonged to Seyan Slema Lebbe, who by a deed of donation P 1 of 29th April 1897 gifted it to his son Abdul Rahiman (the father of the plaintiff and the 1st defendant) subject to a fideicommissum in favour of such children of the donee as would be alive at the time of his death. Abdul Rahiman, (hereafter called "the fiduciary") died on 11th November 1950 leaving only two children surviving him, namely, the plaintiff and the 1st defendant. Another son (Juwadu *alias* Thahir) had predeceased the fiduciary on 4th October 1949.

The plaintiff and the 1st defendant claimed that an undivided ½ share in the property vested absolutely in them when the fiduciary interest of their father came to an end in 1950. The contention raised on behalf of the 3rd and 4th defendants, on the other hand, was that the title had already passed to their father L. P. D. Premaratne by right of purchase (under the conveyance 3 D 5 of 1st April 1925), his vendors being the fiduciary, the 1st defendant (acting on his own behalf and as curator of the estate of the plaintiff who was then a minor) and Juwadu *alias* Thahir. L. P. D. Premaratne gifted the entirety of his interests to the 3rd and 4th defendants in 1947, and they now claim exclusive ownership by virtue of this title.

The vital dispute between the parties relates to the legal effect of the conveyance 3D5. The learned trial Judge, in dismissing the plaintiff's action, held that this document operated as a valid transfer to L. P. D. Premaratne of absolute *dominium* in the property. Accordingly, he decided that the plaintiff had no rights of co-ownership entitling him to claim a decree under the Partition Ordinance.

It is first necessary to set out the circumstances in which the conveyance 3D5 was executed in April 1925. The plaintiff was at that time 18 years old and, as the fiduciary was still alive, he enjoyed no more than a mere *spes* or expectation that a vested right would accrue to him in the event of his surviving the fiduciary. So too with regard to the 1st defendant and his other brother both of whom had attained majority before April 1925. The extent of the share, if any, which would ultimately vest in each of the three brothers upon the death of the fiduciary was not capable of precise ascertainment. Indeed, it was not even certain that the class of potential beneficiaries under 3D5 had yet been closed in 1925. Nevertheless, the fiduciary, the 1st defendant, and Juwadu *alias* Thahir " arranged to sell " the entire property, including the plaintiff's interests, for a composite consideration of Rs. 3,500. The 1st defendant thereupon made an application 3D1 dated 25th March 1925 to the District Court of Galle to be appointed curator of the estate of the plaintiff under Chapter 40 of the Civil Procedure Code " for the purpose of selling the rights of the said minor's (i. e., the plaintiff's) ½ share " of the property. The application was allowed after what appears to have been a very perfunctory inquiry, and in due course a certificate of curatorship was issued to the 1st defendant for the special purpose previously referred to. This was the authority upon which the 1st defendant as curator purported, for an unspecified part of the total consideration, to convey in 1925 " all the right, title, interest, claim and demand whatsoever " of the plaintiff in a property in which no vested interest actually accrued to him until 25 years later.

The argument for the plaintiff is that 3D5 of 1925 was void and wholly inoperative as a conveyance to L. P. D. Premaratne of his future contingent interest in the property. It being conceded in argument on behalf of the 3rd, 4th and 5th defendants that the plaintiff was a minor at the relevant date, the submission is that the 1st defendant, as curator of his estate, had at best obtained the authority of the Court to sell only an undivided ½ share which, according to the application 3D1 and the certificate of curatorship was incorrectly assumed to have already vested in him (subject only to a life-interest in his father). In other words, the application was based on an allegation of fact which had no relation to reality ; and the Court, in authorising the proposed sale, had acted upon an entirely wrong assumption. Alternatively, it was argued, the 1st defendant had no express authority from the Court to sell the future contingent interest which was all that the plaintiff himself (had he been capable of entering into a contract on his own behalf) could have disposed of.

The powers and responsibilities of a Court as the traditional " upper guardian of minors " under the Roman Dutch Law have received statutory recognition in section 69 (1) of our Courts Ordinance whereby every District Court is entrusted with the care and management of a minor's estate situated within its jurisdiction. Chapter 40 of the Code provides for the appointment of curators to take charge of such property under the general supervision of the Court. No express provision is made for granting authority to a curator to sell a minor's property, but it has always been assumed (and rightly so) that such authority may be

given (subject to well-established limitations) in appropriate cases. Cayley, J. in *Re Hider, ex parte Corbet* [1] has clarified the rules which should guide a Judge in exercising his jurisdiction in such cases. When an application is made by a curator for sanction to sell or encumber property belonging to a minor, "there should be a decree . . . . . the minor being represented by a guardian-ad-litem for the purpose. The facts should then be especially adjudicated upon, and a formal order entered. There must in fact be, as laid down in *Voet* 27 : 9 : 6, a *causae cognitio*, a *probatio*, and a *decretum*." The Court, before sanctioning a sale of property which is already vested in the minor, must be satisfied on proper material that the proposed transaction is "manifestly to his advantage".

In Ceylon, even a lease for a term of years (being regarded as a *pro tanto* alienation) is void if granted without the sanction of the Court—*Perera v. Perera* [2]—and the rule applies even though the guardian had been expressly authorised by the donor to sell the property for the minor's benefit. *Mustafa Lebbe v. Martinus* [3]. A minor, on attaining majority, is therefore entitled to vindicate his title (which the curator had purported to alienate) by mere proof that the property had been conveyed *sine decreto* i.e. without the sanction of the Court. *Breytenbach v. Frankel* [4]. The reason is that such a sale is *ipso jure* void, and dominium has not passed from the minor. *Sande* 1 : 1 : 79. Accordingly, the burden is on the alienee to show that the Court's sanction was validly obtained. *Voet* 27 : 9 : 11.

Applying these principles to the facts of the present case, I am content to say that the burden of proving that the Court had interposed its consent to the purported sale of the plaintiff's interests in the property by 3D5 has not been discharged. In the first place, the plaintiff was not at that time vested with the undivided ½ share which alone had been authorised to be sold. In the second, authority to sell a minor's property cannot validly be granted without reference to a specified consideration, and neither the 1st defendant's application, nor the certificate of curatorship, nor the conveyance 3D5 makes any mention of the price which was to be paid (or was in fact paid) to the plaintiff's estate out of the total consideration agreed upon. For these reasons alone, 3D5 is of no force or avail against the plaintiff. The *exceptio rei venditae et traditae* cannot apply to a transaction of this kind. Finally, the 1st defendant as curator had not obtained the sanction of the Court to dispose of the mere *spes* which was all that the plaintiff did enjoy in 1925.

This last objection goes beyond a mere technicality. It would be wrong to assume that the District Judge who issued the certificate of curatorship would have authorised the sale of the minor's future contingent interest in the property if it had been brought to his notice that the class of potential fideicommissaries in whom the title would ultimately vest upon the fiduciary's death was not capable of ascertainment in 1925. Under the general law, a stricter test must be satisfied if there are unborn potential beneficiaries to whom the property (or some interest in it) could in a certain contingency pass in due course. In that event, authority to

[1] *(1876) 3 S.C.C. 46.*
[2] *(1902) 3 Brown 150.*
[3] *(1903) 6 N.L.R. 364.*
[4] *(1939) A.D. 309 at 340.*

sell the future contingent interest of a ward of the Court cannot validly be granted unless " the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries. " *Ex parte Visagie* [1]. Only an alienation *ob causam necessariam* would be justified. *Ex parte Koen* [2]; *Ex parte Shano* [3]. It is unnecessary to decide whether a Court's statutory jurisdiction to sanction the sale of the entire property under the provision of the Entail and Settlement Ordinance is similarly restricted where the class of ultimate beneficiaries under a *fideicommissum* has not yet been closed. Suffice it to say that this jurisdiction, with all its attendant safeguards, was not in fact invoked in the present case.

For the reasons which I have given, I would hold that the plaintiff became entitled to an undivided ½ share of the property upon the fiduciary's death in 1950. He is therefore entitled to claim a decree for partition or sale upon that basis.

There remains the question of title to the outstanding ½ share. It seems to me that the claim of the 3rd and 4th defendants is to this extent unassailable. It is true that, at the time of the conveyance 3D5, the 1st defendant had no vested interest in the property. But in his case the doctrine of *exceptio rei venditae et traditae* clearly operated to the benefit of the 3rd and 4th defendants as soon as he subsequently acquired title to an undivided ½ share in 1950. The ruling of the Privy Council in *Gunatileke v. Fernando* [4] is precisely in point, and I am unable to accept Mr. Ranganathan's argument that the *exceptio* can fairly be limited to the ⅛ share which was originally assumed to be vested in his client in 1925. The conveyance caught up " all the right, title, interest, claim and demand whatsoever " of the 1st defendant in the property, and these words are clearly wide enough to include the larger interest which he ultimately acquired.

I would set aside the judgment under appeal and send the record back with a direction that a decree be entered (either for a partition or sale of the property) on the basis that the plaintiff is entitled to an undivided ½ share and that the balance ½ share belongs to the 3rd and 4th defendants equally. The 3rd, 4th and 5th defendants must pay the plaintiff's costs of this appeal and of the contest in the Court below. The 1st defendant must, however, pay the 3rd, 4th and 5th defendants' costs of the contest in the Court below. The other costs in the lower Court will be borne *pro rata* between the plaintiff and the 3rd, 4th and 5th defendants, and the order for costs against the 2nd defendant will, of course, stand.

GUNASEKARA, J.—I agree.

Judgment set aside.

[1] *(1940) C. P. D. 42.*
[2] *(1930) C. P. D. 154.*
[3] *(1949) 3 S. A. L. R. 929.*
[4] *(1921) 22 N. L. R. 385 at 395.*