Present ; Fisher C.J., Garvin and Drieberg JJ. **1928.**

GIRIGORISHAMY *v.* LEBBE MARIKAR.

303—D. C., Galle, 23,856.

Guardian—Right to mortgage minors' property—Authority under will—Sanction of Court.

The testatrix bequeathed all her property to her two minor sons and appointed her husband the executor of the will and her uncle the guardian of the children.

The will further authorized " the said husband in association with the uncle, the guardian, to deal with a certain defined land as he pleases, in case any necessity shall arise, for the expenses of my said children."

The husband and the uncle acting under the said authority mortgaged the land by bond, which recited, among others, the necessity of raising money for the purpose of paying the expenses incurred and to be incurred in connection with the minor sons.

Held, that mortgage was invalid without the sanction of Court.

Mustapha Lebbe v. Martinus[1] followed.

ACTION instituted to recover a sum of Rs. 1,250 on a mortgage bond executed by the mortgagors, hypothecating a land, in pursuance of an authority given to them under the last will of one Jaleelath Umma. By the last will the testatrix bequeathed all her property to her two sons and appointed her husband as executor and her uncle guardian of the children. The husband and the uncle were the mortgagors. They acted under a clause of the will which authorized them to deal only " with the defined and surveyed land called Dangaragahawatta, in case of any necessity shall arise

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for the expenses of my said children." The learned District Judge held that the mortgage was invalid without sanction of Court.

H. V. Perera (with *Wijewardene*), for plaintiff, appellant.—The mortgage is valid as the husband, who had executed it, was the executor, and acted as such in fact, though he did not say so in express words. He purported to act under the will which authorized him to mortgage, as executor. His act could only be referred to the power given to him by the will.

Counsel cited *Bentham v. Wiltshire* [1] and *Soysa v. Cecelia* [2].

N. K. Choksy (with *L. A. Rajapakse*), for respondents, was not called upon.

November 11, 1928. FISHER C.J.—

In this case one Jaleelath Umma made a will, the material portions of which are as folows :—

> And I do hereby bequeath and donate unto my two sons, Ahamadu Sultan Mohamedo Saiko and Ahamado Sultan Mohammedo Adunan, all the movable and immovable property belonging to me and also all the movable and immovable property which I shall become entitled to hereafter.
>
> And I do hereby appoint my husband, Omeru Lebbe Markar Ahamadu Sultan, as executor of my estate, and my uncle Uduma Naina Markar Ahamadu Lebbe Markar as guardian over the said children.
>
> And I further do hereby authorize that my said husband, Omeru Lebbe Markar Ahamadu Sultan, may, in association with the said uncle the guardian, deal with only the surveyed and defined land called Dangaragahawatta, situate at Dangedera in Galle, as he pleases, held and possessed by me, in case of any necessity shall arise for the expenses of my said children.

The said Ahamadu Sultan and Ahamadu Lebbe Markar purporting to act under authority conferred upon them by the last paragraph of the will executed a mortgage bond (P1) by which, after recitals as to the necessity of raising money for the purpose of paying expenses incurred and to be incurred in connection with the two minor sons, the said Ahamadu Sultan and Ahamadu Lebbe Markar,

[1] *4 Maddocks 44 ; Vol. 2, Vernon's Chancery Cases, p. 153 ; Jarman on Wills, p. 915 ; 3 Borrows Reports 1028, at 1031.*

[2] *23 N. L. R. 74.*

bound themselves to pay a sum of Rs. 1,250 and mortgaged the property Dangaragahawatta to the plaintiff to secure the repayment of that sum.

On that bond the present action was brought, and the question for our decision is embodied in the third issue: "Had Ahamadu Sultan and the guardian defendant full authority to give the mortgage bond without permission of the Court"? It was urged by Counsel for the appellant that Ahamadu Sultan had power in his capacity as executor to execute the bond. There are two grounds on which that argument cannot prevail, firstly, because the money was not required for the purpose of the administration of the estate, and, secondly, the recitals in the bond show that it was not executed by Ahamadu Sultan in his capacity as executor. In my opinion, on the construction of the will, the property in question was given absolutely to the two minor children and the clause under discussion was inserted to give authority to the testatrix's husband, acting with the approval of the guardian, to deal with the property mentioned for the purpose of providing for the expenses of the infants should the occasion arise. I do not think that it is possible to construe the will in any other way.

That being so, the question is whether a person can be invested with authority to deal with property, the title to which is vested in minors, without the sanction of the Court. This question was very fully discussed in the case of *Mustapha Lebbe v. Martinus*.[1] That was a case in which, by a deed of gift, certain immovable property was given to children of whom two were minors at the time and the other was born subsequently. The deed of gift contained a provision giving the mother of the children full power to deal with and dispose of the property "if she shall see it necessary and expedient for the advantage and benefit of the said donees." Purporting to act under this authority the mother of the children sold the property, and one question for decision was whether the sale was valid, having been made without the sanction of the Court. In giving judgment in that case Layard C.J., at page 367, said: "It is a clear principle of the Roman-Dutch law that a minor's immovable property cannot be alienated without the decree of a Court of competent jurisdiction," and he cited a number of authorities in support of that proposition. And Moncreiff J. in his judgment, at page 368, said: "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."

It was sought to draw a distinction between that case and the present case based on the difference in standpoint from which the Court construes wills and transactions *inter vivos*. In view, however,

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of the construction which, in my opinion, must be put on the terms of the will there is no distinction in principle between the two cases. The accuracy of the proposition of law laid down in that case is not open to question, and on the basis of that proposition of law, section 71 of the Courts Ordinance, 1889, provides that the charge of the property of minors is vested in the District Courts and the procedure for dealing with it is dealt with in sections 582 and 585 of the Civil Procedure Code. (See also Form 94, Legislative Enactments, Volume IV., p. 693.) This case is not and cannot be treated as a case of property vested in a trustee, the property is actually vested in the minors, and Ahamadu Sultan had therefore no power to deal with it except with the sanction first obtained of the Court.

The appeal, therefore, must be dismissed with costs.

GARVIN J.—I agree.

DRIEBERG J.—I agree.

Appeal dismissed.