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against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of Justice will decline its aid to enforce a contract thus wrongfully entered into. "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his own sake, however, that the objection is ever allowed, but is founded on general principles of policy, which the defendant has the advantage of" (*Per Lord Mansfield, Cowper's Rep. 343*). It is on this principle that defendants in suits on contracts, ostensibly *bona-fide*, are permitted to show that those contracts really are mere wagering transactions. In *Ram Surun Singh v. Mt. Fran Peary* (1) the Privy Council say: "It is impossible to treat this deed of conditional sale and mortgage as creating any estoppel. *It is sought to be enforced by a person out of possession.* It is, in truth, the case of a common mortgage on which the defendant says there never was the money advanced. It is open to a mortgagor in this country to deny that the money, the receipt of which is generally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction." As to the objection that a tenant may not deny his landlord's title, there is not any tenancy whatever between the plaintiff and defendant here if the latter's defence be true, and the plaintiff, so far from being the landlord, is the trustee of the defendant.

[306] We think that the Small Cause Court was in this case deprived of jurisdiction under s. 91 of Act IX of 1850 by the defence set up by the defendant. The judgment of that Court should be reversed, and the suit should have been dismissed for want of jurisdiction.

The parties respectively should bear their own costs of the suit and reference.

Attorney for the plaintiff.—Mr. H. W. Payne.

Attorneys for the defendant.—Messrs. Hore, Conroy and Brown.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice,
and Mr. Justice Birdwood.

JADOW MULJI (*Plaintiff*) v. CHHAGAN RAICHAND, DECEASED, BY HIS SON JAMNA, MINOR, BY HIS GUARDIAN, *ad litem* WANMALI HARJIVAN (*Defendant*).^{*} [8th March, 1881.]

Administrator of a minor's estate—Guardian ad litem—Next friend—Minors' Act, XX of 1864, s. 2—Civil Procedure Code (Act X of 1877), ss. 443, 456, 458—Act XII of 1879—Act X of 1876, s. 15—Act XV of 1880, s. 3, cl. (b)—Courts of Small Causes—Jurisdiction.

Where no administrator of the estate of a minor is appointed under Act XX of 1864, there is no objection to the appointment of a guardian *ad litem* under s. 443 of the Civil Procedure Code (Act X of 1877) (as amended by Act XII of 1879) for the purpose of defending a suit against the minor.

^{*} Small Cause Court Reference, No. 1 of 1881.

(1) 13 M.I.A. 551 at p. 559.

Act XX of 1864, s. 2, has no bearing on the case of a next friend or guardian *ad litem* not claiming charge of the minor's estate.

Neither Act XX of 1864, nor the Civil Procedure Code, (Act X of 1877) (as amended by Act XII of 1879) empowers any Court to appoint a person against his or her will, to be a next friend, *guardian ad litem*, administrator of the estate, or guardian of the person of a minor.

Section 458 of the Civil Procedure Code (Act X of 1877) is not, so far as regards payment of costs, applicable to any person appointed to act as guardian *ad litem* without his previous assent.

Section 3, cl. b, of Act XV of 1880 preserves jurisdiction to a Court to try a suit against a minor, notwithstanding the appointment of one of its officers to be the minor's guardian *ad litem*.

The decision in *Mohan Iswar v. Haku Rupa* (1) is superseded by Act XV of 1880, sec. 3, cl. b, in so far as that decision affected officers of the Court [307] appointed guardians *ad litem* under s. 456 of Act X of 1877, as amended by Act XII of 1879.

Inconvenience, pointed out, of introducing into Acts relating, and enacted as relating, to special jurisdiction only, provisions affecting civil procedure generally.

[F., 20 B. 534; Rel., 15 C.L.J. 3=16 C.W.N. 256=13 Ind. Cas. 414; R., 9 B. 239; 9 B. 395.]

THIS case was referred for the opinion of the High Court by Cursetji Manekji, Judge of the Small Cause Court at Ahmedabad, under s. 617 of the Civil Procedure Code (Act X of 1877), with the following remarks:—

"Plaintiff's suit is on balance of account settled by Chhagan Raichand, since deceased. The said Chhagan has left a son who is a minor, and property which is worth more than Rs. 250. The said minor is made defendant with Wanmali Harjivan as his guardian *ad litem*. Wanmali, however, declines to act as such guardian, though he is the minor's maternal uncle, and it appears from the man's demeanour in the witness-box that he simply objects for the purpose of evading or delaying satisfaction of plaintiff's claim.

"The questions which arise are—

"1st—Has this Court power to appoint a guardian *ad litem* under s. 443 of the Civil Procedure Code, (Act X of 1877) where the estate is beyond Rs. 250 in value, supposing a person is found willing to act as such guardian?

"2nd.—Has this Court power to appoint such guardian where the person is unwilling to act as such guardian, though his unwillingness is merely vexatious, and is assumed for the purpose of delay or evasion?

"3rd.—If the Court appoints one of its own officers guardian *ad litem* under s. 456, Civil Procedure Code, (as amended by s. 73, Act XII of 1879), would it have jurisdiction to try the suit?

"My opinion, as to the first question, is in the affirmative. If a person be found 'fit and willing', s. 443, I submit, authorizes any Civil Court to appoint him guardian *ad litem* to defend the suit on behalf of a minor, irrespective of the value of the estate to which the minor may have succeeded. *Moortidhur v. Supdev* (2) [308] has been urged against this opinion; but that decision does not, I think, apply, as there, from the frame of the suit, it appeared that plaintiff claimed to have 'charge of the property,' and, as that was worth more than Rs. 250, a certificate was necessary under Act XX of 1864. A guardian *ad litem* is a totally different person; he has nothing to do with the administration of the minor's property; he is simply appointed to contest the particular suit in order to protect the

(1) 4 B. 638.

(2) 3 B. 149.

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minor from a false claim ; and, when decree is made and executed, he is *functus officio*. Thus, as regards a guardian *ad litem* under s. 433, it would make no difference whether the property is worth more or less than Rs. 250, and a certificate in the former case is not necessary. The very fact that under s. 456 (as amended by s. 73, Act XII of 1879) a plaintiff or creditor of a minor's estate can apply for the appointment of a guardian *ad litem*, would show that Act XX of 1864 does not apply to him ; for in that Act there is no provision by which such creditor can ask the District Court to have a guardian appointed, though this is sometimes done on the authority of *Dhondiba v. Kusa*(1), a decision which, I humbly submit, is not altogether a satisfactory one.

"As regards question No. 2, I am of opinion that a person cannot be forced to act as guardian *ad litem* against his will. When no person is found willing to act, all that the Court could do, would be to appoint some one of its own officers. The amending words of s. 456 are 'where there is no other person fit and willing to act'; and the necessary implication from these words is that the person to be appointed must not only be fit, but also willing. It often happens that a person, though he has the custody of the minor, declines to act as his guardian *ad litem* for the purpose of delaying the plaintiff, or from fear of being harassed in execution proceedings ; but the Court has now the power to appoint its own officers, and thus get over the difficulty which otherwise would have presented itself when the friends or relatives of the minor were recalcitrant.

"As to question No. 3, I am of opinion in the affirmative. A recent decision of the High Court (I. L. R., 4 Bom., 638) decides [309] that an officer of a Civil Court appointed under s. 456, amended as aforesaid, would be a Government officer, and thus this Court and other subordinate Civil Courts would have no jurisdiction. But, subsequently to the passing of that decision, the Legislature has added an important provision to s. 32, Act XIV of 1869, as amended by s. 15 of Act X of 1876 (see s. 3, Act XV of 1980, passed on 3rd November last). By this proviso a Court officer, appointed as aforesaid, would not be acting as a Government officer, and this Court would, therefore, have jurisdiction."

There was no appearance of parties in the High Court.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPPE, C.J.—As this Court understands that there has not been any administrator of the minor's estate appointed under Act XX of 1864, there does not appear to be any valid objection to the appointment of a guardian *ad litem* under s. 443 of Act X of 1877 (as amended by Act XII of 1879) in the present case. (See s. 464.) Section 2 of Act XX of 1864 has not any bearing on the case, of a next friend or guardian *ad litem* not claiming charge of the estate of the minor. [See *Vijkore v. Jijibhai* (2).]

As to the second question, this Court is of opinion that neither Act XX of 1864 nor Act X of 1877 (as amended by Act XII of 1879) empowers any Court to appoint, against his or her will, any person, to be a next friend, guardian *ad litem*, guardian of the person, or administrator of the estate, of a minor. So it was decided as to Act XX of 1864 in *Babaji v. Maruti*(3). In s. 456 of Act X of 1877 (as amended by Act XII of 1879) the words "no other person fit and willing to act as guardian for the suit"

(1) 6 B.H.C.R. 219 (220). (2) 9 B.H.C.R. 310. (3) *Infra in notis*, 5 B. p.310.

clearly indicate that the Legislature did not intend to force the office of guardian *ad litem* on any person *in invitum*; and such, even independently of those words, this Court would have deemed to be the proper construction of the Act, unless the contrary distinctly appeared in it, which it does not. Section 458 does not, so far as regards payment of costs, appear to be properly applicable to any person appointed to act as guardian *ad litem* without his previous assent.

[310] The reply to the third question, *viz.*, whether the Court of Small Causes at Ahmedabad, if it appointed one of its own officers to be guardian *ad litem* under s. 456, would thereby lose its jurisdiction to try the suit, is given by s. 3, cl. b, of Act XV of 1880, the effect of which is to preserve to the Court of Small Causes its jurisdiction notwithstanding the appointment of one of its officers to be guardian *ad litem*. That enactment, which received the Viceroy's assent on the 3rd November, 1880, supersedes the law as laid down in the decision in *Mohan Ishwar v. Haku Rupa* (1), made on the 13th July, 1880, in so far only as that decision affects officers of the Court appointed under s. 456 of Act X of 1877, as amended by Act XII of 1879.

This is a suitable opportunity for observing that the introduction of a clause affecting civil procedure and Civil Courts generally, such as s. 15 of Act X of 1876, into an Act purporting to regulate a special branch of civil procedure only, *viz.*, that relating to revenue jurisdiction, is inartistic in legislation and inconvenient in the administration of justice. Such a general provision, when hidden in a special Act not often resorted to in practice, is apt to be overlooked by pleaders and Judges who are seldom concerned in revenue cases. This irregularity of legislation having been commenced in Act X of 1876 is, therefore, less inappropriately continued in Act XV of 1880.

5 B. 310.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice Kembell.

BABAJI (Plaintiff), Appellant v. MARUTI, A MINOR, BY HIS
GUARDIAN GUJAI (Defendant), Respondent.* [15th September, 1874.]

The Minors' Act, No. XX of 1864—Certificate of Administration—Minor—Defendant—Procedure.

An order for the issue of a certificate of administration to any particular individual, under Act XX of 1864 ought not to be made until it is ascertained whether that individual is willing to take it.

Where an order for the issue of a certificate of administration was made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her.

[311] Held that such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party.

If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge should name some officer of his Court, or some respectable nominee of the suing creditor of the infant.

[F., 7 C.L.R. 407; R., 5 B. 306; 13 B. 656 (663).]

* Civil Reference, No. 10 of 1874.

(1) 4 B. 638.