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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.

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5 B. 310.

APPELLATE CIVIL.

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

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).]

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* Civil Reference, No. 10 of 1874.

(1) 4 B. 638.

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THIS case was referred for the opinion of the High Court by R. F. Mactier, Judge of the District Court of Satara. It came before him in appeal, and was stated by him as follows :—

"On the 5th of April, 1872, Babaji bin Kusaji applied to this Court, as he stated, under Act XX of 1864, in order that a certificate, as guardian and administratrix of her infant son, Maruti, might be granted to Gujai, widow of Yeshwanta, deceased, against whom he had a claim, and wished the guardian of the infant to be placed in a position to enable him (Babaji) to sue her as guardian of the minor heir of the deceased Yeshwanta. The decision of the High Court in *Dhondiba* v. *Kusa* (1) and that in *Ex parte Waman Bapuji* (2) (Appeal No. 6 of 1870 under Act XX of 1864) and other similar decisions were put forward as authority for this application.

"This application of Babaji under the above ruling of the High Court was entertained, and notice was served on Gujai to appear to take out the certificate, or show cause for her not doing so. Gujai did not appear, and, under the ruling of the High Court, an order was passed that Gujai should receive a certificate as guardian of the infant Maruti.

"On the strength of this order having been given, copy of which he obtained, Babaji sued Gujai to recover the amount of a debt due by her husband, Yeshwanta, making her a defendant 'as guardian and manager of the minor Maruti, son and heir of Yeshwanta, deceased.' The case was heard by the Subordinate Judge, First Class, who dismissed the suit, on the ground that, though an order had been passed on Babaji's application to give Gujai a certificate, she had not actually taken out the certificate, and was not, therefore, properly made a defendant.

"Babaji has now appealed against the decision of the Subordinate Judge dismissing his suit, and the case has been partly heard; but, as I am in doubt as to what is to be done under the circumstances, I am forced to ask for the opinion of the High Court on the matter.

"This Court has done all that it could possibly do in appointing Gujai guardian of her infant son on the application of a third party, and it appears to have gone somewhat beyond the law in even doing so much, as there seems to be no law to force a person to take out a certificate, and none to authorize a third party to get another person to be appointed guardian, who will not apply to be so made of his own accord.

"This Court has done all that it could do. The question, then, is—Should the Subordinate Judge have refused to admit Gujai as a defendant without the actual certificate of guardianship? According to the *strict* reading of [312] s. 2 of Act XX of 1864, the Subordinate Judge was right, for Gujai has not actually *obtained* a certificate. But I know of no law to force Gujai to come and obtain a certificate, and as she cannot be so made to take a certificate, and as the Subordinate Judge was right, on the other hand, in not admitting her name as a defendant until she did hold a certificate, the matter, as it stands, leaves me in doubt as to what is to be done.

"If this Court were to appoint the nazir a guardian, *ex-officio*, of a minor under the charge of the Civil Court, this would be attended with great inconvenience. Many such minors as this one have no property whatever which could be made available to pay 'for taking charge of the estate,' and, though in this case there may be some property, there are many in which there is none at all, and yet the nazir would have all the trouble of defending suits against the minor under his charge without any remuneration.

(1) 6 B. H. C. R. A. C. J. 219. (2) Unreported.

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"If the nazir were made by this Court trustee of every minor's estate, the 'manager' of which would not take out a certificate, it is probable that this difficulty would be got over, but it would not be without a great deal of unremunerated trouble to the nazir of the District Court, and it might probably also involve him in expense.

"Under these circumstances, I am obliged to ask for the opinion of the High Court, and would respectfully suggest a review of the decision in *Dhondiba* v. *Kusa* (1) which, I would submit, is hardly supported by Act XX of 1864."

There was no appearance of parties in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—This Court concurs with the District Judge in thinking that a certificate of administration cannot be forced on the mother of the infant, and is further of opinion that an order for the issue of such a certificate to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it. In the present case the order for the issue of the certificate appears to have been made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her. 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 will be under the necessity of naming some officer of his Court or some respectable nominee of the suing creditor of the infant. Difficulty will sometimes arise in such cases: but this Court is inclined to think, and certainly hopes, that the instances will be rare in which a minor, whom it is worth the creditor's while to sue, will be so completely destitute of friends and relatives as that none can be found to protect his interest.

5 B. 313.

[313] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice West.

CURSETJI RUSTOMJI SETNA (*Plaintiff*) *v.* THOMAS WILLIAMS (*Defendant*).* [28th and 29th April, 1881.]

Small Causes Court—Ship—Bill of lading—Charter party—Incorporation in bill of lading of terms of charter party—Cargo—Freight payable on intake measurement—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight.

K.V. at Moulmein consigned to the plaintiff at Bombay 135 logs of teak timber shipped on board the defendant's ship. The bill of lading, which was signed by the defendant, described the logs as marked K. V., and measuring tons 115-12-10, and it provided for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant, and was as follows :—"Marks, number, quantity and measurement unknown : all other conditions as per charter party." The charter party was expressed to be between the owners of the ship and Messrs. B. of Rangoon, as charterers of the whole ship, and provided for the payment of freight "at the rate of Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half

* Suit No. 30 195 of 1880.

(1) 6 B. H. C. R. A. C. J. 219.