they do not amount to a signing of the memorandum itself, and according to the Bombay cases do not, therefore, satisfy the requirements of the section. They do not create the positive agreement which the law has made [7] the necessary consequence of the signature of the real memorandum before registration. They only amount to a proposal. Has there been acceptance? There has been no allotment. There has been no placing on the register. It is unnecessary for me to cite cases in support of the proposition that an application for shares which is not followed by allotment and placing on the register does not bind the applicant. His liability was merely inchoate and never became complete. The Liquidator argued that the consent to become a director created an implied argeement to accept those five unpaid shares. But that is inconsistent with his own statement on affidavit of the real facts of the case, which are that the defendant qualified for his directorship by the five paid-up shares he obtained from Premchand. I do not think his application for five shares was ever accepted. There was no allotment. Acceptance cannot be legally inferred from the circumstances of the case. The company whilst it was solvent never accepted the defendant's offer to become a shareholder. It is too late now to do so. His name must be removed from the list of contributories, and his costs must be paid out of the assets.

Attorneys for the Official Liquidator:—Messrs. *Tobin* and *Roughton*.
Attorneys for N. D. Katruck:—Messrs. *Pestonji* and *Rustim*.

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13 B. 7.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

RATTONBAI (*Plaintiff*) *v.* CHABILDAS LALLOOBHOY AND OTHERS (*Defendants*). * [18th June, 1888.]

Practice—Minor—Next friend—Suit filed by a minor without a next friend—Application by defendant to strike plaint off the file—Civil Procedure Code (Act XIV of 1882), s. 442.

The plaintiff was a widow, and sued for the administration of her deceased husband's estate. The suit was filed on the 5th April 1888. On the 2nd May, the defendants' attorneys gave notice to the plaintiff's attorney that the plaintiff was a minor suing without a next friend, and that the plaint must be struck off the file in consequence. The plaintiff's attorney replied [8] that if the plaintiff was really a minor he would at once take steps to have her father appointed her next friend, and the plaint and proceedings amended. On 7th May inspection was given to the plaintiff's attorney of the plaintiff's horoscope, and after that inspection the plaintiff's attorney proposed that the proceedings should be amended by making the plaintiff's father her next friend. It appeared that the plaintiff was sixteen months under age. Nothing was done by either party for some weeks. On 6th June the defendants' attorneys gave notice that they would apply for an order that the plaint should be taken off the file under s. 442 of the Civil Procedure Code (Act XIV of 1882). On hearing the application the Court refused to make the order asked for. The suit did not appear to be a vexatious one, and the plaintiff's age did not appear to have been fraudulently concealed, her father having stated on oath that he believed her to be of age and expressing his willingness at once to be placed on the record as her next friend.

The Courts, as a rule, only strike the plaint off the file where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when

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it is proved that it was filed with the knowledge that the plaintiff was a minor and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails in the claim. When the fact of minority is a *bona fide* question of evidence and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend.

APPLICATION by the defendants under s. 442 of the Civil Procedure Code (Act XIV of 1882) to have the plaint taken off the file.

The plaintiff was a widow, and she filed this suit against her deceased husband's brothers (who were also his executors), for administration of his estate. The plaint was filed on the 5th April, 1888, and on the 9th April the plaintiff obtained a *rule nisi* and an *interim* injunction restraining the defendants from disposing of any portion of the estate, &c.

On the 2nd May, 1888, affidavits were filed by the defendants to be used at the argument of the rule. In these affidavits it was alleged that the plaintiff was a minor. The defendants' attorneys sent copies of these affidavits to the plaintiff's attorney, together with a letter as follows:—

"From our clients' affidavits you will see that your client, the plaintiff, is a minor, and that you have filed this suit on behalf of a minor without a next friend. Please, therefore, let us know if you consent to this suit being taken off the file and personally [9] undertake to pay our clients' costs of this suit. If you decline to consent to this, we beg to give you notice that we will apply to the Court to have the plaint taken off the file, with costs to be paid by you. Please let us have an immediate reply."

On the next day the plaintiff's attorney wrote as follows:—

"In reply to your second letter of yesterday, I beg to state that I shall enquire into the matter of the plaintiff's age, and if it should turn out that she is really a minor, I shall take steps to have her father appointed her next friend, and the plaint and proceedings amended accordingly. It will not, therefore, be necessary for you to apply to the Court, as threatened in your letter under reply. Please let me have an appointment for inspection of the alleged horoscope referred to in your clients' affidavits; also of the writing of which Ex. No. 1 to your clients' affidavit purports to be a translation."

On the 7th May inspection was given to the plaintiff's attorney of the plaintiff's horoscope, and thereupon the plaintiff's attorney wrote to the defendants' attorneys as follows:—

"*7th May* 1888.

"Dear Sirs,—Mr. Atmaram Gokuldas, father of the plaintiff, will be her next friend in this suit. Please let me know whether you will consent to the amendment of the plaint and proceedings in this suit, necessary for the insertion of his name therein as such next friend. On hearing from you in the affirmative I will send the necessary order for your consent. I beg to give you notice that if you refuse to consent to the amendment I shall be obliged to apply for a Judge's summons.

"Yours truly,
"MORESHVAR LAKSHMANJI."

To this letter the defendants' attorneys replied on the 6th June as follows:—

"*6th June*, 1888.

"Dear Sir,—In reply to your letter of the 7th ultimo, our clients decline to consent to the amendment of the plaint as proposed by you.

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[10] "As you do not seem to consent to the suit being taken off the file and to pay our clients' costs of this suit as required in our letter to you of the 2nd of May last, we are instructed to move the Court for an order for dismissal of the suit and for payment of costs, which application we intend to make on Monday next, the 11th instant.

"Yours truly,
PAYNE, GILBERT, AND SAYANI."

The application that the plaint should be taken off the file now came on for hearing.

Jardine, for the defendants, in support of the application.

Starling, for the plaintiff, *contra*.

The following authorities were cited :—Civil Procedure Code (Act XIV of 1882), s. 442; *Flight* v. *Bolland* (1); *Rolo* v. *Smith* (2); *Cheyt Narain Singh* v. *Bunwaree Singh* (3); *Moorlee Dhur* v. *Nathoonee Mahtoon* (4); *Maganbhai Purshotamdas* v. *Vithoba* (5); *Parikh Gokaldas* v. *Raval Jalam* (6); *Hanmant Lakshman Kulkarni* v. *Jayaram Narsinha Kulkarni* (7); *Beni Ram Bhutt* v. *Ram Lal Dhukri* (8).

JUDGMENT.

SCOTT, J.—The plaintiff Rattonbai on the 5th April last brought an administration suit against the executors of her late husband, and on the 9th April obtained a rule *nisi* and an *interim* injunction against them. On the 2nd May, the defendants' solicitors gave notice to the solicitor of the plaintiff, that the plaintiff was a minor suing without a next friend, and the plaint must be struck off the file in consequence. The plaintiff's solicitor at once replied that if the plaintiff was really a minor, he would at once take steps to have her father appointed her next friend, and the plaint and proceedings amended accordingly. On the 7th May, inspection was given to the plaintiff's solicitor of the plaintiff's horoscope, and after that inspection the plaintiff's solicitor proposed that the plaint and proceedings should be [11] amended by the insertion of the name of the father of the plaintiff as her next friend. Nothing was done by either party until the close of the May vacation; and on the 6th June 1888 the defendants' attorneys gave notice of an application for an order that the plaint should be taken off the file under s. 442 of the Civil Procedure Code. That application came on for argument before me last Monday, when also an application was made to amend the proceedings by the insertion of the name of the plaintiff's father as her next friend.

As regards the law of the case, there is no doubt that an infant cannot prosecute an action either in person or by solicitor, but only through an adult person known as "the next friend of the minor." There is no doubt also that if an infant do sue either in person or by solicitor, the defendant may, under s. 442, apply to have the proceedings set aside. The omission is not more than an irregularity. It is not a case of nullity. But the cases cited by Mr. Starling show that the Courts, both in England and in India, as a rule, only strike the plaint off the file where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court

(1) 4 Russ. 298. (2) 1 B.L.R.O.C.J. 10. (3) 23 W.R.C.R. 395.
(4) 25 W.R.C.R. 184. (5) 7 B.H.C.R.A.C.J. 7.
(6) Printed Judgments for 1884, p. 262.
(7) Printed Judgments for 1888, p. 112. (8) 13 C. 189.

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and evading the payment of costs in case the plaintiff failed in the claim. When the fact of minority is a *bona fide* question of evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend: see *Beni Ram Bhutt* v. *Ram Lal Dhukri* (1): Chitty's Practice, Vol. 2, p. 1017; and other authorities cited by Mr. Starling.

Now, in this case, the father of the plaintiff was, no doubt, the instigator of the suit. But the suit does not appear, on the face of it, to be a vexatious one. He states on oath that he believed his daughter was of age. Her horoscope does not seem to have been in his possession. She was, as a matter of fact, some sixteen months under age. Mr. Jardine argued that it was impossible to believe that a father could honestly have made such a blunder. I [12] am inclined to doubt whether parents all the world over follow the ages of their children with the accuracy Mr. Jardine ascribes to them. I think the blunder may have been honestly made. At any rate, in presence of the statement under oath, I will not decide that knowledge of the true age was fraudulently concealed, especially as the father expressed his willingness at once to be placed upon the record as his daughter's next friend. I will not, therefore, strike off the plaint. Still the father was guilty of gross carelessness. He must have known a horoscope was in existence, and he ought to have consulted it. I can only admit him on the record as next friend on his payment of all the costs of the present application, as I think the defendant was justified in coming to the Court.

Attorney for the plaintiff:—Mr. *Moreshvar Lakshmanji*.

Attorneys for the defendants:—Messrs *Payne, Gilbert, and Sayani*.

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13 B. 12.

ORIGINAL CIVIL.

Before Mr. Justice Jardine.

MANILAL DHUNJI (*Plaintiff*) *v.* GULAM HUSEIN VAZEER (*Defendant*).* [12th July, 1888.]

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), s. 103—*Application to set aside order of dismissal made under s.* 102—*Sufficient cause for non appearance of plaintiff when suit called on for hearing.*

The plaintiff duly attended the Court on the day fixed for the hearing of his case, and waited for some time as the Judge happened to be sitting on that day at first in the appeal Court. Believing that when the Judge took his seat in his own Court a part-heard case would be proceeded with and would occupy some time, the plaintiff left the Court-house and went to assist his employer who had sent for him to explain some matters connected with a mercantile transaction. The plaintiff returned to the Court in about half an hour, and found that in his absence his suit had been called on for hearing and dismissed under s. 102 of the Civil Procedure Code (Act XIV of 1882). On application under s. 103 to set aside the order of dismissal,

Held, refusing the application, that the above circumstances did not amount to "sufficient cause" for his non-appearance when his suit was called on for hearing. He was not taken unawares. He was under no compulsion to leave the Court, nor was his absence due to any weighty cause. He accepted the risk of the case being called on in his absence.

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* Suit No. 25 of 1888.

(1) 13 C. 189.