1902.
*July 20.*

## GUNASEKERA *v.* ABUBAKER.

*D. C., Galle, 6,267.*

*Curator—Civil Procedure Code, ss. 476 and 582—Action by minor.*

**An action by a minor is not well brought if brought in the name of the curator.**

**Before suing, the curator should obtain the authority of the Court to institute an action as the next friend of the minor and in the name of the minor.**

THIS was an action for a declaration of title to certain shares of certain lands bought by two plaintiffs, the first of whom was described in the title of the suit as "George Abeyewardena Gunasekera of Galupiyadde, curator of the estate of the minor George Dias Abeyesinghe of Colombo." The prayer was that the said George Dias Abeyesinghe be declared entitled to 47/72 parts, &c., and the second plaintiff to 25/72 parts, &c.

The issues raised on the pleadings and agreed to were: (1) Can the first plaintiff maintain this action? and (2) Is the defendant in the wrongful and forcible possession of the house and soil claimed?

The District Judge (Mr. J. D. Mason) held that the first plaintiff could not proceed with the action.

The plaintiffs appealed. The case came on for argument on 28th April, 1902, and it was ordered to be listed before three Judges.

*Dornhorst* (with *Sampayo*), for appellants.

*Bawa* for respondent.

*Cur. adv. vult.*

20th July, 1902. MONCREIFF, A.C.J.—

The question is whether the plaintiff, suing as curator of a minor, can maintain this action. It is urged that, in view of section 476 of the Civil Procedure Code, he can only do so when the action is instituted in the minor's name, and he has been appointed and is designated in the plaint the next friend of the minor. I have had the advantage of learning the views of my brothers, and I agree that the objection is fatal. If section 582 of the Code had stood alone, I should have thought otherwise, but I find it impossible to disregard the positive provisions of sections 476-480. I agree to the order proposed by my brothers.

WENDT, J.—

The present action was brought by two plaintiffs. The first of them was described as George Abeyewardena Gunasekera, curator of the estate of the minor George Dias Abeyesinghe, and the

question upon which the case has been decided is whether the action was maintainable without Gunasekera having been appointed next friend of the minor in question. Now, I agree with the statement of Lawrie, A.C.J., in one of the cases to which I shall presently refer, to the effect that it is not easy to reconcile some of the provisions of chapter 35 with those of chapter 40 of our Civil Procedure Code, and the difficulty is probably due to the fact that, while chapter 35 was adapted from chapter 31 of the Indian Code, our chapter 40 represents enactments contained in two separate Acts of the Indian Legislature not included in their Code, viz., Acts No. 40 of 1858 and No. 20 of 1864. In the case of *Jalaldeen v. Meerapulle* (*3 C. L. R. 26*), which was an action by a next friend, Lawrie, A.C.J., expressed a somewhat doubting opinion that an action could not be brought in respect of a minor's lands by a next friend appointed under section 481, unless he got also a certificate under section 582.

In *Fernando v. Weerasinghe* (*3 C. L. R. 67*), which was an action by a curatrix in the name of the minor upon a lease granted by the curatrix, Lawrie, J., held (Withers, J., concurring) that a curator duly appointed by the Court could not institute actions in the minor's name without the express sanction of the Court obtained on an application to be made next friend. In *Uduma Lebbe v. Seyadu Ali* (*1 N. L. R.* 1) the action was brought by the minors, by their father as next friend duly appointed by the Court, and was an action of ejectment. The District Court held that it was necessary for the father to obtain an order under section 582 of the Code. The appeal was specially argued before the Full Court, and Browne, A.J., was of opinion that the certificate of curatorship was only necessary to support actions brought by the curator *qua* curator in his own name, and was not required for actions instituted (or defended) " by a minor, by his next friend " (or guardian *ad litem*). Withers, J., considered that section 582 had reference only to cases in which there was a claim to have charge of the minor's estate, and that, as plaintiff's father made no such claim, the action was in order, although, had he put forward such a claim, it would still have been free from objection owing to the two provisos to section 582, inasmuch as the minors' shares of the property sued for were worth considerably under Rs. 1,000. Lawrie, A.C.J. observed that it was hard to ignore or to explain away the plain words of section 582: " No person shall be entitled to institute or defend any action connected with the estate of a minor of which he claims charge until he shall have obtained such certificate." He asked, " Is the solution to be found in the words of which he claims charge? " and departing from the view

1902.
*July 20.*
WENDT, J.

he had expressed in *Jalaldeen v. Meerapulle*, he agreed to the construction of chapter 35, which enabled a next friend appointed under section 481 to sue without getting a certificate under section 582. Now, the present is not an action upon a contract of the curator's own, upon which he might have sued in his own name, as was pointed out in *Fernando v. Weerasinghe*. It is not a mere act of management, such as the letters of curatorship comtemplate, but a proceeding to recover by right of the minor land said to belong to the minor, but of which the minor never was in possession. It is in substance an action " by the minor " (in the words of section 476) or " on behalf of the minor " (section 478). In either case an appointment as next friend is necessary.

I think we ought to give effect to the comprehensive words of section 476, and hold that the curator should in the present case, before suing, have obtained the sanction of the Court. This construction is to be welcomed in view of the fact that it will give the Court the opportunity of exercising a very desirable supervision over actions brought by or on behalf of minors.

The present objection, however, ought to have been taken in the form of an application to take the plaint off the file (section 478). Instead of doing that the defendant filed an answer, and put the plaintiff to the expense of getting ready for trial on the merits. While, therefore, I think the dismissal of the action should stand, I think we ought to direct that the order should have no other effect than if the plaint had been taken off the file.

Under the circumstances there will be no costs in the District Court, but the respondent will have the costs of the appeal.

MIDDLETON, J.—

In this case one G. A. Gunasekera sues, as curator of the estate of a minor, G. D. Abeyesinghe.

The action claimed that the minor be declared entitled to a fraction of certain land, and be put in quiet possession thereof, and for damages.

The District Judge, on an objection taken by defendant's advocate that the curator cannot institute an action on behalf of the minor without an appointment as next friend or guardian *ad litem*, held that the plaintiff could not proceed with the action.

From the plaint it is clear that this is an action by a minor, and by sections 476 and 481 of the Civil Procedure Code every action by a minor shall be instituted in the minor's name by an adult person designated his next friend and appointed by the Court after it is

satisfied as to his fitness and the absence of any adverse interest on his part to the minor.

By section 478 if an action is begun by or on behalf of a minor without a next friend, the defendant may apply to the Court to have the plaint taken off the file.

By section 480 every order made in an action.....before the Court by which a minor is in any way concerned or affected without such minor being represented by a next friend.....may be discharged on application made on summary procedure.

Section 582 enacts that no person shall be entitled to institute or defend any action connected with the estate of a minor of which he claims the charge, unless he shall have obtained a certificate of curatorship.

Now, it is a priciple of construction that the Legislature must be supposed to be consistent with itself, and if it has expressed its mind clearly in one place it ought to be presumed that it is still of the same opinion in another place, unless it clearly appears that it has changed it (Maxwell on *The Interpretation of the Statutes*).

On the ground that the Civil Procedure Code is an *olla podrida* derived from many diverse sources, the learned counsel for the appellant invites us to violate this principle of construction, and to say that chapter 40 of the Code is not governed by chapter 35, and consequently that the action is brought in proper form, the curator taking the place of a guardian *ad litem*. It is possible to construe chapter 40 consistently with chapter 25 by holding that the curator, if he brings an action for the minor, must obtain the authority of the Court to his doing so as his next friend, and I am of opinion that this is what the Legislature intended, as it has been held by this Court in the case reported in *2 Browne, p. 107.*

I am fortified in this opinion by finding what I believe to be the basis on which the regulations in chapter 35 were founded in *Vanderlinden, p. 106*, where he says, as a principle of the Roman-Dutch Law, that a guardian cannot sue on behalf of a minor without the previous authority of the Judge, except at the risk of paying the costs himself.

It was intended in my opinion, under the Roman-Dutch Law that the Judge should control the initiation of litigation on behalf of a minor for good and sufficient reasons, and this theory, I think, underlies the sections quoted by me from chapter 35. Section 480, I think, also shows that it was not intended that any person should bring an action for the minor, unless sustained by the direct authority of the Court as next friend.

1902.
*July 20.*

MIDDLETON, J.

For these reasons I am of opinion that the action by the minor is not well brought in the name of the curator, and that the decision of the District Court must be upheld. I would, however, treat this order as one under section 478, and allow the plaint to be restored to the file upon the curator's applying to, and obtaining the leave of, the Court to sue as next friend of the minor. I agree with my brother Wendt as to the costs.