BENSON AND SUNDARA AYYAR, JJ.

SHEIKH IBRAHIM THARAGAN v. RAMA AYYAR.

section 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule as there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The judgment of the judicial committee already referred to shows that the case of the manager of a Hindu family is such an exception. We must, therefore, refuse to uphold this contention also.

In the result, we dismiss the appeal with costs.

The sixteenth defendant has preferred a memorandum of objections against the direction of the Subordinate Judge making him liable with defendants Nos. 1 to 15 for the plaintiff's costs of the suit. On the finding that he and defendants Nos. 1 to 15 colluded with each other to put forward an exclusive right himself to the amount of the mortgage-bond, the lower Court's order is right and we must dismiss the memorandum of objections also, with the costs of the plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

1911. March 29, 30. April 24.

SANKA KRISHNAMURTHI, MINOR BY GUARDIAN *ad litem* SRIRAM LAKSHMI KANTHAM (DEFENDANT), APPELLANT,

v.

THE BANK OF BURMA, LIMITED (PLAINTIFF), RESPONDENT.*

Hindu Law—Guardian of minor who is sole owner of trading firm—Liability of minor for debts contracted by agent of guardian.

A minor member of a joint Hindu trading family is liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of section 247 of the Contract Act (IX of 1872). This rule, however, is applicable to minors who are sole owners of a business, only subject to the general principles regulating the relationship between guardian and ward.

In India, a guardian has no power to bind his ward by a personal covenant. Although a widow and natural guardian may, in India, carry on a family business belonging to a minor son by a manager, such guardian and not the minor is the person personally liable on contracts entered into in the course of business.

*Original Side Appeal No. 49 of 1909.

Creditors of the business have no right of direct recourse against the minor; but as the guardian will be entitled to indemnity for liabilities properly incurred out of the assets of such business, creditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian.

A guardian cannot invest an agent with powers larger than are reasonably proper for carrying on the business; and where as a consequence of giving such powers the guardian has become involved in liability for the fraud of the agent, the guardian has no right of indemnity against the assets of the minor nor are the creditors entitled to claim such right through the guardian.

APPEAL against the judgment and decree, dated the 21st October 1909, of the Hon. Mr. Justice SANKARAN NAIR in the exercise of the ordinary Original Civil jurisdiction of this court in Civil Suit No. 348 of 1908.

V. V. Srinivasa Ayyangar for appellant.

N. Grant and *C. Madhavan* Nair for respondents.

The facts of this case are sufficiently set out in the judgment.

JUDGMENT.—This is an appeal from a judgment of Mr. Justice SANKARAN NAIR sitting on the original side by which the plaintiff Bank recovered judgment against the assets of the minor defendant on five promissory-notes made on the 19th and 24th July, 1908, for Rs. 9,100 in all by one K. A. Lakshminarasimham, acting under a power-of-attorney from the minor's mother and natural guardian who was carrying on business under the style of Sanka Ramasami & Son. The business was a joint family business carried on by the father on behalf of himself and the minor under his own name, and on his death his interest passed by survivorship to the minor who became the sole owner. The notes were signed by K. A. Lakshminarasimham *per proc* Sanka Ramasami & Son and were made in favour of the firm of C. L. Cantham & Co. of which Lakshminarasimham was the leading partner and were discounted by Cantham & Co. with the plaintiff Bank who credited them with the amount of the bills. At the time Cantham & Co. were of good credit, but indebted to Sanka Ramasami & Son in about Rs. 20,000 on a balance of accounts. Within a month they absconded and were adjudicated insolvents and the plaintiffs now seek to recover the amount of these bills from the minor defendant.

According to the evidence the bank were aware that the agent by whom the notes were signed was a partner in the firm of Cantham & Co. in whose favour they were made but did not

WALLIS AND MUNRO, JJ.

SANKA KRISHNA-MURTHI v. THE BANK OF BURMA.

know that the business of Sanka Ramasami & Son belonged to a minor as they omitted to inspect the power-of-attorney. It is however well settled that the signature having been made *per proc* they must be held to have had notice of the contents of the power and therefore of the fact that the business belonged to a minor and of the extent of the agent's authority under the power.

The learned Judge has found that the notes must be treated as made by the mother and guardian herself, and having regard to the recitals in the power that as mother and guardian of her son she was desirous of carrying on business under the style of Sanka Ramasami & Son, and to the power it conferred upon the agent "in her name and on her behalf in her capacity as mother and guardian to carry on the said business and sign, make, draw, accept, endorse and negotiate all cheques, receipts, letters, accounts, promissory-notes, hundis, drafts, bills of exchange, indents, invoices and delivery orders and all other papers whatsoever." I think the learned Judge was right and that the notes must be treated as purporting to be made by the mother and guardian carrying on the business of Sanka Ramasami & Son by her agent under the power.

The case for the respondent is that it was necessary and proper for the mother and guardian to carry on during the minority the ancestral business to which her own son had succeeded, and for that purpose to appoint an agent to carry it on and to give such agent power to draw bills and promissory-notes in her name, on the ground that such a drawing of bills and notes is necessary and incidental to the carrying on of a business and that the business could not be carried on without it, and they contend that the minor though not a party to notes made by his guardian is liable on them to the extent of his estate.

The learned Judge agreed with these contentions and was of opinion that the liability of the minor in these circumstances is similar to that of a minor member of joint Hindu trading family for bills drawn by the managing member. The extent and nature of this liability have recently been considered in *Raghunathji Tarachand* v. *The Bank of Bombay*(1) where it was held that the minor was liable to the extent of his share in the firm on bills or notes drawn by the managing member in the name of the firm

(1) (1910) I.L.R., 34 Bom., 72.

but in fraud of it and for purposes unconnected with it. In so deciding CHANDAVARKAR, J., applied the rule laid down by SAUSSE, C.J., in *Rámlál Thakursidás* v. *Lakhmichánd Munirám* (1) that "in carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager (or the adult members acting as managers) which are necessarily incidental to and flowing out of the carrying on of that trade . . . . The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade." It is, in my opinion, unnecessary to consider the reasoning by which the learned Judge satisfied himself that this ruling was in accordance with the sureties and their commentators because it seems to me the general principles laid down in the above passage are far too well settled to admit of question at the present day. The important point expressly decided for the first time in this case is that minors are to be bound not only on bills or notes drawn or made in the carrying on of the business but on such bills or notes drawn or given by the persons carrying on the family for purposes unconnected with the business. All that SAUSSE, C.J., says in *Rámlál Thakursidás* v. *Lakhmichánd Munirám*(1) is that "Third parties, in the ordinary course of *bonâ fide* trade dealings, should not be held bound to investigate the status of the family . . . . whilst dealing with him on the credit of the family property." This does not seem to mean more than that it is unnecessary to enquire whether there are minors or not. Similarly the remarks of PONTIFEX, J., in *Johurra Bibee* v. *Srigopal Misser* (2) are confined to "debts honestly incurred in carrying on such business." Similarly in *Sakrabhai* v. *Maganlal*(3) it was held that where an ancestral business descends to and is carried on by a widow the reversioners are liable for debts properly incurred by her in connection with the business on the ground that so far as carrying on the business is concerned her position is analogous to that of the manager of a joint Hindu family.

The question of liability on bills drawn for purposes unconnected with the business and in fraud of the family did not arise in these cases, but it seems to me that as held by the learned

(1) (1861) 1 Bom., H. C. R., appex. 51.

(2) (1876) I. L. R., 1 Calc., 470 at p. 475. (3) (1902) I. L. R., 26 Bom., 206.

WALLIS AND MUNRO, JJ.

SANKA KRISHNA-MURTHI v. THE BANK OF BURMA.

Judges in *Raghunathji Tarachand* v. *The Bank of Bombay*(1) the minor in such a case is liable to the extent of his interest in the firm, and this for the reason given by BATCHELOR, J., in his judgment that we must be guided by the analogy of the law of partnership as a joint Hindu family business is a peculiar sort of partnership. In England according to the judgment of the House of Lords in *Lovell and Christmas* v. *Beauchamp* (2) a minor may be a partner, but judgment cannot be obtained against him on a partnership debt, but the adult partner is entitled to insist that the assests should be applied in the first instance in satisfaction of the partnership debts, and if the proper steps are taken this right can be made available for the benefit of the creditors. In India section 247, Indian Contract Act, which allows a minor to be a partner and declares the share of the minor in the property of the firm to be liable for the obligations of the firm, has much the same effect, and renders section 251 so far applicable. Under section 251 each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose; and illustration (*a*) shows that where *A* and *B* are partners and *A* in the name of the firm draws a bill of which *B* has no notice and in a transaction in which he has no interest still *B* is liable on the bill. In the same way it seems to me a minor member of a joint Hindu trading family should be held liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of section 247.

These are the grounds on which BATCHELOR, J., based his judgment and I think the conclusion is not only sound but also in accordance with convenience. There will generally be minors in a joint Hindu trading family, and it is desirable that such families should be in a position to trade as freely as other firms. I am not however prepared to apply the rule to minors who are not trading in partnerships but are sole owners of the business without a separate consideration of the law affecting guardians and minors and the extent to which a minor is liable on contracts made by his guardian. In *Wághelá Rajsangi* v. *Shekh Masludin* (3) it has

(1) (1910) I. L. R., 34 Bom., 72. (2) (1894) A. C., 607, appex. 611.
(3) (1887) I. L. R., 11 Bom., 551.

been held by their Lordships of the Judicial Committee that in India a guardian has no power to bind his ward by a personal covenant. There the guardian had alienated part of the ward's land in satisfaction of a debt binding on the ward and had covenanted on behalf of himself and the ward to indemnify the creditor if the land turned out not to be rent free. Though the covenant was apparently beneficial to the minor, their Lordships held it was not binding on him. At page 561 occur the following observations which appear to show how the present case should be approached:—"Now it was candidly stated by Mr. Mayne . . . that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law—if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such power, nor do they see why it should be so in India. They conceive it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward." In *Indur Chunder Singh* v. *Radha Kishore Ghose*(1) where the guardians had taken certain lands on lease in their own names, but as was alleged for the benefit of the minor their Lordships held that neither the minor nor his estate could be made liable on the contract. On the above decisions it appears to me that neither the minor nor his estate as such can be held liable on the notes sued on. In order to see whether the holders of the notes are entitled in a properly framed suit to any recourse against the minor it is necessary in the first place to ascertain the rule of English law as embodying *primâ facie* according to their Lordship's observations the rule of justice, equity and good conscience which we are bound to apply. Further if the minor is the sole owner of the business it does not seem to make much difference whether he has acquired it by birth and survivorship as here or by inheritance or bequest as in England. In either case it seems to me what has to be considered is the interest of the minor. In England a guardian is not ordinarily entitled to carry on a business to which the ward has succeeded and in *Land* v. *Land*(2) Sir George Jessel after a search for precedents

(1) (1892) I.L.R., 19 Calc., 507 at p. 512. (2) (1874) 43 L.J. Ch., 311.

WALLIS AND MUNRO, JJ.

SANKA KRISHNA-MURTHI v. THE BANK OF BURMA.

held that the Court had no jurisdiction to allow this to be done unless in pursuance of testamentary authority or at the instance of creditors of the estate. Mr. Simpson in his book on "Infants" suggests that the rule is too strictly stated and that one precedent was overlooked. In India at any rate the rule appears to be otherwise. In *Joykisto Cowar* v. *Nittyanund Nundy*(1) it was held that a widow and natural guardian may properly carry on a family business belonging to a minor son through a manager and I am not prepared to differ from this decision which so far as I know has never been questioned and merely recognizes the usual practice. But it appears to me that even so the same rule must apply as when the legal representative, or guardian is allowed to carry on the business in England, and that the guardian or legal representative, and not the minor or beneficiary on whose behalf the business is carried on is the person personally liable on contracts entered into in the course of the business, *Labouchere* v. *Tupper*(2). Creditors of the business have therefore no right of direct recourse against the minor or his estate, but, as the guardian is entitled to indemnity for liabilities properly incurred out of the assets of the minor embarked in the business, creditors of the business, it has been held, are entitled to proceed directly against such assets. Where however the guardian has no right to indemnity against the assets in the business, as where he has acted improperly, neither have his creditors as held by Sir George Jessel in *In re Johnson*(3) which was followed in *In re Evans*(4). Applying these principles it appears to me that the plaintiff could at most be entitled to a decree against the assets embarked in the business and that the decree against the estate of the minor went too far in my view. In his judgment the learned Judge observed that it was not alleged or proved that the minor had any property not devoted to the trade, but this, it appears to me, is a matter to be ascertained in execution.

Two questions then remain. Is the guardian liable on the notes made by the agent as acting under the apparent authority conferred by the power, *Bryant Powis & Bryant* v. *Quebec Bank*(5), and is she entitled to indemnity for this liability

(1) (1878) I.L.R., 3 Calc., 738.
(2) (1857) 11 Moo. P.C., 198.
(3) (1880) 15 Ch. D., 548.
(4) (1887) 34 Ch. D., 597.
(5) (1893) A.C., 170 at p. 180.

against the minor's assets in the business? Before dealing with these questions it may be well to refer to the terms of the power and the circumstances under which it was given. No exception can be taken to the particular agent chosen. He had married the minor's sister, had been entrusted with a power of attorney by Sanka Ramasami during his liftime, and was the head of the large firm of Cantham & Co. then (June 30th) in good credit though it failed within the next two months. It was already probably in difficulties, and we find that on March 18th the agent had raised Rs. 7,600 on promissory-notes executed under the power in favour of his own firm. These sums do not find any place in Sanka Ramasami's account in the books of Cantham & Co., Exhibit V, or in Cantham & Co's. account in Sanka Ramasami's books and as the notes were retired before they fell due, it does not appear whether the use made of the power to raise funds for Cantham & Co. at a time when they were already indebted to his firm came to Ramasami's knowledge before his death in June 1908. Shortly afterwards, on June 30th, the agent procured from the widow the power now in question, Exhibit G, by which he was authorized, among other things, "to be in charge of, look after, manage, conduct and carry on under the style of Sanka Ramasami and Son the Family business of general merchant and commission agent heretofore carried on under the style of Sanka Ramasami, to enter into any contracts or agreements of any kind with any other person or persons, firm or firms, company or companies to deposit or withdraw money in or from any bank or banks, company or companies and sign, make, draw, accept, endorse or negotiate all cheques, receipts, letters, accounts, promissory-notes, hundis, drafts, bills of exchange, indents, invoices and delivery orders and all other papers whatsoever." Under this power he executed two promissory-notes for Rs. 4,100 in favour of Cantham & Co. on July 19th and for Rs. 5,000 on July 24th and discounted them with the plaintiff Bank. The substance of the transaction was that the Bank lent money to Cantham & Co. according to the common practice on two signatures its own as indorsers and that of Sanka Ramasami & Son as makers of the notes, the notes being made by the agent under the power in favour of the firm of Cantham & Co. to which he himself belonged. Now it is not at all clear that the words of the power which authorized him to enter into

WALLIS AND MUNRO, JJ.

SANKA KRISHNA-MURTHI v. THE BANK OF BURMA.

any contracts or agreements of any kind with any other person or persons, firm or firms, authorized him to make a promissory-note in favour of his own firm. And assuming there is no express restriction, it seems to me open to question whether the power authorized the agent to execute promissory-notes in favour of his own firm, and whether holders taking with notice of the fact are entitled to recover upon them. According to the American authorities, an agent is not entitled to execute negotiable paper in his principal's name for his individual purposes, and subsequent holders taking with notice that he has done so cannot recover against the principal. See Danial on "Negotiable Instruments," Section 282, citing *Stainback* v. *Read & Co.* (1). Lord Blackburn's *query* in *Jonmenjoy Coondoo* v. *Watson* (2) points the same way, but in *The Bank of Bengal* v. *Macleod* (3) their Lordships held that power to endorse included power to endorse in the agent's own favour, and the observations in *Jonmenjoy Coondoo* v. *Watson* (2) leave the question open. It may be possible to distinguish these cases, but it is unnecessary to decide the point, because in my opinion, assuming the notes to have been duly made in the exercise of the power and the guardian to be liable upon them, neither the guardian nor the holders have any right of recourse against the minor.

SANKARAN NAIR, J., decided in the plaintiff's favour mainly on the ground that it was proper for the guardian to carry on the business through an agent and to give the agent power to execute negotiable instruments and that the business could not be carried on, as he says, without drawing hundis. There is much to be said for this view, especially as a Hindu widow would not generally be competent to reserve the exercise of such a power to herself. At the same time there can be no doubt that the result of so holding must be to expose the minor's estate to a degree of risk that can only be justified on the ground of its being a lesser evil than closing the business, and here it may be observed that the risk to the minor sole owner is undoubtedly much greater than that of the minor member of a joint Hindu trading family whose interests are identical with those of the adult members having control of the business. In these circumstances, it seems clear that the guardian cannot, in any view, be justified in giving any larger powers than are

(1) (1854) 62 Amer Decn., 648. (2) (1884) 9 A.C., 561 at pp. 563, 569.
(3) (1849) 5 M.I.A., 1.

reasonably necessary. Assuming it to be necessary to give the agent power to draw bills and promissory-notes, it appears to me that it cannot be necessary and it has certainly not been shown to be necessary to give him power to draw in favour of himself or his firm, while to do so must greatly and unneccessarily increase the risk to the minor's estate. The giving of such an unrestricted power is, I think, improper, and if as the result of giving it the guardian finds herself involved in liability for the fraud of the agent, she has no right of indemnity against the assets of the minor in the business nor are her creditors entitled to claim through her. This ground is, in my opinion, sufficient for the reasons already given, to dispose of the case, and the appeal must accordingly be allowed and the suit dismissed with costs throughout.

MUNRO, J.—I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

In re KALI MUDALY AND THREE OTHERS (PRISONERS), APPELLANTS.*

1911. April 25, 26, 27.

Criminal Procedure Code Act V of 1898, s. 526, cl 8—Application for adjournment to apply for transfer, when to be made—Hearing, commencement of, in Sessions Court.

The first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused. An application for adjournment under section 526, clause 8, Criminal Procedure Code, must therefore be made before the charge is read to the accused.

Quære.—Whether a contravention of section 526, clause 8, will render the trial illegal.

APPEAL against the order of J. J. Cotton, Additional Sessions Judge of the Coimbatore Division, in Calendar Case No. 101 of 1910.

The facts necessary for the consideration of the point of law raised in this case are set out in the judgment of the Sessions Court as follows :—

The case was posted for trial before the Additional Sessions Court on the 5th of December, 1910. The Court took its seat at

* Criminal Appeal No. 46 of 1911.