I do not wish to say more, because my learned brother RAMESAM in the Order of Reference has given his reasons for believing that *Ramanathan Chettiar* v. *Muthiah Chetty*(1) is wrongly decided and can no longer be regarded as good law, and I am entirely of the same opinion. I think that this reference must be answered in the affirmative as regards both (*a*) and (*b*).

COUTTS TROTTER, C.J.

RAMESAM, J.—I agree.

RAMESAM, J.

WALLACE, J.—I agree and have nothing to add.

WALLACE, J.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Victor Murray Coutts Trotter, Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.

VASIREDDI SRIRAMULU (FIRST DEFENDANT), APPELLANT,

1924, April 9.

v.

PUTCHA LAKSHMINARAYANA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, O. XXXII, r. 4 (3)—*Consent of guardian* ad litem—*Express consent not necessary.*

Order XXXII, rule 4 (3), Civil Procedure Code, does not require that the consent of a person for his appointment as guardian *ad litem* should be express; it may be an implied one.

APPEAL preferred against the decree of B. VENKATESWAR RAO, Second Additional Subordinate Judge of Guntūr, in Original Suit No. 72 of 1919.

The facts are given in the Order of Reference by PHILLIPS, J.

The Subordinate Judge gave a decree for the plaintiff holding on the preliminary issue that there was no express or implied consent of the guardian to act as

(1) (1920) I.L.R., 43 Mad., 429.

* Appeal No. 101 of 1921.

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guardian-ad litem in the previous suit and that the decree against plaintiff was therefore a nullity.

This Appeal coming on for hearing on Friday, the 30th November, and Monday, the 3rd December 1923, and the case having stood over for consideration the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—The plaintiff brings this suit for a declaration that the decree obtained against him by the first defendant in O.S. No. 72 of 1916 in the Temporary Sub-Court, Guntūr, is not valid and binding on him. This decree was passed against the plaintiff when he was a minor, and he was represented in that suit by his natural father as guardian. It has in many cases been held that unless a guardian *ad litem* consents to his appointment as such, the appointment is invalid. This is based on the assumption that the provision of Order XXXII, rule 4 (3), that "no person shall without his consent be appointed guardian for the suit" is mandatory. In many of these decisions in referring to the consent of the guardian, the words "express consent" have been used, and it is argued that the consent of the guardian must be "express" and cannot be implied; but although this word "express" has been repeatedly used, as in *Narendra Chandra Mandal* v. *Jogendra Narayan Roy*(1) and *Mohan Krishna Dar* v. *Har Prasad*(2), the question as to whether the consent should be express or implied was not under consideration, and certainly the wording of clause (3) does not contain the word "express." As it is stated "that no person shall without his consent be appointed guardian" it appears to me clear that the appointment may be made when the person does consent; and unless it is otherwise

(1) (1914) 19 C.W.N., 537. (2) (1917) 40 I.C., 2.

provided a consent may always be express or implied, and consequently there appears to be no provision in rule 4 (3) that the consent must be express. In fact, in *Mallayya* v. *Punnamma*(1), it was held that the consent might be implied. It was also held in *Chhattar Singh* v. *Tej Singh*(2) and *Thakur Tajeswar Dutt* v. *Lakhan Prasad Singh*(3), that the consent may be implied, in fact, in the latter case it was held that where the certificated guardian, the mother of the minor, was served with notice that it was proposed to appoint her the guardian *ad litem* of her son and no objection was taken by the mother, the Court might properly assume that the mother had no objection to the proposed appointment, and that she in fact consented thereto. Taking it, therefore, that an implied consent is sufficient we have to decide whether in the present case there was such a consent. The plaintiff was an adopted son and his adoptive mother was acting as his guardian; but the plaintiff, in O.S. No. 72 of 1916, put in a petition for the appointment of the natural father as guardian on the ground that the natural father had filed a guardian petition in the District Court stating that the adoptive mother was not acting properly on behalf of the minor and requesting that she might be removed from guardianship. Notice was accordingly taken out to the natural father, and after two attempts, it was served personally upon him. The notice reads as follows:—

"The plaintiff has filed a petition stating that you have no interest adverse to that of the said minor and requesting that you may be appointed guardian for conducting the suit proceedings; so, you should appear either in person or through a vakil and inform if you have any objection to being appointed guardian."

(1) (1924) I.L.R., 47 Mad., 476. (2) (1921) I.L.R., 43 All., 104.
(3) (1923) I.L.R., 2 Patna, 296.

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The return on this notice was as follows:—

"The defendant mentioned in this order being a minor his natural father and guardian has affixed his signature and received a copy of the notice in Guntūr village on 7th September 1916";

and there is another endorsement signed by the natural father, namely,

"As this order was shown to me, the guardian-defendant mentioned in this order in Guntūr village on 7th September 1916 and a copy of the notice to minor sent with it was given to me, I have received it."

The proposed guardian did not appear in Court and allowed the proceedings to be conducted *ex parte*. Considering the fact that this natural father had applied to the District Court to be appointed guardian of the minor and for the removal of his adoptive mother from her guardianship it is clear that he was acting in the interests of his natural son; and when he received this notice calling upon him to take any objection that he had to his appointment as guardian and he failed to appear in Court, it may be taken that he did consent to such appointment, but had no case to present to the Court. I would from these circumstances infer that the father consented to his appointment as guardian and consequently the decree obtained against the minor, who was properly represented in the suit, is *prima facie* binding on him.

As my learned brother is not prepared to hold that the guardian has been appointed with his consent, it becomes necessary to consider the further question whether the decree obtained against the minor is invalid because he was not properly represented in the proceedings. It has been held in many cases that, where a guardian has not consented to his appointment as such, the minor is not properly represented and the decree is a nullity so far as he is concerned. This view has been

consistently held in Calcutta—vide *Dinabandhu* v. *Mashuda*(1), *Annada Prasad* v. *Upendra Nath Dey*(2), *Umapati* v. *Masietulla*(3), *Baneswar Pramanik* v. *Tarapada Bhattacharjee*(4) and *Narendra Chandra Mandal* v. *Jogendra Narayan Roy*(5). The same view is taken in the Allahabad Court in *Hanuman Prasad* v. *Muhammad Ishaq*(6), in the Patna Court in *Mohan Krishna Dar* v. *Har Prasad*(7), and *Shaikh Sajjad Husain* v. *Sakal Rai*(8), and in the Punjab Court in *Hira Singh* v. *Ghulam Qadir*(9). The same view has been taken in this Court in an unreported case, L.P.A. No. 3 of 1913, and also in *Shroof Sahib* v. *Raghunatha Sivaji*(10) and *Eda Punnayya* v. *Jangalu Rama Kotayya*(11). A different view was, however, taken in *Oodayanasamy Tevar* v. *Alagappa Chetty*(12), and in *Kuppuswami Ayyangar* v. *Kamalammal*(13). The question has been considered by the Privy Council. But I do not consider that the two cases cited for reference, viz., *Rashid-un-nisa* v. *Muhammad Ismail Khan*(14) and *Partab Singh* v. *Bhabuti Singh*(15) are applicable to the present case. In the former case a married woman was appointed guardian and in law such an appointment could not be recognized and consequently the minor was deemed to be unrepresented. In the second case it was found that the guardian had been appointed fraudulently and on that ground it was held that there was no proper representation.

The leading case on the point is the decision of the Privy Council in *Walian* v. *Banke Behari Pershad*

(1) (1912) 16 C.L.J., 318.
(2) (1922) 65 I.C., 18.
(3) (1923) 37 C.L.J., 496.
(4) (1917) 41 I.C., 872.
(5) (1914) 19 C.W.N., 537.
(6) (1906) I.L.R., 28 All., 137.
(7) (1917) 40 I.C., 2.
(8) (1923) I.L.R., 2 Pat., 7.
(9) (1918) 48 I.C., 399.
(10) (1915) 29 I.C., 579.
(11) (1920) M.W.N., 1.
(12) (1904) 14 M.L.J., 342.
(13) (1920) I.L.R., 43 Mad., 842.
(14) (1909) I.L.R., 31 All., 572 (P.C.).
(15) (1913) I.L.R., 35 All., 487 (P.C.).

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Singh(1), where it was held that, although no formal order appointing the mother as guardian had been drawn up, the minors were effectively represented in the suit. It appears that, in that case, the mother was described as guardian in the plaint and also in the decree but that the record contained no formal order of appointment. The mother did not appear in Court and an *ex parte* decree was passed. This would seem to be conclusive on the point, but this case has been distinguished in the Calcutta Court on the ground that in that case the mother actually represented the minor in the proceedings and therefore it was a proper representation. This distinction appears to have been drawn owing to an erroneous view of the facts and I would point out that at least in one case *Annada Prasad* v. *Upendra Nath Dey*(2), MUKERJEE, J., remarked that in *Walian* v. *Banke Behari Pershad Singh*(1), the mother who had been proposed as guardian for the minor son "had entered appearance and acted throughout the trial of the suit." This does not appear to be a correct statement of the facts of that case, and a similar mistake has been made in *Hanuman Prasad* v. *Muhammad Ishaq*(3), where it is remarked that the mother in *Banke Behari's* case(1) did appear in Court and the same mistake appears to underlie several of the other decisions. This has been pointed out by DAS, J., in a very recent case in the Patna High Court reported in *Pande Satdeo Narain* v. *Ramayan Tewari*(4), where, after a very carefully reasoned judgment he comes to the conclusion that where, on the face of the record, a person qualified to act as the guardian appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of

(1) (1903) I.L.R., 30 Calc., 1021 (P.C.). (2) (1922) 65 I.C., 18.
(3) (1906) I.L.R., 28 All., 137. (4) (1923) I.L.R., 2 Patna, 335.

the decree to examine the evidence in order to see whether notices under Order XXXII, rule 3 (4), were in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case; but, where the record on the face of it shows that the minor was not represented by a guardian for the suit or was represented by a guardian disqualified under the express provisions of the statute from acting as guardian, the position is the same as if the minor was not a party to the suit. In this case the lower Court, acting on the decisions in *Eda Punnayya* v. *Jangalu Rama Kotayya*(1), *Shroof Sahib* v. *Raghunatha Sivaji*(2), and *Baneswar Pramanik* v. *Tarapada Bhattacharjee*(3), has held that, inasmuch as the guardian's consent was not obtained, the decree against the minor was a nullity, and consequently has not determined the further issue as to whether the guardian in that suit was guilty of gross and culpable negligence.

As I have pointed out, there is abundant authority to support this finding, but, inasmuch as there is authority to the contrary and I personally respectfully agree with DAS, J., in his judgment and consider that a number of decisions to the contrary are based on a misinterpretation of *Walian* v. *Banke Behari Pershad Singh*(4), I think it is advisable that the question should be considered by a Full Bench of this Court. The whole question and all the authorities have been most elaborately discussed in DAS, J.'s judgment in *Pande Satdeo Narain* v. *Ramayan Tewari*(5), and therefore it seems to be unnecessary in a mere reference to traverse

(1) (1920) M.W.N., 1. (2) (1915) 29 I.C., 579.
(3) (1917) 41 I.C., 872.
(4) (1903) I.L.R., 30 Calc., 1021 (P.C.). (5) (1923) I.L.R., 2 Patna, 385.

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the same ground again. I would only say that I respectfully agree with the conclusions arrived at by DAS, J., and I think considerable weight must be attached to the judgment, for in it he has resiled from the earlier view taken by him in *Shaikh Sajjad Husain* v. *Sakal Rai*(1). I would therefore refer the following questions for the opinion of the Full Bench :—

1. Whether, where a person has been appointed guardian *ad litem* for a minor but his consent to such appointment has not been obtained, the decree is a nullity or whether it is merely voidable on good ground being shown therefor ?
2. Whether the consent of a guardian to his appointment as such must be express or may be implied ?

VENKATASUBBA RAO, J.—Two questions arise in this Appeal. First, whether the appointment of a guardian *ad litem* may be validly made without his express consent. Secondly, whether a decree passed without a guardian *ad litem* on the record who has consented to act is a nullity or is merely voidable.

In regard to the first question, the terms of Order XXXII, rule 4, Code of Civil Procedure, must be considered. Clause (3) says :

"No person shall without his consent be appointed guardian for the suit."

Clause (4) is to the effect that where there is no other person fit and willing to act as guardian, the Court may appoint any of its officers to be such guardian.

The contention that the words "without his consent" are equivalent to "against his will" seems to me utterly unsound, and I reject it without further discussion.

Then it is said that consent need not be express but may be implied. I am not prepared to accept this view.

(1) (1923) I.L.R., 2 Patna, 7.

In considering whether a person is willing to act under clause (4), is the Court to act merely upon inference from circumstances? or again is the Court to take evidence regarding the state of mind of the proposed guardian and is the duty cast upon the Court of finding as a fact that the guardian is willing to act although he has not expressed his willingness? In my opinion, it was not the intention of the legislature that the Court should in each individual case, upon a careful scrutiny of facts and circumstances, come to the conclusion that the proposed guardian is willing to act. The usefulness of the rule contained in clause (3) will be greatly diminished by adopting any such construction. The question whether the guardian has consented or not will generally not arise when the guardian subsequently appears and does any act on behalf of the minor. Therefore, whether consent could be implied, has very often to be determined with reference to the facts existing at or before the appointment. I find it difficult to imagine the nature of the evidence that can be given either to support or repel the inference that there was consent. Is the fate of a case involving large issues to depend upon the determination of a question of fact on evidence necessarily interested and very often perjured, adduced as is inevitable in a large majority of cases, after a long lapse of time from the date of the appointment? The reason of the thing and the language of the section alike demand that consent to be valid must be express. There is abundant authority for this position and it is sufficient to refer to the judgment of MUKERJEE and PANTON, JJ., in *Annada Prasad* v. *Upendra Nath Dey*(1). The learned Judges refused to give effect to the rule of implied consent even when the guardian

(1) (1922) 65 I.C., 18.

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proposed happened to be a certificated guardian on whom there was a duty cast in law to safeguard the interests of the minor.

I shall now deal with the second question. When there is no guardian *ad litem* on the record who has consented to act, is the decree obtained null and void or is it voidable on proof of prejudice having accrued to the minor defendant? The preponderance of authority is, in my view, in favour of the position that the decree is a nullity. In *Pande Satdeo Narain* v. *Ramayan Tewari*(1), DAS, J., in a very long judgment, attempts to show that the balance of authority is the other way. But with great respect I am unable to agree with him. I shall first refer to *Khiarajmal* v. *Daim*(2). The facts are complicated and are very clearly stated by the Lords of the Judicial Committee and I shall not recapitulate them. The facts, however, so far as they are relevant to the question under consideration, are extremely simple. One Naurez died leaving a widow and four children including a son Amirbaksh. Suit No. 372 of 1879 was instituted *inter alia* against Amirbaksh described as a "minor aged about 14 years, legal representative of Naurez, deceased, by his guardian, his uncle Alahnavaz." Again Suit No. 160 of 1878 was also filed against "Naurez, deceased, by his legal representative, Amirbaksh, by his guardian, his uncle Alahnavaz." Two questions arose. Firstly, whether the estate of Naurez was sufficiently represented when only one out of the five heirs was impleaded in the suit. Secondly, what was the effect of the decrees passed so far as the share of Amirbaksh was concerned?

The full import of the Privy Council judgment will become evident if, while reading it, these two points are kept distinctly in view.

(1) (1923) I.L.R., 2 Patna, 335. (2) (1905) I.L.R., 32 Calc., 296 (P.C.),

"Amirbaksh was of course one of the heirs of Naurez but in no other sense his legal representative. It is not pretended that Alahnavaz was in any legal sense or in fact his guardian or was ever appointed his guardian *ad litem*. It is, however, contended by the appellants that Naurez's heirs are bound by the proceedings in both the suits and that his share of the property whatever it was, was effectually sold in the suit No. 160 of 1878 *or at any rate that the share of Amirbaksh himself passed by the sale*" (see page 313).

Then their Lordships overrule the contention that the Naurez's estate was sufficiently represented by one of his heirs Amirbaksh; and in this connexion they distinguish *Malkarjun* v. *Narhari*(1) and they equally clearly negative the second contention that Amirbaksh was duly represented on the record by his guardian Alahnavaz.

Now, let me reproduce another passage from the judgment:

"In suits Nos. 372 of 1879 and 160 of 1878, the Judge seems to have accepted without question the statement on the record that Amirbaksh was the legal representative of Naurez and Alahnavaz was his guardian and never applied his mind to the matter . . . Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits and the sale of his property was therefore without jurisdiction and null and void. *Nor can they hold that the share of Amirbaksh himself in his estate was bound.*"

It is obvious that their Lordships were dealing with two distinct and independent points and I find it impossible to agree with Mr. Justice DAS that the Judicial Committee was not dealing with the second question. The learned Judge has been at great pains to analyse the facts, but with the greatest respect it appears to me that he has overlooked a very essential point in the judgment of the Privy Council.

It may be useful to refer to another passage in the judgment of the Judicial Committee:

(1) (1901) I.L.R., 25 Bom., 337 (P.C.).

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"Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings *or properly represented on the record*. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside" (page 312).

I shall next deal with another case considered by DAS, J., *Rashid-un-nisa* v. *Muhammad Ismail Khan*(1). In some proceedings the minor in that case was represented by her sister who acted as guardian *ad litem* and in certain other proceedings by an uncle by name Maula Dad. Their Lordships held that so far as the sister was concerned, she was a married woman and therefore disqualified from being appointed guardian and in regard to Maula Dad, they held that his interest was obviously adverse to that of the minor and he was therefore disqualified. They decided that the minor was not a party to the proceedings and the execution sales were null and void.

I shall now proceed to consider the third case referred to by DAS, J., *Partab Singh* v. *Bhabuti Singh*(2). In the judgment of the Privy Council, reference is made to two suits, but for the present purpose it is sufficient to notice the facts connected with one of them, that is, the suit brought by Bhabuti Singh on 26th June 1899. The minors Pertab and Abharan Singh were added as defendants to that suit. They were described as being under the guardianship of Hari Pershad. No order appointing Hari Pershad as a guardian for the minors was applied for or was made. The result was that the minors were not in law represented in the suit in question. Their Lordships observe:

(1) (1909) I.L.R., 31 All., 572 (P.C.). (2) (1913) I.L.R., 35 All., 487 (P.C.).

"As Hari Pershad had not been appointed guardian for the suit for the minors Pertab Singh and Abharan Singh, they were in law unrepresented and the decree will not bind them."

There was another ground to support the same conclusion, but it is not at present material.

What do these three cases establish? In *Khiarajmal* v. *Daim*(1) the name of Alahnavaz appeared on the record and he was described as the guardian of Amirbaksh, the minor. Similarly in *Partab Singh* v. *Bhabuti Singh*(2) Hari Pershad was described on the record as the guardian of the minors, Pertab and Abharan. In neither case was the appointment of the guardian *ad litem* made by the Court. In *Rashid-un-nisa* v. *Muhammad Ismail Khan*(3) the sister and the uncle were appointed guardians *ad litem* but they were incompetent to act. In all the three cases, the Judicial Committee held that there was no representation of the minor at all and that the decrees or sales as the case might be were null and void. On the principle underlying these decisions, a decree obtained against a minor for whom a guardian was appointed without his consent would be equally ineffectual and be likewise a nullity.

I am glad to find that this is the law, for otherwise the interests of minors will be gravely imperilled. Hundreds of persons may be competent to act as guardians of a minor defendant, but if any of them is appointed without his consent merely because the plaintiff in the suit chooses to propose his name, does it follow that the man so appointed is either under a legal or moral duty to safeguard the minor's interests? The proposed guardian not having consented, he cannot be made liable for any injury sustained by the minor, nor is he likely to be under any sense of personal responsibility in the matter. Mr. Justice DAS distinguishes the

(1) (1905) I.L.R., 32 Calc., 296 (P.C.). (2) (1913) I.L.R., 35 All., 487 (P.C.).
(3) (1909) I.L.R., 31 All., 572 (P.C.).

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three decisions to which I have referred and finds support for his conclusion in *Walian* v. *Banke Behari Pershad Singh*(1). I fail to see how this case is an authority for his position. The Subordinate Judge held that although no formal order appointing the mother to be the guardian *ad litem* of the infants has been drawn up, the Court must be deemed to have sanctioned the appointment and that the want of a formal order was at most an irregularity (see page 1030). The High Court disagreeing with the Subordinate Judge considered that there was nothing from which they could presume that the Court had sanctioned expressly or impliedly the appointment of the minors' mother as their guardian (see page 1031). The Judicial Committee observes :

"Their Lordships are unable to concur in the conclusion at which the learned Judges arrived. The present plaintiffs were substantially sued in the former suit, and the alleged fraud has been negatived. It appears to their Lordships that they (the present plaintiffs) were effectively represented in that suit by their mother, and with the sanction of the Court."

They then proceed to say that one of the defects which can be pointed out is that no formal order appointing the mother of the plaintiffs is shown to have been drawn up. In the result, they hold that the defects of procedure alleged were at most irregularities which could not invalidate the proceedings in the absence of proof of prejudice having accrued to the infants. There can be no doubt about the facts. *There was an appointment by the Court of a guardian* ad litem. *The order of the appointment was not, however, shown to have been formally drawn up.* This was considered in the nature of an irregularity and there is nothing in the judgment to warrant the view that if there was no representation, the decree would not have been treated as void.

(1) (1903) I.L.R., 30 Calc., 1021 (P.C.).

Mr. Justice DAS is at pains to establish that the mother did not in fact act for the minors at any stage of the suit and that some learned Judges in India were under a misapprehension on this point. It seems to me that this question whether the mother did or did not in fact act for the minors is of no importance, because the judgment of the Privy Council is based on two facts, viz., (1) that there was a proper appointment and (2) that there was no formal order of appointment: and as the defect was held to be a mere irregularity the Judicial Committee proceeded to consider whether any prejudice resulted to the infants.

I am therefore of the opinion that a decree passed against a minor defendant where there is no consent on the part of the guardian *ad litem* to act as such is null and void, and it is unnecessary to set it aside in separate proceedings.

Coming to the facts of the case on hand, even if consent can in law be implied, I am of the opinion that the fact that over the signature of the proposed guardian *ad litem*, the endorsement appears containing the words "guardian—defendant" proves nothing, for it only means that the description in the endorsement was made to conform to the description in the notice, and it is not uncommon for persons to merely reproduce the words constituting the description when they are making an endorsement of this nature, without accepting the truth of the description. I agree to the questions, as stated by my learned brother, being referred for the decision of a Full Bench.

ON THIS REFERENCE

T. Ramachandra Rao for respondent.—The consent must be express; otherwise all sorts of difficulties will arise, several years after. Order XXXII, rule 4 (3), is mandatory. He relied on *Annada Prasad* v. *Upendra*

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Nath Dey(1), *Mohan Krishna Dar* v. *Har Prasad*(2), *Shaikh Sajjad Husain* v. *Sakal Rai*(3), *Narendra Chandra Mandal* v. *Jogendra Narayan Roy*(4), *Shroof Sahib* v. *Raghunatha Sivaji*(5).

A. Krishnaswami Ayyar, following, argued that the rule was new and that there must be some overt act showing previous consent, though it need not be express; *Gilbey* v. *Rush*(6). Mere silence is not consent.

S. Varada Achariyar (with *K. Rama Rao*) for appellant was not called upon.

OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—In this case two questions have been referred to us by the Divisional Bench; the first is, "whether, where a person has been appointed guardian *ad litem* for a minor but his consent to such appointment has not been obtained, the decree is a nullity, or whether it is merely voidable on good ground being shown therefor?" The second question is, "whether the consent of a guardian to his appointment as such must be express or may be implied?"

In the view we take of this matter, the answer we propose to the second question must end in a reference back to the Divisional Bench which may render the first of these questions purely academic and one which need not arise for the determination of the suit. The words of the statute are contained in Order XXXII, rule 4, clause (3):—"No person shall without his consent be appointed guardian for the suit," and we are asked to say whether that consent can be implied or whether it must be express. There are cases that have been cited to us in which the learned Judges speak of express consent, but I do not think that before this reference arose, the

(1) (1922) 65 I.C., 18.
(2) (1917) 40 I.C., 2 at 11.
(3) (1923) I.L.R., 2 Pat., 7.
(4) (1914) 19 C.W.N., 537.
(5) (1915) 29 I.C., 579.
(6) [1906] 1 Ch., 11 at 22.

learned Judges who used the language which has been cited were really deliberately applying their minds to the question as to whether consent must under the statute be express. The statute does not contain the word "express," and I fail to see how Courts have a right to put into the statute a word which is not there. Consent is a question of fact. A person may have consented and there may be no direct evidence of it. The evidence may be inferential, indirect and circumstantial and, as my brother WALLACE put it, it is purely a question of evidence. We are unaware of any rule of evidence which says that this simple question of fact—aye or nay, did this person consent to act—is to be decided by any different laws of evidence from those which guide Courts, in arriving at the determination of all questions of fact. Is the evidence before the Court sufficient to enable it to say with confidence, "we hold here on the evidence that there was consent by this man that he would act as guardian"? We therefore think that the case must go back with the expression of our opinion that the answer to the second question referred to us is that the consent need not be express. It is quite true that the two learned Judges who formed the Divisional Bench gave an indication of what their finding would be on the question of fact; but as they both approached it under the shadow of this supposed rule of law, it seems to us that it is better that they should reconsider the question under our direction and come to an express finding on the question as to whether there was a consent to be inferred from the evidence available to them or not. That is a matter for them and not for us.

RAMESAM, J.—I agree. RAMESAM, J.

WALLACE, J.—I agree and have nothing to add. WALLACE, J.

N.R.