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and that the enquiry in such cases should be directed to the question as to which party was in possession of the subject of dispute before any proceedings in the Court had been taken in the matter.

Then a further objection, which we consider to be fatal to the order of the Joint Magistrate, is this: That whereas the subject of dispute was the 105 bighas which the Joint Magistrate has found to be in the possession of neither party, the order he has made puts the second party into the possession of the *khal* or cutting regarding which there was no dispute, and as to the possession of which there was no question before him. The effect of this order is virtually to give to the second party possession of the whole of the *julkur*, so far as the fish may be drawn with the water into the *khal*. On all these grounds we think that the order of the Joint Magistrate was bad in law, and must be set aside.

We, accordingly, make the rule absolute, and set aside the Joint Magistrate's order.

T. A. P. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

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February 22.

SAHAI NAND (PLAINTIFF) *v.* MUNGNIRAM MARWARI AND OTHERS (DEFENDANTS).*

Act XL of 1858, s. 3—*Certificate of guardianship—Period from which authority of guardian dates—Court Fees Act (VII of* 1870), s. 6.

Section 6 of the Court Fees Act (VII of 1870), which says that a certificate under Act XL of 1858 (among other documents) "shall not be filed exhibited or recorded in any Court of justice, or received or furnished by any public officer," unless a certain fee be paid, means that such certificate cannot come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of stamp duty.

Independently of this section, however, the preparation of such a certificate after the order granting it, is not a purely ministerial act: it must then be applied for by the grantee: and it is from the date of the certificate being actually taken out, and not from the date of the order granting

* Appeal from Original Decree No. 152 of 1884, against the decree of Baboo Dwarka Nath Mitter, Rai Bahadur, Second Subordinate Judge of Bhagulpore, dated the 31st of March 1884.

it, that a guardian of the person and property of a minor is to be considered as appointed under Act XL of 1858.

Where, therefore, on a petition for such a certificate by *J*, an order was made that the "application be allowed," and in a suit on certain bonds in which suit the minor in respect of whose person and property the petition for a certificate was made, was a defendant, he was represented by *J*, by whom no certificate had been actually taken out; *Held*, in a suit by the minor to set aside the decree as not binding on him, that without the certificate *J* had no authority to appear on behalf of the minor, and the latter not having been properly represented in the suit brought against him was entitled to have the decree set aside.

Stephen v. *Stephen* (1) followed; *Chunee Mal Johury* v. *Brojo Nath Roy Chowdhry* (2) dissented from.

THE facts of this case were as follows:—

The plaintiff-appellant is the Mohunt of Muth Bela. The defendant-respondent, Mungniram Marwari, had lent two sums of Rs. 4,000 and Rs. 500 respectively to Hari Pershad Nand, the plaintiff's predecessor in the Mohuntship, upon the security of two mortgage bonds executed by Hari Pershad, hypothecating certain properties belonging to the Muth. The lower Court found that these moneys were lent to Hari Pershad Nand personally, and had no relation whatever to, and were not lent for any purpose connected with, the Muth. Hari Pershad died on the 29th of September 1875. After his death one Jit Lall applied by petition to the Court, under the provisions of Act XL of 1858, to be appointed guardian of the person and property of the plaintiff who was then a minor. In that petition the applicant stated that the plaintiff in this suit was about thirteen years of age, that he had been appointed to the Mohuntship of Muth Bela, and that the petitioner was his Chucha Guru, and as such had been in possession of the Muth and of the properties appertaining thereto; and he asked for a certificate appointing him guardian of the minor under Act XL of 1858. That petition was heard by the Judge, Mr. Lowis, and the operative part of his order on it was that the "application be allowed." Though this order was made, no certificate was, as a matter of fact, ever taken out. After this order had been made the respondent brought

(1) I. L. R., 8 Calc., 714: S. C. on Appeal I. L. R., 9 Calc., 901.
(2) I. L. R., 8 Calc., 967.

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a suit against the appellant on his mortgage bonds. The appellant was described in the plaint as Mohunt Pershad Nand, minor disciple and heir of Mohunt Hari Pershad Nand deceased *under the guardianship* of Jit Lall Nand." The suit was heard *ex-parte*, and a decree was given for the plaintiff.

On 9th May 1877 the mortgaged properties were put up for sale, and the respondent himself purchased one of them, *viz.*, 16 annas settled lakhiraj of mouzah Bela, Sheottur pergunnah Bisthazari and entered into possession thereof.

The plaintiff brought this suit for a declaration that the decree made in the respondents' suit against him was not binding upon him, and for possession of mouzah Bela and for mesne profits.

The only ground of his claim material to this report was that he was not represented in the suit, that as no certificate had been taken out by Jit Lall, he Jit Lall, even if he had appeared to defend the suit, had no authority to do so.

The Subordinate Judge framed certain issues, of which the only material one, *viz.*, the fourth issue, "was Jit Lall, the duly constituted guardian of the plaintiff, who should have represented him," was decided by him in the affirmative. Against that decision this appeal was preferred.

The arguments and cases cited sufficiently appear in the judgment.

Mr. *Woodroffe*, Mr. *C. Gregory*, Baboo *Tarack Nath Sen*, Baboo *Rashbehari Ghose* and Baboo *Jogendra Chandra Ghose* for the appellant.

Mr. *Evans*, Mr. *O. C. Mullick*, and Baboo *Dwarka Nath Chakrabati* for the respondents.

The judgment of the Court (TOTTENHAM and NORRIS, JJ.) after stating the facts proceeded as follows:—

The Subordinate Judge appears to have based his judgment upon the case of *Chunee Mal Johury* v. *Brojo Nath Roy Chowdhry* (1), where it was held that the making of the order under the provisions of Act XL of 1858, and not the subsequent taking out of the certificate is that by which a guardian is

(1) I. L. R., 8. Calc., 967.

appointed of the person and property of a minor within the meaning of s. 3 of the Indian Majority Act. With great respect to the Judges who decided that case, we are unable to agree with them. *Stephen* v. *Stephen* (1) is an authority the other way; and though on appeal it was found that the learned Judge, Wilson, J., who had decided the case had mistaken the facts, not only was no doubt thrown by the Court of Appeal on his view of the law, but Garth, C.J., says, "I think until the certificate has been actually issued, the estate of the minor does not vest in the person who obtains the certificate,"—see *Stephen* v. *Stephen* (2). Mr. Evans for the respondent contended that the order directing the certificate to be granted operated as a grant of the certificate, and clothed Jit Lall with as much authority as if he had actually taken out the certificate. He contended that after the order was made nothing remained to be done but a purely ministerial act by the officer of the Court. As to the effect of the order he cited *Ex parte Hookey, in re Risca Coal and Iron Company* (3), and as to the drawing up of the certificate being purely a ministerial act, he cited *Koylosa Jonardan* v. *Ramasami Ayyan* (4), and *Sithal Jonardan* v. *Sithajirao Puttajirao* (5). The case of *Ex parte Hookey*, Mr. Evans himself admitted was not entirely sufficient for his purpose, that it only bridged over a portion of his difficulty. That case decided that when an order had been given orally in Court by a Judge upon a certain date, and had not been drawn up until some time afterwards, time for the purpose of limitation must be considered to run from the date on which the order was delivered orally in Court. Independently of the provisions of s. 6 of the Court Fees Act, we do not think that the preparation of the certificate is a purely ministerial act; we think that after an order is made for its being granted, the grantee must apply for it. But the section referred to seems to us to put the point beyond all doubt. It says: "Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the *first* or *second* schedule to this Act annexed shall be filed, exhibit-

(1) I. L. R., 8 Calc., 714.
(2) I. L. R., 9 Calc., 901.
(3) 4 DeG. F. and J., 456.
(4) I. L. R., 4 Mad., 172.
(5) I. L. R., 6 Bom., 587.

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ed or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." A certificate under Act XL of 1858 is one of the documents mentioned in the second schedule of the Court Fees Act. When the section says that such a document shall not be filed, exhibited or recorded in any Court of Justice, or received or furnished by any public officer, it means that a certificate cannot actually come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of stamp duty. We are of opinion that the certificate under Act XL of 1858 was the very foundation of Jit Lall's title. Without it he had no authority to appear in the proceedings in the suit brought by Mungniram Marwari against the present plaintiff.

On this ground, we think that the judgment of the Subordinate Judge must be set aside, and this appeal allowed with costs.

The decree will be a decree for possession, and the Court below will be directed to enquire as to what mesne profits, if any, the appellant is entitled to under s. 212, and as to what mesne profits, if any, he is entitled to under s. 211 of the Civil Procedure Code.

J. V. W. *Appeal allowed.*

Before Mr. Justice Field and Mr. Justice Macpherson.

1886 *February* 5.

DEBENDRA KUMAR MANDEL (ONE OF THE DEFENDANTS) *v.* RUP LALL DASS AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, 1882, ss. 268, 274—*Attachment and sale of Mortgage bond—Lien of purchaser on mortgaged property after attachment under s.* 268—*Presumption of Payment of Bond.*

In execution of a decree obtained by them against *J* and *M* the plaintiffs attached a decree obtained by *J* and *M* against *D*, and on the allegation that *J* and *M*, in order to avoid the consequences of this attachment, executed a *benami* conveyance of their interest under the attached decree to *B* and *P*, and afterwards with the same object took in adjustment and satis-

* Appeal from Original Decree No. 235 of 1884, against the decree of Baboo Beni Madhub Mitter, Rai Bahadur, Subordinate Judge of Backergunge, dated the 6th June of 1884.