APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

A. C. BOEVEY, TA'LUKDA'RI SETTLEMENT OFFICER (APPLICANT).

1880
April 28.

The Minors Act (XX of 1864*), Section* 11*—Construction—"May"—"Shall."*

The provision in section 11 of the Minors Act (XX of 1864), that when the estate of a minor consists of land the Court "may" direct the Collector to take charge of the estate, is not obligatory.

THIS was an appeal from an order made by H. M. Birdwood, Judge of the district of Surat. Mr. Crawley-Boevey, Tálukdári Settlement Officer in Gujarát and Administrator of the property of Zulficar Ali(a minor) and guardian of his person, applied to the Court of the District Judge to have Mr. Lely appointed to succeed him as administrator and guardian, being himself about to leave India on furlough and Mr. Lely having been appointed to act for him as Tálukdári Settlement Officer. The District Judge was of opinion that the appointment of Mr. Lely would not be legal, and that as the minor's estate consisted partly of land, the Collector of the district, in which the larger portion of the land was situated, ought to be directed to take charge of the minor's estate under section 11 of Act XX of 1864. The following is an extract from his judgment:—

"In my opinion, the provisions of section 11 of the Minors Act are not permissive, but imperative. The word 'may' in the section must, I think, be read as equivalent to 'shall', on the principle that, when occasion arises for the exercise of any power conferred on a Court by any law, the Court is bound to act in the manner contemplated by the law. Sections 9 and 11 of the Act are parallel sections, and are both subsidiary to section 8. They might be read as two clauses of section 8. Neither can be put in force, except under the circumstances contemplated in section 8. If a person claims under a will, or deed, or other instrument in writing, and establishes his title, or if there is a near relative willing and fit to be entrusted with the charge of the property or person of the minor, then no appointment can be made by the Court either under section 9 or section 11. But if no title under a will has been established, and if there be no duly qualified relative

* Appeal No. 3 of 1880 under Act XX of 1864.

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whom the Court can appoint, then, if the Court thinks it necessary for the interest of the minor to make provision for the charge of his property or person, the Court is bound to proceed in the manner provided in the sections which follow section 8. The language of section 8 is: 'The Court shall proceed to make such provisions in the manner hereinafter provided';—that is, the Court must make some appointment. The only question is, under what section must it act? The answer, so far as the charge of property is concerned, depends on the nature of the property for which provision is to be made. If the property consists of (1) moveable property or of houses, gardens, or the like, the appointment of administrator must be under section 9; but if it consists (2), in whole or part, of land or any interest in land, then section 11 must be applied. It is true that in section 9 the words used are 'shall grant', and in section 11 they are 'may direct'. But these latter words are not, I think, to be held as giving the Court any discretion. They are enabling words. The principle I have above referred to, is laid down in the case quoted in the note to section 138 of Mr. Nelson's Code of Civil Procedure, and is quoted there in these words: 'Where a statute confers an authority to do a judicial act in a certain case, it is imperative on those authorized to exercise the authority when the case arises'. Thus the Calcutta High Court held, in a Full Bench case reported in 1 C. W. R., 177, that, on a proper application under section 138, a Court was bound to send for the record of a case, though the word used in that section is 'may'. On occasion arising for a Court to make an appointment of an officer to take charge of an estate consisting of land, it does not appear what appointment could be made if section 11 (which is clearly applicable to the case) were not applied. No other section of the law would justify an appointment in such a case."

Nánábhái Haridás (Government Pleader) for the appellant.—The provisions of section 11 of the Minors Act are permissive, not imperative. The Legislature has in some of the sections of the Act used the word "may" and in others "shall". The former are permissive, the latter imperative. Section 11 belongs to the former class. There is no evidence to show that the bulk of the minor's property is in the Broach Collectorate. As to the question of

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fitness and convenience, it is admitted that the successor of the applicant in the office of tálukdári settlement officer is the proper person to be appointed as administrator and guardian of the minor. The order of the District Judge is, therefore, both illegal and inconvenient, and must be set aside.

Per Curiam.—The provisions of Act XX of 1864 are in many respects obscure and apparently contradictory. We do not think that the word "may" in section 11 should be construed as equivalent to "shall". The manner in which the words "may" and "shall" are used in contradistinction to one another in other parts of the Act (*e. g.* in section 6) seems to show that this is not the case. Again, section 3 shows that the Collector may, when the minor's property consists of land, apply to the Court to appoint "a fit person" to take charge of the property; and this indicates that a fit person, other than the Collector, may be appointed. Finally, if a certificate of administration must necessarily be granted to the Collector under section 11, it is not easy to see how the provisions of section 10, which are in terms retrospective, could be applied, and the result would be that the Act would contain no provision for the appointment of guardian in such cases. It is true that section 9 does not, in terms, apply to cases in which the property of the minor consists of land other than gardens and the like: but we must suppose that, although no distinct provision is made by the Act, the Court in which the charge of the property vests, has an inherent power of appointing an administrator; and we think that, although section 11 permits the appointment of the Collector, yet the other considerations, to which we have referred, show that it is not obligatory upon the Court to do so. It appears that the administration of the minor Mir Zulfikar Ali's property has been for seventeen years in the hands of Mr. Hope and Mr. Crawley-Boevey, neither of whom was Collector of the district of Broach; and it is admitted that Mr. Crawley-Boevey's successor in the office of tálukdári settlement officer is the person by whom the administration can be most fitly and conveniently carried on. On these grounds we reverse the District Judge's order, and direct that Mr. Lely be appointed administrator of the estate. Costs of this application to come out of the estate.

Order accordingly.