1901.
March 6 and 26.

MINGA *v.* SENDERIYA.

C.R., Keyalla, 3,340.

Action by minors by their next friend—Liability for costs—Civil Procedure Code, s. 476.

The duty of deciding whether the next friend or the minor should pay the costs of suit brought by the next friend on behalf of the minor is, according to section 476 of the Civil Procedure Code, in the discretion of the judge.

According to the Roman-Dutch Law, a guardian *ad litem* who has obtained the authority of the Court to sue for his ward is not liable personally for costs, but the property of the ward is.

Bawa, for appellant.

A. Drieberg, for respondent.

This was an action brought by three minors "by their next friend Katulandale Dilo", against the defendants for declaration of title to a land. The action was dismissed with costs.

The decree entered was that "the plaintiffs aforesaid be, and "are hereby, allowed to withdraw from this action, with liberty to "bring a fresh action. And it is further ordered that the said "plaintiff do pay the said defendants their costs of this action, "Rs. 47.75, as taxed by the officer of this Court."

The defendants took out writ against the property of the plaintiffs and seized a certain land.

Plaintiffs, by their proctor, moved that the seizure of the land be withdrawn, as their property was not liable, but the property of the next friend.

The Commissioner disallowed the motion.

The plaintiffs appealed.

Bawa, for appellants.—Defendants took out writ against the property of the minors. That was wrong, because costs should be paid by the next friend and not levied on the minor's property. The object of the appointment of a next friend is to have some one responsible for the costs (*O'Kinealy, p. 404*, note to section 440). The law is clear that the next friend shall be liable for costs in the first instance to the defendants. It may or may not be that he could recover the amount from the minor's estate. Defendant must look to the next friend for costs if the action is against the minor's estate.

Should the next friend go into Court with a frivolous or absurd suit, he must pay costs himself personally, and our Code, section 476, has provided for that distinctly, the principle being that he must not irresponsibly fritter away the minor's estates in

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paying costs on misconceived and frivolous actions without any risk to himself. If the action is a *bonâ fide* one, on behalf or against the minor's estate, then the next friend may be reimbursed from the minor's estate (*Râmanâthan, 1843, p. 55*).

Drieberg.—The guardian is only liable if he institutes the action without authority of the Court (Civil Procedure Code, section 476.) It is only in exceptional cases that he is liable, the rule being that the minor's estate is liable, and he is free from responsibility for costs (*Maasdorp's Grotius, p. 38*).

Cur. adv. vult.

26th March, 1901. LAWRIE, J.—

A comparison of the two authorities—*Vanderlinden, 105*, quoted in 2 *Thompson, 59*, and the Jaffna case reported in *Râmanâthan, 1843, 56*—shows, I think, that a guardian who was without authority of Court is liable personally in costs, while a guardian who has obtained authority of the Court to sue for his ward is not liable personally, but the property of the minor is liable for costs.

The 476th section of the Civil Procedure Code lays on the Court before which the action depended the duty of deciding whether the next friend or the minor should pay the costs.

In the first case the Commissioner of Requests, Mr. De Alwis, on 14th March, 1899, appointed Dilo, their mother, next friend to four minors. It is plain that the Commissioner did not read the plaint, for, when it came before him for trial, he refused a postponement saying "this action was misconceived. The plaintiffs say that Lapaya, Pinna, and Kiriya were the owners. Plaintiffs admit Lapaya's right to one-third, but they do not claim under Pinna and Kiriya." The Commissioner allowed the plaintiffs to withdraw the action with liberty to bring a fresh action, plaintiffs paying defendants' costs.

The Commissioner did not exercise the right he had of ordering the next friend personally to pay the costs as if he had been plaintiff. As the order stands, the plaintiffs, who are minors, must pay. But is it right that they should pay? That I think is very doubtful. The proctor who drew up the plaint and the next friend who instituted the action were careless. It is hard that the minors should lose their lands for costs of a misconceived case.

In revision, I set aside as much of the decree of 31st October 1899, as deals with costs, and remit the case to the Commissioner of Requests, giving him power to make any order as to costs after hearing parties as to him may seem just. The sum taxed, Rs. 47.75, seems unduly large.