1907.
May 16.

Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

SILINDU *v.* AKURA.

D. C., Kegalla, 383.

Minor—Compromise—Leave of Court—Restitutio in integrum—*Action —Prescription—Roman-Dutch Law—Civil Procedure Code, s.* 500—*Ordinance No.* 22 *of* 1871, *s.* 11.

A compromise entered into by a next friend on behalf of a minor, under section 500 of the Civil Procedure Code, is not valid unless (1) the attention of the Court was directly called to the fact that a minor was a party to the compromise, and (2) the Court has expressly approved of the proposed compromise.

An application for *restitutio in integrum* is an action within the meaning of section 11 of Ordinance No. 22 of 1871, and is barred in three years.

APPEAL from an order of the District Judge on an application for *restitutio in integrum* referred to him by the Supreme Court. The material facts sufficiently appear in the judgments.

H. A. Jayewardene, for the appellant.

There was no appearance for the respondent.

Cur. adv. vult.

16th May, 1907. GRENIER A.J.—

This appeal arises out of an application for *restitutio in integrum*, and the matter has now come before us finally for decision as to whether the remedy, which is an extraordinary one, should be granted or not to the appellant. Two questions were raised and discussed before us, and I shall take them in the order in which they were presented by appellant's counsel. The first question was whether the decree in D. C., Kegalla, 383, was void in law, so far as the appellant was concerned, by reason of its not being in conformity with the provisions of section 500 of the Civil Procedure Code. Admittedly, the appellant was a minor when the decree was made. Although I was at first inclined to hold that the decree could not be challenged, on the broad ground that it must be presumed to have been rightly made, and that all necessary conditions were observed to render it valid and effectual, I was unable to resist the weight of the authorities cited by the appellant's counsel at a rather late stage of the argument. Those authorities unmistakably lay down, especially the judgment of the Judicial Committee of the Privy Council delivered by Lord MacNaghten in the case of *Manohar Lal v. Jadu Nath Singh* and others,[1] that in order to maintain the

[1](1906) 4 *Cal. L. J.* 8; *I. L. R.* 28, *All.* 585.

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validity of a compromise under section 462 of the Indian Code of Civil Procedure, which corresponds to section 500 of our Code, entered into on behalf of a minor, when such compromise is subsequently challenged, it must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. In the present case there is certainly an entire absence of proof that the attention of the Court was pointedly drawn to the fact that the settlement agreed to on the 19th October, 1893, affected the interests of the appellant, a minor at the time, and that the leave of the Court was obtained at any time before decree was entered confirming the terms of the settlement. In the course of his judgment Lord MacNaghten said: "It was argued on behalf of the appellant that the exigencies of that provision (462) had been complied with in this case, inasmuch as it appeared that the minor (the first respondent), who was a party to the compromises in question, was described in the title of the suit as a minor suing 'under the guardianship of his mother,' and the terms of the compromises were of course before the Court. In the opinion of their Lordships that is not sufficient." The record in the case before us contains the following entry under date 19th October, 1893: "Parties present. It is agreed between the parties that judgment be entered up as follows for the plaintiff," and then follow the terms of the judgment, which were subsequently embodied in the decree. There is nothing to show that the Court was made aware of the fact that the plaintiff was a minor and that the compromise was one which related to the title in several lands which formed the subject of the action. I need hardly remark that the duty is cast on the Court in all cases where minors are concerned to safeguard and protect their interests to the fullest possible extent; and I can well understand the severity of the rule laid down by Lord MacNaghten in the case already cited, in which the circumstances under which the compromise was made are not dissimilar to those present in this case. Here too, in the title of the suit, the fact of the plaintiff being a minor clearly appears, because she is suing by her next friend Kiri Ukkuwa; but even assuming that proof *aliunde* and not open to doubt may be adduced to show that the Court sanctioned the compromise with knowledge of the fact that the plaintiff was a minor, we have been unable to discover any such proof, nor was any attempt made to supply it. I have no hesitation therefore in declaring that the decree in D. C., Kegalla, 383, dated the 19th October, 1893, was void and inoperative in law as against the appellant.

The second question argued was whether the appellant's application for *restitutio in integrum* was barred by prescription. The appellant was born on the 12th April, 1878, and she is nearly thirty years old now. She attained majority by marriage on the 23rd

April, 1895, and by age on 12th April, 1899. The application for *restitutio in integrum* was made on the 15th July, 1904. It was contended for the appellant—and the contention somewhat startled me—that there was no time limit prescribed by law within which an application for restitution should be made. On a former appeal which came up before my brother Wendt and myself on the 15th February, 1906, in consequence of a ruling by the District Judge that it was not too late to frame an issue in regard to prescription, and of his finding thereafter that the appellant's application was barred by prescription, this Court sent the case back for evidence as to whether or not the appellants had all throughout been in possession of the land which they claimed, and also for the purpose of ascertaining when the appellant Silindu first became aware of the existence of the judgment in D. C., Kegalla, 383. I have no recollection now of any argument having been addressed to us on the question of prescription, but I find that we assumed that section 11 of Ordinance No. 22 of 1871 would apply; and the case was remitted to the District Court to enable the appellants to prove such facts as would take the case out of the operation of the Ordinance. There was, however, no distinct pronouncement on the point, which was therefore open to the argument that was addressed to us. Since the argument I have consulted several Roman-Dutch Law authorities, and I have carefully considered the scope and object of section 11 of Ordinance No. 22 of 1871, which was apparently intended to apply to all cases not specially provided for; and the conclusion I have come to is that, whether we apply section 11 or the period of limitation prescribed by the Roman-Dutch Law for applications of this nature, the remedy sought for is completely barred by effluxion of time. There was undoubtedly much force in the argument that as the remedy was one not provided for by the *jus civile*, and was not governed by its rigid and strict principles, but was by an act of grace of the Sovereign given to a subject on equitable grounds, time did not run against it. But in such a perfect system of jurisprudence as we find in the Roman and Roman-Dutch Law, it was inconceivable that no provision should be found in regard to the time within which the remedy should be applied for. I was, therefore, not surprised to find on the authority of *Voet*, 4, 1, 19, and *Vanderkeesel*, 3, 42, 5, that in the case of persons who apply for restitution on the ground that they were minors at the time of the occurrences complained of, the application should be made, except on the ground of enormous wrong, within four years of their attaining majority or of their obtaining letters of *venia ætatis* or of their marriage (see also *Nathan's C. L. S., Africa, vol. II., sec.* 845). It must further be remembered that although an application for restitution under the Roman Law was technically referred to as an " extraordinary petition " as

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distinguished from " condictiones," which were actions of strict law arising on unilateral obligations (*Warn Kœnig's Inst.* s. 1,057), the terms " action " and " petition " were indifferently applied to the former. In a case of restitution what was aimed at was the doing of reciprocal and complete justice, and for this purpose the formulæ or civil forms of action were dispensed with (see note to *Berwick's Voet, p.* 115). So that if we regard an application for restitution as an equitable action, as to all intents and purposes it was, it seems to me that the words of section 11 of Ordinance No. 22 of 1871 are comprehensive and far-reaching enough to embrace the present application. Whether therefore we apply the period of prescription under the common law or the statute law, the remedy sought for is barred, as Silindu, the first appellant, attained majority by age and marriage considerably more than four years before she applied for it. I would dismiss the appeal.

WOOD RENTON J.—

I agree. On the first point discussed by my brother Grenier, I think that the record should show (*a*) that the attention of the Court has been directed to the fact of minority, and (*b*) that the Court has approved of the proposed compromise. On the second, I think that the term " action " in section 11 of the Prescription Ordinance must be construed as embracing any proceeding by which a legal right to redress is asserted.

Affirmed.