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*Nov. 7
*Dec. 21

GROVER H. SCHATZ ÈSQUAL (PLAINTIFF) . . APPELLANT;

AND

JOHN McENTYRE ÈSQUAL (DEFENDANT) . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Minor—Automobile accident—Action in damages—Minor injured, residing in United States—Guardian appointed by court of that country—Authorized by it to take action—Letters of guardianship providing for fyling of a bond before receiving moneys—Bond not fyled—Exception to the form—Private international law—Art. 6 C.C.—Arts. 78, 79 C.C.P.

One Ruth Schatz, domiciled in the state of New York, was injured in an automobile accident in Montreal and suffered serious personal injuries. In order to bring an action in damages, being a minor, she had to be represented according to article 78 C.C.P. Accordingly she filed a petition in the Surrogate's Court of the state of New York asking for the appointment of her father, the appellant, as "her general guardian to

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes, JJ.

(1) (1854) 1 Spinks (Ecc. & Ad.) 248; 164 Eng. Rep. 144.

commence and carry on such action for her." Pursuant to an order from that court granting the petition, letters of guardianship were issued appointing the appellant "limited guardian of the person and estate of the said minor on (his) making, executing and filing with the said Surrogate such bond or application as is required by the statute in such cases made and provided"; the same court in its previous order having stipulated that "until the filing of a bond * * * the guardian (was) restrained from receiving any funds arising from said action." The appellant then brought the present action in damages on his own behalf and as guardian to his minor daughter and, with the return of the writ, he filed duly certified copies of the decree and of the other judicial proceedings in the New York court. The respondent made a motion in the nature of an exception to the form disputing the appellant's capacity and quality to bring his action on behalf of his minor daughter on the ground that he had been appointed limited guardian on "filing with 'the Surrogate's Court a bond or obligation as is required by statute" which provision had not been complied with by him. The exception to the form was dismissed by the Superior Court; but the appellate court reversed that decision and dismissed the appellant's action as to the damages claimed on behalf of his minor daughter.

Held, reversing the judgment of the Court of King's Bench (Q.R. 56 K.B. 520), that, by virtue of his appointment as guardian by the court of the state of New York, the appellant had the quality and the capacity to bring in the province of Quebec an action in damages on behalf of his minor daughter. According to the provisions of article 79 C.C.P. and also in uniformity with the terms of article 6 C.C., all foreign persons may come before the Quebec courts, providing they are authorized to appear in judicial proceedings under the law of their country: the test of their capacity or quality before the Quebec courts being their quality or capacity in the courts of their own country. Although there is in the record no evidence of the New York law by expert witnesses, the decree and the other judicial proceedings in the New York court, duly filed, make *prima facie* proof of the facts therein set forth and they afford the best evidence that the law therein applied is the law in force in the country in which the judgment had been rendered. Therefore, by force of that decree and of the foreign law of which it bears evidence, the appellant was a person duly authorized to appear in judicial proceedings within the meaning of article 79 C.C.P., and it follows that he had the quality and capacity assumed by him in this action. As to the restriction placed upon the appellant's authority to receive the funds arising from the action until he had fyled a bond required by the order appointing him as guardian, it should be held that the letters of guardianship cannot be construed as limiting the authority of the guardian to proceed with the action and that such restriction has to do with nothing else but the final discharge if and when payment would be made; and the Quebec court seized with the case, by force of its inherent power and *proprio motu,* would have the power to stay proceedings at any stage, or at all events, before making its final adjudication, so that the condition imposed in the restriction may be previously complied with: in that way, the court would keep control of the case and would give judgment only after it would be satisfied that the required bond has been approved.

(1) (1934) Q.R. 56 K.B. 520.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Curran J. (1), and maintaining the respondent's motion in the nature of an exception to the form.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

Wm. F. Macklaier for the appellant.

Walter A. Merrill K.C. and *Gordon D. McKay* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—This appeal raises a question of private international law.

Ruth Schatz, domiciled at Poughkeepsie, in the state of New York, United States of America, was injured in an automobile accident which happened in the city of Montreal, province of Quebec. She suffered serious personal injuries. She intended to sue the person whom she held liable for the damages she sustained; but, being a minor and not having the free exercise of her rights, she could not, in the province of Quebec, be a party to an action. In order to bring her action, she had to be "represented (or) assisted * * * in the manner prescribed by the laws which regulate (her) particular status or capacity" (Art. 78 C.C.P.).

Under the Quebec law (Art. 6 C.C.), persons domiciled out of the province of Quebec "as to their status and capacity, remain subject to the laws of their country."

Accordingly, Ruth Schatz filed a petition in the Surrogate's Court of the State of New York, representing that she desired "to commence an action in the city of Montreal, province of Quebec, Dominion of Canada, against John G. McEntyre, an infant, and his guardian, John McEntyre, who are residents of the city of Montreal, province of Quebec, Dominion of Canada." (N.B. The latter are the present respondents.)

The petition alleged:

That the action arises out of personal injuries sustained by (the) petitioner through the careless and negligent operation of an automobile operated and controlled by the said John G. McEntyre in the city of

(1) (1934) Q.R. 56 K.B. 520.

Montreal, province of Quebec, Dominion of Canada * * * that the estimated value of the personal property to which the petitioner is or will be entitled on a favourable decision of this action will not exceed $5,000; that she had no additional income from any other source; therefore she prayed that Grover H. Schatz, her father (the present appellant),

be appointed her general guardian to commence and carry on such action for her.

The petition was supported by affidavit.

Upon the petition, the Surrogate's Court

Ordered and decreed that said Grover H. Schatz be and is hereby appointed general guardian of the person and property of said infant, to serve until said infant shall attain the age of twenty-one years, or a successor to said general guardian shall be appointed, and that letters of guardianship issue, on filing the oath required by law.

And it was also

Ordered and decreed that the guardian proceed with such action as may be advisable to protect the infant's rights in the action stated in her petition;

And it was further

Ordered and decreed that the filing of a bond be dispensed with until further order of this court but that until the filing of a bond satisfactory to this court the said guardian is hereby restrained from receiving any funds arising from said action.

Pursuant to this, letters of guardianship were issued. They were signed by the "Clerk of the Surrogate's Court." They recite:

That said minor is entitled to certain property and estate and that, to protect and preserve the legal rights of said minor, it was necessary that some proper person should be duly appointed guardian of her person and estate * * *

* * * The said Surrogate's Court did order that the said Grover H. Shatz be appointed limited guardian of the person and estate of the said minor on (his) making, executing and filing with the said surrogate such bond or application as is required by the statute in such cases made and provided; and you, the said Grover H. Schatz, having executed the proper oath of office approved by the said Surrogate, according to the form of the said statute, we do by these presents constitute and appoint you, the said Grover H. Schatz, limited guardian of the person and estate of the said minor until she shall attain the age of twenty-one years, or until another guardian shall be appointed.

The appellant, having been appointed guardian in the manner just stated, brought the action with which we are at present concerned, both for himself personally and in his quality of guardian on behalf of his daughter Ruth Schatz. With the return of the writ, he filed duly certified copies of the decree and of the other judicial proceedings in the New York court (including a copy of the oath of office executed by him). The action was at once met by

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the respondent's motion in the nature of an exception to the form disputing the appellant's capacity and quality to bring the action on behalf of his minor daughter.

The ground of the motion was that the appellant

had not such full and complete capacity, authority or power as is required by a person making claim before the courts of the province of Quebec.

that his power was in fact limited, and, as appeared by the letters of guardianship, he was appointed limited guardian on, among other things,

filing with the Surrogate's Court a bond or application, as is required by statute,

which provision had not been complied with by him.

The exception to the form was dismissed by the Superior Court: but the Court of King's Bench (appeal side), by a majority, reversed that decision and dismissed the appellant's action

jusqu'à concurrence de l'indemnité de $5,000 qui y est demandée pour et au nom de la mineure, Ruth Schatz.

The guardian then appealed to this Court. Since this appeal has been lodged, both Ruth Schatz and John G. McEntyre became of age and now have and enjoy the free exercise of their rights. Suggestions were filed with the prayer that each of them be added as a party to the appeal. This may be done under the rules of the Court (rule 50); and, indeed, has become essential, since the guardian, acting on behalf of Ruth Schatz, and the tutor representing John G. McEntyre are *functi officio*.

The fact, however, that Ruth Schatz has now attained the age of majority cannot be allowed to improve the proceedings originally entered in the province of Quebec by her guardian, if these proceedings were invalid. Her present application to be substituted for her guardian cannot affect the situation as it existed when the action was instituted. If the appellant was then lacking in the quality or the capacity required to bring the action, the appeal must be dismissed and the adding of Ruth Schatz as a party becomes immaterial. If, on the contrary, we come to the conclusion that the original proceedings were properly and competently brought by the appellant, the granting of the applications to add as parties both Ruth Schatz and John G. McEntyre should follow as a matter of course.

It is, therefore, necessary to discuss the case as it stood before the courts of the province of Quebec.

The question is whether the appellant, by virtue of his appointment in the state of New York, had the quality and the capacity to bring the action in the province of Quebec.

Under Article 79 of the Code of Civil Procedure,

> All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in the province.

It follows from the provisions of this article that all foreign persons may come before the Quebec courts, provided they are authorized to appear in judicial proceedings under the law of the country. The test of their capacity or quality before the Quebec courts must be their quality or capacity to appear in the courts of their own country. This is further borne out by article 6 of the Civil Code already adverted to.

In order to answer the question now before us, the inquiry, therefore, must be: What is the law of the State of New York in respect to the authority of the appellant to appear in these judicial proceedings?

There is in the record no evidence of the New York law, in the sense that no witnesses were heard who, on account of their profession or their expert knowledge, are recognized as being in a position to state what that law is; but the appellant alleged that,

> in his quality of guardian to the said minor Ruth Schatz, he was well and truly entitled by the laws of the state of New York to institute and carry on the present action,

in support of which he filed copies of the decree and the other judicial proceedings had in the New York court. These documents make *prima facie* proof of the facts therein set forth (Art. 1220-1 C.C.), and they afford the best evidence that the law therein applied is the law in force in the country in which the judgment was rendered (*Bauron* v. *Davies* (1), and authorities there cited at pp. 551, 552 and 553).

As was said in the House of Lords by Lord Cranworth, in the case of *Doglioni* v. *Crispin* (2).

> It is the decision of a court of exclusive jurisdiction, a decision which we are bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced.

(1) (1897) Q.R. 6 Q.B. 547.

(2) (1866) 35 L.J., Pro. and Mat. 129, at 135.

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So that the matter resolves itself into the interpretation of the decree appointing the appellant and of the accompanying documents. The guardian's powers are there set out.

Now, if we turn to these documents, we find that the decree of the Surrogate's Court was sought for the very purpose of appointing a guardian to Ruth Schatz, because she desired to institute the present action in the province of Quebec against John G. McEntyre and his tutor. The petition states that she had no income from any other source and that the estimated value of her personal property was the value of the damages resulting from the automobile accident and to which she claimed to be entitled on a favourable decision of her action. Then the decree appoints her father, the present appellant,

general guardian of the person and property of the said infant, orders that letters of guardianship do issue on filing the oath required by law

and

that the guardian proceed with such action as may be advisable to protect the infant's rights in the action stated in her petition.

And the decree goes on to say that

the filing of a bond be dispensed with until further order of the Surrogate's Court and that until the filing of a bond satisfactory to that court the said guardian is hereby restrained from receiving any funds arising from said action.

The letters of guardianship state that the appellant has executed the oath of office (copy of which, as a matter of fact, is filed with the return of the action) and they declare the appellant limited guardian of the person and estate of the said minor.

No explanation is given for the use of the word "limited" in the letters of guardianship signed by the clerk of the Surrogate's Court. The reasonable interpretation would be that the word is referable to the restriction put upon the guardian's right to receive the funds arising from the action until he has filed a bond satisfactory to the New York court. Be that as it may, the letters of guardianship cannot be construed as limiting the authority of the guardian to proceed with the action, in the province of Quebec, in order to protect the infant's rights, which is expressly given in the decree and which, indeed, was the sole apparent purpose for which the petition was presented and the decree issued. There can be no doubt that, by force of the decree and of the foreign law of which it bears evidence,

the appellant is a person duly authorized to appear in judicial proceedings within the meaning of art. 79 of the Code of Civil Procedure. It follows that he has the quality and capacity assumed by him in this action. He has the quality of guardian to which was expressly attached the power to commence and carry on the action for Ruth Schatz.

The argument made against him is that, on account of the restriction placed upon his authority to receive the funds arising from the action, he is not fully clothed with all the powers requisite to bring the action. In a general way, it is said that he who cannot receive payment of a sum of money cannot bring action to recover that sum.

With great respect, it seems to us that the argument so presented forgets the quality in which alone the appellant appeared in these proceedings. The action is concerned not with the appellant's rights, but with the minor's rights. The appellant is not claiming for himself; he is claiming on behalf of the minor. The minor's rights are full and complete; they constitute (to borrow the language of the Court of King's Bench) "un droit né et actuel." The action whereby he claims those rights belongs to the minor; and the only reason why the guardian appears is because

> Actions belonging to a minor are brought in the name of his tutor. (Art. 304 C.C.).

This provision is implemented by that of the Code of Civil Procedure (art. 78) whereby

> No person can be a party to an action. . . unless he has the free exercise of his rights * * *
>
> Those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity.

In this case the appellant merely represents the minor, and he does so

> in the manner prescribed by the laws which regulate the particular status or capacity

of the minor and his own. We are unable to come to the conclusion that, for this purpose, he was not adequately and sufficiently authorized by the New York decree. The restriction therein has to do with nothing else but the final discharge if and when payment is made.

The respondent complains that he was not faced with a claimant to whom a payment could be made and from whom a discharge could be obtained.

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The first observation ought to be in this respect that the point does not arise, for the respondent does not disclose any intention of making payment, nor can we discern any indication of his willingness to offer any proposition of settlement.

Should the respondent wish to pay the claim in full, we should be sorry if no means could be found under the laws of Quebec whereby a good and valid discharge could be given to him. Should he be willing to compromise, he would have no more difficulty to do so as a consequence of the New York decree than he would have in the case of a tutor appointed under the Quebec law. In the first case, he need only require, before paying, a certified copy of the order of the Surrogate's Court approving the bond, upon the filing of which the restriction put upon the respondent's power to receive the money shall be removed. In the second case, he could not transact with the tutor unless the latter was authorized by the court, a judge or a prothonotary on the advice of the family council (art. 307 C.C.). The restrictions in both cases are of a similar character. They cannot affect the quality of the New York guardian more than they do the quality of a Quebec tutor.

It is true, as was argued by the respondent, that, before the bond is filed and approved, the restriction in the decree may suspend the power of the appellant to prosecute the execution of a judgment given in his favour. A somewhat similar objection was advanced in the case of *London Life Insurance Company* v. *Séguin* (1), and it was rejected by the Court of King's Bench as not being a bar to the capacity to bring the action and as raising a point which could be taken care of after judgment, should the defendant be called upon to pay.

While we think a preferable way would be for the court not to make any adjudication of the money until the appellant has complied with the condition; without going as far as the decision in the *Séguin* case (1) and without waiting until after final judgment is rendered, it does not seem to us that the Quebec courts are lacking in power to deal with the matter. The restriction against the appellant's authority to receive payment is not absolute. The authority is not taken away. It is, in fact, given to him condi-

(1) (1933) Q.R. 55 K.B. 332.

tionally; and the condition is that he should file the prescribed bond. It was suggested that the respondent might have met the situation completely by taking advantage of paragraph 2 of art. 179 of the Code of Civil Procedure and by asking that the suit be stayed until the bond had been filed and approved, as provided for in the decree, the whole of which could have been certified to the Quebec court in the usual way. To this suggestion the respondent was unable to give any satisfactory answer.

Under all circumstances, we see no reason to doubt that the Quebec court seized with the case, by force of its inherent power and *proprio motu,* could stay proceedings at any stage or, at all events, before making its final adjudication, so that the condition imposed in the restriction may be previously complied with. In that way, the court would keep control of the case and would give judgment only after it is satisfied that the required bond has been approved. Authority for this course could be found in the judgments of *Grondin* v. *Cliche* (1) and *Ellard* v. *Millar* (2).

The appellant, no doubt, in the conclusions of his declaration, prayed for the payment to himself in his capacity of guardian, although at that time he was still affected by the restriction. This was pointed out by the respondent.

In our view, the objection does not go to the question raised by the exception to the form. In the words of Japiot (Traité élémentaire de procédure, p. 61),

> L'on fait souvent intervenir à tort la notion de qualité en contestant à une personne la qualité, alors qu'il vaudrait mieux contester l'existence du droit.

The appellant may have asked for more than he was entitled to until he had filed the bond required by the New York decree. But this does not affect his quality or his capacity to appear for and on behalf of the minor and to represent her. If he had limited his conclusions to a prayer that the defendant be condemned to indemnify Ruth Schatz in the amount of $5,000 and that payment of that sum, or of such other sum as may be awarded, be made to him as guardian of Ruth Schatz after he has filed in the case a bond satisfactory to the New York Surrogate's Court, there could have been no question as to his quality or capacity to do so.

(1) [1922] S.C.R. 390.
(2) [1930] S.C.R. 319.

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The complaint of the respondent really is that the appellant's conclusions go too far, at least for the present. It may be conceded that they ought not to be granted precisely in the form in which they are, unless the bond has been previously filed. But, if the facts are found in favour of the minor, it will be within the power of the court, indeed it would no doubt be its duty to see that the respondent should not be compelled to pay except upon being adequately protected in respect to the discharge to which he is entitled. (Compare: *Montreal Street Ry.* v. *Girard* (1); *People's Holding Company Ltd. v. Attorney-General* (2). In the later case, objection was made and doubts were expressed both by the Court of King's Bench and by this Court whether the prayer of the information was not in excess of the powers of the Attorney-General of Quebec. Yet, as it appeared that, upon his allegations if proven, he was entitled to some measure of relief, it was held the objection did not affect his quality or capacity, and it would be for the courts, on the merits, upon the conclusions as drawn or upon proper amendments, to order the appropriate remedy.

The appeal should, therefore, be allowed and the judgment of the Superior Court restored with costs here and in the Court of King's Bench in favour of the appellant.

The application to have Ruth Schatz and John G. McEntyre added as parties will be granted with costs in the cause. Our decision was reached, as it should be, independently of that consideration; but it is satisfactory to realize that as Ruth Schatz now enjoys the full exercise of her rights, the possibility of the difficulty anticipated by the respondent and discussed in this judgment has disappeared and no question subsists as to her capacity to give a valid discharge in the future.

Appeal allowed with costs.

Solicitors for the appellant: *MacDougall, MacFarlane & Barclay.*

Solicitors for the respondent: *Merrill, Stalker & McKay.*

(1) (1911) Q.R. 21 K.B. 121, at 127.

(2) (1930) Q.R. 48 K.B. 133; [1931] S.C.R. 452, at 459.