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Civil Procedure—Capacity of Incompetent to Sue

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Agent's Inuring Immunities

The Court of Appeals in *Berger v. 34th Street Garage, Inc.*[10] reaffirmed the rule allowing for the extension of a principal's non-personal immunities to his agent.[11] Where an expressman's liability is limited and he stores his truck and contents overnight in a garage, with the shipper's knowledge and consent, the garageman may enjoy the same limited liability.

CIVIL PROCEDURE

Capacity of Incompetent to Sue

In *Sengstack v. Sengstack,* a suit for legal separation between New York residents, plaintiff wife alleged her own mental incompetence in anticipation of her husband's defense of abandonment. She had had a long history of mental disorders and treatment when in 1952 she left her husband's abode in New York and went to live in Minneapolis with a son. In 1953, a Minnesota probate court appointed her son as general guardian over her estate and person after having received her signed application alleging her own incompetence. A guardian ad litem brought a suit for separation shortly thereafter but her husband successfully defended on the ground that she had to bring it in person as there had been no adjudication of incompetency and therefore the court was without power to appoint a guardian ad litem. This was not appealed.

This suit was commenced in her own name by attorney. The trial court upheld her capacity to sue and also appointed a special guardian to look into the facts of the situation and make recommendations for the protection of her interests.[2] The Appellate Division[3] affirmed as did the Court of Appeals,[4] despite the arguments of the husband that she had no capacity to sue and that the trial court had no power to appoint a special guardian in this case.

The Court of Appeals took the view that the Minnesota decree was not binding upon New York courts inasmuch as plaintiff was a resident of New York and there had been no actual adjudication of incompetence, the order having been issued *ex parte.* In effect, this establishes a converse rule to *In re Curtiss*[5]

10. 3 N.Y.2d 701, 171 N.Y.S.2d 824 (1958).
11. RESTATEMENT, SECOND, AGENCY §347; Schoeffer v. United Parcel Service of New York, 277 App. Div. 569, 101 N.Y.S.2d 451 (1st Dep't 1950).

1. 4 N.Y.2d 502, 176 N.Y.S.2d 337 (1958).
2. 7 Misc.2d 1012, 166 N.Y.S.2d 576 (Sup.Ct. 1957).
3. 4 A.D.2d 1035, 169 N.Y.S.2d 487 (1st Dep't 1957).
4. *Supra* note 1.
5. In re Curtiss, 134 App.Div. 547, 119 N.Y.Supp. 556 (1st Dep't 1909), *aff'd,* 197 N.Y. 583, 91 N.E. 1111 (1910).

where it was held that New York will give full faith and credit to a decree of incompetency issued by a sister state where the subject of the decree was a resident of that state.

Section 236 of the Civil Practice Act provides that a person who is of full age may prosecute or defend a civil action in person or by attorney unless he has been judically declared incompetent to manage his own affairs.[6] It is settled law in New York that until a court imposes its jurisdiction to declare a person mentally incompetent, the legal status of such person is not changed and he may sue or be sued in the same manner as anyone else.[7] However, the question as to whether a litigant may actually allege his own incompetence and successfully sue in his own name, had never been directly decided in New York. The nearest approach to this situation arose in *In re Palestine's Estate*[8] where an administratrix was sued by an alleged creditor of the estate. There she alleged her own mental incompetence, but the suit was nevertheless maintained, the Surrogate's Court appointing a special guardian to look after her interests as administratrix. The court relied upon section 236 of the Civil Practice Act as interpreted by *William v. Empire Woolen Co.*[9] which declared that a person may sue or be sued regardless of incompetency so long as there was no judicial declaration of it.

In affirming the right of Mrs. Sengstack to sue, the Court of Appeals gives weight to the reasonableness of it under the circumstances of this case. There is affirmative authority for it in section 236 and no statutory prohibition. In addition, the attitude of her husband showed that she had need of the court's protection in as much as he had been playing a dilatory game both in court and out. The same reasoning applies to the appointment of a special guardian. Any incompetent, whether judicially declared so or not, is a ward of the court and is owed by it a duty of protection.[10] Section 207 of the Civil Practice Act[11] permits the appointment of a special guardian for an incompetent at any stage of the proceeding when considered by the court to be necessary for the protection of the interests of the incompetent. There is no express requirement that the incompetent be judicially declared so. In the light of the circumstances of this case, it seems reasonable to appoint such a guardian at this stage of the proceeding rather than delay things by requiring that a committee be appointed and plaintiff be judicially declared incompetent under Article 81 of the Civil Practice Act.[12] Such a requirement would merely aid the dilatory tactics of the husband. In its decision here,

6. N. Y. CIV. PRAC. ACT §236.
7. Williams v. Empire Woolen Co., 7 App. Div. 345, 39 N.Y. Supp. 941 (4th Dep't 1896); Anonymous v. Anonymous, 3 A.D.2d 590, 162 N.Y.S.2d 984 (2d Dep't 1957); In re Palestine's Estate, 151 Misc. 100, 270 N.Y.Supp. 844 (Surr. Ct. 1934).
8. *Ibid.*
9. *Ibid.*
10. Wurster v. Armfeld, 175 N.Y. 265, 67 N.E. 584 (1903).
11. N. Y. CIV. PRAC. ACT §207.
12. N. Y. CIV. PRAC. ACT Article 81.

the Court of Appeals does not say that *any* incompetent who has not been judicially declared so may successfully sue while alleging his own incompetence. The holding merely permits a trial court, in its discretion, to permit such a person to go forward with an action, if it appears that under the circumstances of that particular case the interests of the incompetent would be better protected than by requiring the appointment of a committee and a judicial declaration of incompetency.

Res Judicata—Judgment for Defendant on Non-appearance of Plaintiff no Bar to Subsequent Action

The defendant, in *Greenberg v. DeHart,* [13] made a motion to dismiss the complaint pursuant to Rule 107 of the Rules of Civil Practice. Prior to the commencement of the present action, the Greenbergs had asserted the same causes of action against DeHart in an action commenced in King's County. This action was consolidated with an action to recover damages for injury to property commenced by DeHart, since both actions arose out of the same automobile collision. When the consolidated action came up for trial, the Greenbergs did not appear. At this point in the proceedings, the claim asserted by DeHart had been settled and there remained to be tried only the issues in the Greenbergs' personal injury action. The attorney for defendant appeared and waived a jury trial and the court proceeded to take evidence from defendant's witnesses. At the close of the evidence, the trial court granted defendant's motion to dismiss the complaint on the merits and judgment of that effect was entered. It is this judgment, purportedly rendered on the merits, that constituted the basis of defendant's motion to dismiss in the present action. The Court held that the doctrine of res judicata did not apply and accordingly reinstated the order of the special term denying the defendant's motion to dismiss in the present action.

A judgment must be rendered upon the merits if it is to be used as an estoppel to the prosecution of subsequent action.[14] The effectiveness of the adjudication will depend, not on its form, but on the nature of the proceedings in which it was made.[15] After a careful analysis of the proceedings, the Court concluded that the judgment relied on by DeHart as a bar to the present action was no more than a nonsuit.[16] A recital in the judgment that it is upon the merits lends no efficacy to it for purposes of res judicata. But the defendant alleged that the lower court authoritatively rendered a judgment on the merits pursuant to section 494-a of the Civil Practice Act which provides for the

13. 4 N.Y.2d 511, 176 N.Y.S.2d 344 (1958).
14. Rudd v. Cornell, 171 N.Y. 114, 63 N.E. 823 (1902).
15. Bannon v. Bannon, 270 N.Y. 484, 1 N.E.2d 975 (1936); *but see* Ziegler v. International Railway Co., 232 App. Div. 43, 248 N.Y.Supp. 375 (4th Dep't 1931).
16. See Honsinger v. Union Carriage & Gear Co., 175 N.Y. 229, 67 N.E. 436 (1903).