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would have been possible for the Legislature to legislate so that the Act should apply to cases where a reference is made after proceedings have been taken, but it is clear that they did not do so when they framed the Arbitration Act of 1899. Section 19 seems to me perfectly clear. It says:

"Where any party to a submission to which this Act applies or any person claiming under him, commences any legal proceedings" &c.

Therefore, such a person must be a party to a submission before the commencement of the proceedings. In this case it is admitted that the submission was made after the proceedings commenced, and, therefore, it is not competent for any party to apply under section 19 to stay the proceedings.

Attorneys for the applicants: *Messrs. Jamshedji, Rustomji and Devidas.*

Attorneys for the opponents: *Messrs. Mahubhai, Jamietram and Madan.*

K. McI. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909. *July* 30.

SHAPURJI HORMASJI HARVER, APPELLANT AND DEFENDANT, *v.* MONOSSEH JACOB MONOSSEH, RESPONDENT AND PLAINTIFF.*

Costs—Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal.

The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when a guardian *ad litem* takes it upon himself to appeal against a decree, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

* Original Suit No. 406 of 1907,
Appeal No. 53 of 1908.

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SHAPURJI HORMASJI v. MONOSSEH JACOB.

THIS was an application arising out of an appeal filed by the guardian *ad litem* of a lunatic against a decision of Mr. Justice Macleod. The appeal was dismissed and the respondent awarded his costs out of the estate of the lunatic, the question of the costs of the appellant being reserved. The present application was made by the guardian to have his costs paid out of the estate.

Padshah appeared for the applicant.

Joshi appeared for the committee of the property of the lunatic, and submitted himself to the order of the Court.

SCOTT, C. J.—This is an application on behalf of the guardian *ad litem* of the defendant in this suit who is an adjudged lunatic, for an order allowing him to have his costs of an appeal filed by him in the suit out of the estate of the lunatic.

The suit was originally filed by the plaintiff against the defendant upon a mortgage and deed of further charge and in consequence of the defendant's state of mind the present applicant was appointed his guardian *ad litem*. The principal defence raised in the suit was that the defendant on the dates of the execution of the documents sued on was of unsound mind and that therefore he was not liable for the amount advanced by the plaintiff on those occasions. The suit was heard before Mr. Justice Macleod at great length and that learned Judge delivered a very careful judgment. The suit was dismissed but the guardian *ad litem* was allowed his costs out of the estate. He was not satisfied, however, with the decision and filed an appeal against it. The appeal was argued before us and turned entirely upon the facts of the case and was dismissed. Shortly after the appeal had been filed, committees of the person and property of the defendant were appointed. The committee of the property is on this application represented by counsel.

It is a fact, although our judgment will not be influenced by that fact, that the applicant was personally interested in defeating the claim of the plaintiff, because he is the brother of the defendant and in the event of the defendant's death will succeed to a portion of his property under the Parsi Law. The guardian *ad litem* appointed by the Court usually gets his costs out of the

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estate of the defendant whom he represents if he does not recover them from the plaintiff; but when the guardian *ad litem* takes upon himself to appeal against a decree passed against the lunatic, whom he represents, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

Now the rule is that if proceedings instituted by the next friend are unnecessary or improper, and the next friend might, with reasonable care, have known them to be so, he must pay the costs personally. See Simpson on Infants, (2nd. Edn.), p. 484. The same rule has been laid down with regard to trustees who take upon themselves to appeal against the decision of the Court. In *re Walters* (1) the Court of Appeal in England refused to allow trustees their costs of the appeal out of a fund and ordered them to pay the costs. Bowen, L. J., said that in his opinion when there was an unsuccessful appeal relating to a fund, the appellant ought to be ordered to pay the costs; otherwise there would be a premium upon unsuccessful appeals. Fry, L. J., concurred and said:

"The trustees were sufficiently protected by the order of the Court below, and there was no ground for their coming to this Court."

Similarly in *Ex parte Russell* (2), Sir George Jessel said:

"In the County Court the trustees might fairly say, 'We want a decision about the settlement,' but, having had a decision, if they choose to appeal, they must take the consequences."

They were ordered personally to pay the costs of the appeal.

Here, however, it is said that the guardian *ad litem* filed this appeal by the advice of his solicitor and counsel. That, however, is no reason for asking the Court to lessen the lunatic's funds by an order for payment of his costs in the unsuccessful appeal.

In *In re Beddoe. Downes* v. *Cottam* (3) Lindley, L. J., said:

"But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on Counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to

(1) (1890) 34 S. J. 564. (2) (1882) 19 Ch. D. 588 at p. 602.
(3) [1893] 1 Ch. 547 at p. 557.

charge them against his *cestui que trust* unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate."

Now, if the guardian *ad litem* in the present case had been in serious doubt as to whether he ought not to file the appeal, he could have adopted the course, which was in fact adopted a month later, of obtaining an order of the Court for the appointment of a committee of the property. That committee could then have applied to the Court for advice as to whether an appeal should be filed or not; and the guardian *ad litem* could have filed the appeal, if the Court thought it was a proper case, with the sanction of the committee of the property. We do not think, however, that this is a case in which the Court could have sanctioned the appeal, for the appeal had nothing to recommend it. The guardian *ad litem* having chosen upon his own responsibility to file this appeal, must take the consequences to the extent of having to bear the costs of the appeal incurred by his authority.

We are not asked on behalf of the lunatic to throw the costs of the successful respondent upon the guardian *ad litem*: so with regard to them, we make no order.

We refuse the application.

The applicant must pay the costs of the committee of the property on this application.

Application refused.

Attorneys for the guardian: *Messrs. Jehangir, Gulabbhoy & Billimoria.*

Attorneys for the committee: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

K. McI. K.