Privy Council Appeal No. 11 of 1913.

William Levine - - - - *Appellant,*

v.

Harry Serling - - - - *Respondent.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY 1914.

Present at the Hearing:

THE LORD CHANCELLOR.	LORD PARKER OF WADDINGTON.
LORD DUNEDIN.	LORD SUMNER.
LORD MOULTON.	SIR GEORGE FARWELL.

[*Delivered by* SIR GEORGE FARWELL.]

This is an appeal from the judgment of the Supreme Court of Canada, who by a majority of three to two have reversed the unanimous decision of the Court of King's Bench for Quebec.

The respondent on 4th November 1908 issued his writ in an action for damages for tort against the appellant, and the appellant duly pleaded that he was a minor, and issue having been joined thereon established the plea. On the 5th May 1909 the time for service of the writ expired (Art. 120) and on the 2nd July 1909, the appellant attained his majority. Ineffectual efforts were made by the respondent during the appellant's minority to obtain the appointment of a tutor to the appellant, and on the 27th September 1909 Lafontaine, J., made an order on the respondent's motion that the defendant

[46] J. 338. 90.—5/1914. E. & S.

should be properly joined to the action and ordered to plead within the regular time on the ground that the appellant had had notice of the application and made default in appearance, and that there was reason to believe that the exception of infancy was made to delay the proceedings, and on the 21st January 1911 final judgment was entered *ex parte* against the appellant condemning him to pay $2,000 for malicious arrest.

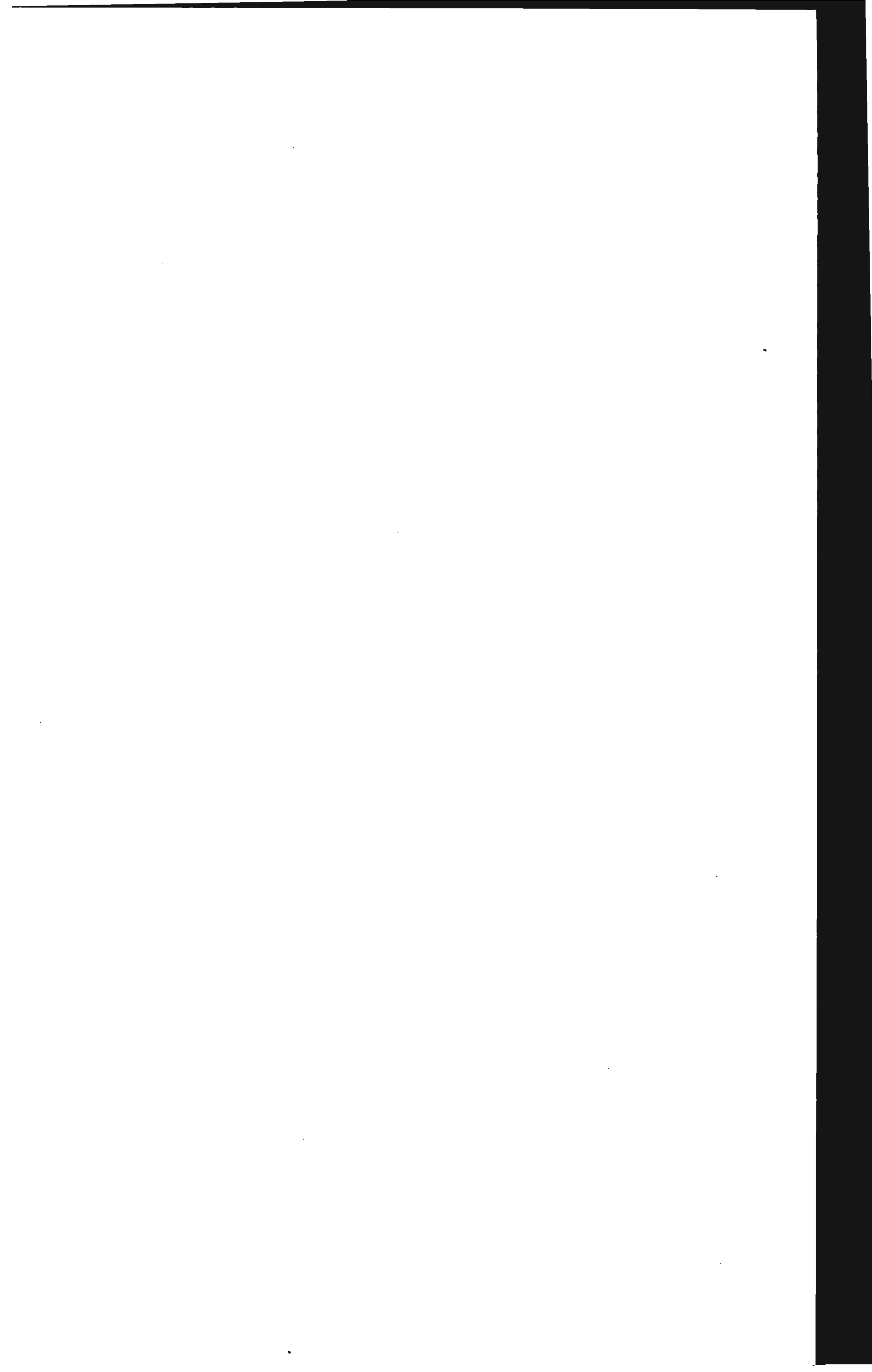
Their Lordships are in accord with the dissenting judgment of the Chief Justice in the Supreme Court. Minority is an absolute bar to an action.

Art. 78. "No person can be a party to an action, either "as claimant or defendant, in any form whatever, unless he "has the free exercise of his rights, saving where special "provisions apply. Those who have not the free exercise "of their rights must be represented, assisted, or authorised "in the manner prescribed by the laws which regulate their "particular status or capacity."

Every action is commenced by writ of summons, which remains in force while unserved for six months from its date (Article 120). Service must be made either on the defendant in person or at his domicile, or at the place of his ordinary residence, speaking to a reasonable person belonging to the family (Article 128). The defendant when summoned must file an appearance (Article 161). It is clear from these articles that a minor sued and served as a defendant is not in truth thereby made a party at all. There is an absolute bar to the right to sue him in his own name. He is by Article 174 enabled to take exception to any action in which he is named as defendant, notwithstanding that he is not in law capable of being one, and by Article 1177 he can obtain revocation of a judgment pronounced against him if no defence or no valid defence has been made on his behalf.

In the case before their Lordships, there was no properly constituted action against the appellant at any time; while he was a minor there was no service on any person capable of being served: before he attained his majority the time for serving the writ had run out and there was no action any longer existing even in an inchoate state. Their Lordships are, with great respect for the majority of the Supreme Court, unable to concur in the reasoning of Brodeur, J. They do not agree with the statement that the incapacity of minors is relative and not absolute: in their opinion the incapacity to sue and be sued is absolute, subject only to certain expressed exceptions. Nor do they altogether agree with the statement that the Code has nowhere declared that *l'assignation* or summons to appear before the Court of a minor is null; if the minor is named as a defendant and excepts on the ground of his infancy and issue is joined on that issue the Court can of course summon the defendant who so takes exception to their jurisdiction to appear and support it, but by so appearing he does not affect the generality of the veto in Article 78: that veto depends on an issue of fact, and the Court must necessarily have the parties raising the issue in Court before the point can be properly determined. But when it has once been established, as in this case, that the so-called defendant is an infant, then he ceases *ab initio* to be a defendant and cannot be treated as if he were by summons or order: this is not a mere question of procedure but of legal right, and is therefore not a matter of judicial discretion but of determination on the facts. The proceedings after the infant attained his majority in this case are open to the further objection that there was then no longer any action in existence.

Their Lordships will therefore humbly advise His Majesty to allow this appeal with such costs as the appellant is entitled to have appealing *in formâ pauperis*. The respondent must pay all the costs of the proceedings in the Courts below.



In the Privy Council.

WILLIAM LEVINE

v.

HARRY SERLING.

DELIVERED BY

SIR GEORGE FARWELL.

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