DOMESTIC RELATIONS

SUITS BY INFANTS — PROCEDURE — DISMISSAL WHERE SUIT IS "NOT FOR THE BENEFIT" OF INFANT.

Plaintiff, a 17-year-old boy, was struck on the face by the defendant, one of his high school teachers, and plaintiff brought an action by his mother as next friend alleging an assault and battery upon P. Defendant moved to dismiss the action. On the hearing the plaintiff testified that he wanted the action stopped. The court of appeals held that under section 11247 of the Ohio General Code[1] the defendant could move the court to dismiss the action because it was not brought *for the benefit of the infant.* The court further held that, in view of the plaintiff's testimony and the fact that only nominal damages could have been recovered, the lower court did not abuse its discretion in dismissing the action. Judge Lloyd, in dissenting, said the court's power in advance of trial was limited to the question of whether or not the next friend was a fit and proper person.[2]

Several states[3] have enacted statutes similar to the one in Ohio, but none of these has been construed by the courts. The court in the *Hanna* case said, in effect, that the action of the legislature in enacting Section 11247 was to codify the rules of the common law. It is well then to examine the common law in the light of the decision of the court.

It has been held that anyone with legal capacity to sue could act as next friend for an infant and no permission of the court was necessary to bring an action.[4] The usual practice, however, is to recognize the one rightfully entitled to act as next friend, the nearest relative of the infant.[5] But in the absence of a special statute the

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[1] The action of an insane person must be brought by his guardian; and of an infant by his guardian or next friend. When the action is brought by his next friend, the court may dismiss it, if it is not for the benefit of the infant, or substitute the guardian, or any person, as next friend.

[2] Hanna v. Titus, 68 Ohio App. 127, 39 N. E. (2d) 556 (1941).

[3] Indiana (1926), Secs. 263-266, 378; Iowa (1858), Secs. 10965; Arkansas (1937), Sec. 1327; New Mexico (1929), Secs. 105-102; Kansas (1935), Secs. 60-406; Okahoma, Title 12, Sec. 226.

[4] Heck v. Philadelphia & Reading Ry. Co., 281 Pa. 593, 127 A. 318 (1925); Barwick v. Reckley, 45 Ala. 215 (1871); Walker v. Else, 7 Sim. 234, 4 L. J. Ch. 54, 8 Eng. Ch. 234, 58 Eng. Rep. (Reprint) 826 (1835).

[5] Bank of United States v. Ritchie, 8 Pet. 128, 8 L. ed. 890 (1834); Stereus v. Cole., 7 Cush. 467 (Mass. 1851); Chicago Screw Co. v. Weiss, 203 Ill. 536, 68 N. E. 54 (1903). See OHIO G. C. Sec. 10507-8.

validity of the appointment is not affected.[6] In England, the father as natural guardian of the infant has a vested interest and should be substituted in place of another who has procured the appointment by the court as next friend.[7]

The infant is the real party in interest and the action must be brought in his name and not in the name of the next friend.[8] The relationship of the next friend and the infant is similar to that of an attorney and client[9] in that the next friend is considered an officer of the court subject to the control and supervision of the court.[10] Where the next friend is not a proper person or he is not acting for the best interests of the infant he may be removed and another substituted in his place.[11]

Thus, where the next friend has an interest in the suit adverse to or conflicting with that of the infant he may be removed and another substituted in his stead.[12] Likewise, the next friend may be removed where his views on the merits of the litigation are opposed to the interests of the infant,[13] or when he is incompetent[14] or guilty of misconduct.[15]

While several cases have stated, at least in dicta, that an action may be dismissed where it is not for the benefit of the infant,[16] two cases only have been found where the suits were actually dismissed for this reason on the motion of the defendant.[17] In another case the proceedings were postponed where the action was started with-

[6] Bank of United States v. Ritchie, 8 Pet. 128, 8 Ld ed. 890 (1834).

[7] Woolf v. Pemberton, L. R. 6 Ch. Div. (Eng.) 19 (1877).

[8] Morgan v. Potter, 157 U. S. 195, 39 L. ed. 670, 15 S. Ct. 590 (1895); St. Louis I. M. & S. R. Co. v. Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65 (1903); Zaritzky v. Prudential Insurance Co., 14 N. J. Misc. Rep. 527, 186 Atl. 42 (1936).

[9] Bartinelli v. Galoni, 331 Pa. 73, 200 Atl. 58, 118 A. L. R. 398 (1938).

[10] Garner v. I. E. Schilling Co., 128 Fla. 353, 174 So. 837, 111 A. L. R. 682 (1937); McCarrick v. Kealy, 70 Conn. 642, 40 Atl. 603 (1898).

[11] Kingsbury v. Buckner, 134 U. S. 650, 30 L. ed. 1047, 10 S. Ct. 638 (1890); Apthrop v. Backus, Kirby (Conn.) 407, 1 Am. Dec. 26 (1788); Tripp v. Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 53 (1891).

[12] Patterson v. Pullman, 104 Ill. 80 (1882); Dickson v. Jordan, 210 Ala. 602, 98 So. 886 (1924) (mother acting as next friend and individually in action to sell lands of deceased husband and father); Bicknell v. Bicknell, 111 Mass. 265 (1873) (suit by father to recover money loaned to the infants by the stepmother); Swope v. Swope, 173 Ala. 157, 55 So. 418, Ann. Cas. 1914 A 937 (1911).

[13] *In re* Jaeger, 218 Wis. 1, 259 N. W. 842 (1935) (case of a guardian *ad litem* who filed a brief supporting the side opposing the infant).

[14] Tate v. Mott, 96 N. C. 19, 2 S. E. 176 (1887).

[15] Apthrop v. Backus, Kirby (Conn.) 407, 1 Am. Dec. 26 (1788).

[16] Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A. L. R. 1528 (1919); Swope v. Swope, 173 Ala. 157, 55 So. 418, Ann. Cas. 1914 A 937 (1911).

[17] Sale v. Sale, 1 Beav. 586, 48 Eng. Rep. (Reprint) 1068 (1839); Walker v. Else, 7 Sim. 234, 4 L. J. Ch. 54, 8 Eng. Ch. 234, 58 Eng. Rep. (Reprint) 826 (1835).

out the knowledge of the plaintiff, a 20-year-old girl, because in the opinion of the court it was for her benefit to wait until she reached majority.[18]

Of the two cases which dismissed the action on the motion of the defendant, the court in the first case dismissed the suit for the reason that the motive of the next friend in bringing the action was to defraud the infant plaintiff.[19] In the second case a discharged employee of the defendant and unrelated to the infant brought an action to spite the defendant rather than for the benefit of the infant plaintiff.[20]

The obvious purpose of the Ohio statute is to protect the interests of the infant. Yet, there appears to be an added reason for its enactment and that is to prevent a fraud upon the court itself. The English case above, where the purpose of the next friend in bringing the action was to defraud the infant, is an example of this. From the Court's interpretation of the statute two alternatives are open to the court when the action is not for the benefit of the infant. That alternative should be followed which will best protect the infant whether it means the removal of the next friend and the appointment of another or the dismissal of the litigation. Where the purpose of the next friend, for example, is to defraud the infant, it seems that the only means of guarding the infant's rights is to dismiss the suit. Given a clear case, the court should exercise its power and dismiss the action or remove the next friend regardless of the manner in which the matter was brought to its attention, and regardless of what stage has been reached in the proceedings.

The remaining question then is whether or not the court abused its discretion in the instant case.

The point of disagreement between the majority and dissenting opinions was reached when the majority was willing to look at the merits of the case to determine whether or not there was a benefit to the plaintiff. None of the cases reviewed in this note has gone so far. The question in those cases seemed to be limited to whether or not the next friend was a proper person and was acting in the best interest of the infant.

Subject to the supervisory control of the court, the next friend

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[18] Guild v. Cranston, 8 Cush. (Mass.) 506 (1851).

[19] Sale v. Sale, 1 Beav. 586, 48 Eng. Rep. (Reprint) 1069 (1939).

[20] Walker v. Else, 7 Sim. 234, 5 L. J. Ch. 54, 8 Eng. Ch. 234, 58 Eng. Rep. (Reprint) 826 (1835).

has free power to act to secure the infant's rights.[21] The purpose of the next friend is to supply the want of capacity in the minor and to supply someone legally responsible for the costs.[22] One case, at least, has said that it is the next friend and not the infant who decides upon the policy to bring suit.[23]

Nothing appears in the principal case to indicate that the mother as next friend was not acting in her judgment for the best interests of the plaintiff. If the infant has not the capacity to bring an action in the first place, his opinion or judgment that the suit should be terminated should not be grounds for dismissal of the action.

The statute gives control to the court over the next friend because the Court does not appoint the next friend in the first instance. But, where a proper person is acting in the interest of the infant, the statute does not contemplate that the court shall substitute its judgment for that of a jury in determining the merits of the litigation. It is unfair to infants as a class to give a defendant this added defense which he would not have had if the plaintiff had been a person of legal age.

S. L. W.

Equity

Balancing the Inconveniences in Trespass and Nuisances Cases in Ohio.

The court of equity is a court of discretion. A doctrine which is sometimes used to guide that discretion is the principle of balancing the equities or balancing the inconveniences. Its purpose is to avoid the issuance of injunctions which would operate oppressively, or inequitably, or contrary to the justice of the case. Thus, a plaintiff who is suffering irreparable damages, who has no adequate remedy at law, and whose right to an injunction is clear, may, nevertheless, be denied injunctive relief, if equity, after balancing the inconveniences, finds the equities of the case with the defendant.

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[21] Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A. L. R. 1528 (1919); *Re* Moore, 209 U. S. 490, 52 L. ed. 904, 28 S. Ct. 585, 14 Ann. Cas. 1164 (1908). (Next friend may select the tribunal.)

[22] Bertinelli v. Galoni, 331 Pa. 73, 200 Atl. 58, 118 A. L. R. 398 (1938); See Ohio G. C. 11248.

[23] Swope v. Swope, 173 Ala. 157, 55 So. 418, Ann. Cas. 1914 A 937 (1911).