GERMAN v. ELLIOTT.

Appointment of prochein ami—Security for costs—Evidence of prochein ami.

The father of an infant is in the first instance the proper person to act as next friend in a suit by an infant. Where therefore in such a suit a brother aged 22, who, as well as the infant, lived with the father; and their being conflicting evidence as to the brother's solvency, an order was made for security for costs.

Semble, that in such a case the evidence of the father would be admissable even though *prochein ami*.

[Chambers, March 31st, 1866.]

The defendant obtained a summons calling on the plaintiff and her next friend to shew cause why proceedings should not be stayed until the next friend gave security for costs, on the following grounds:

That the said next friend, who was the plaintiff's brother, was not a proper person to have been so appointed, and is of immature years; and that he and the plaintiff are insolvent, and that the father of the infant, the natural guardian, should have been so appointed; and that an imposition had been practised upon the Court in obtaining such appointment.

The affidavits filed on the application showed that the plaintiff resided with her father, that the next friend was her brother, a young man about 22 years old, living also with her father, and stated that the brother was insolvent.

T. H. Spencer showed cause, and put in an affidavit made by plaintiff's attorney showing that "the next friend lives 35 miles from Cobourg," not convenient to any railway "or post office," disclaiming imposition on the court in obtaining the appointment of the next friend and speaking as to his belief that he is a fit and proper person to be the next friend, that the next friend is not insolvent, and the deponent believes the next friend is able to pay the defendant's costs.

There was also another affidavit by a grocer living in Cobourg; that the next friend is not insolvent, nor in insolvent circumstances; and the alleged imposition or intention to impose was denied.

DRAPER, C. J.,—I gather that the Court or Judge who made the order for the appointment of the next friend was not informed that the infant plaintiff was residing with her father in Percy, or the father would have been appointed next friend, as in *Watson* v. *Fraser*, M. & W. 660, Parke, B. says the father is "the proper and natural guardian of every infant, and as such ought always in the first instance to be appointed to act as his *prochein ami*." As to the possibility of the father's evidence being required, there is authority to show that he would, since the evidence Act, be admissible, although *prochein ami*. *Duckett* v. *Satchwell*, 12 M. & W. 779, contains nothing at variance with the doctrine in *Watson* v. *Fraser*, 8 M. & W. 660; which is distinctly recognised in *Lees* v. *Smith*, 5 H. & N. 632.

I think, therefore, I must make an order on the summons, for, besides the objection of insolvency (not very fully met, for it is not shown that the *prochein ami* has any property except his earnings as a carpenter;) the fact that the plaintiff had a father living, with whom she resided, was apparently withheld or suppressed when the *prochein ami* was appointed, and this amounts, as suggested in *Watson* v. *Fraser*, (without casting any imputation on the plaintiff's attorney), to an imposition on the Court, or at least it approaches very closely to it.

If the summons had been so framed, I think I should have preferred making an order to have another *prochein ami* appointed, and then the proper and natural guardian might have been named. It is not a case for costs on either side.

HOGG v. TURNER.
WRIGHT v. PERKIE.

Service of papers—Irregularity.

Notice of trial for 3rd April, and issue book, were handed to a servant of defendants' attorney on the evening of 26th March. The next day they were given by her to her master.

Held, that their service only dated from the 27th, and was therefore set aside as irregular.

Quære, as to the proper mode of taking the objection.

[Chambers, April 2nd, 1866.]

Robert A. Harrison obtained a summons to set aside the notices of trial in these cases with the copies and services thereof, or some, or one of them.

Ferguson, shewed cause.

DRAPER, C. J.,—In the first case the plea was filed on 22nd March. About 8 a.m. of the 27th March, a servant in the house of the father of the defendants' attorney, (who was then residing with his father,) handed said attorney an envelope which she said had been left with her the evening before, and which the attorney found to contain an issue book and notice of trial for the assizes at Berlin on the 3rd April; the attorney swore that neither the servant nor any one else told him on the previous evening that any papers had been left for him. He returned the papers on 27th to plaintiffs' attorney with a letter repudiating the service.

It appeared on the plaintiffs' side by affidavits that a clerk of plaintiffs' attorney went to defendants' attorney's office to serve the notice, and found it closed; that having searched and being unable to find defendants' attorney, his partner or clerk, the clerk of the plaintiffs' attorney proceeded to the place of residence of defendants' attorney, (his father's,) at a short distance from the office, and saw a female servant, and was told by her that defendants' attorney was not in, but she would take the papers for him and deliver them to him; and he gave them to her in an unsealed envelope addressed to defendants' attorney by name; this was before 7 p.m. He swears she received the papers from him as if it was her place to do so; and he verily believes she had the right to do so, and that it was her place alone of any of the domestics or persons at the said house. These facts and the statement of belief do not go so far as in the case of *Robinson* v. *Gomperts*, 4 A. & E. 82, and there the party to be served was not an attorney.

In the second case (an action of Dower), it appears that the issue book and notice of trial were left at the residence of the tenant's attorney on Monday 26th March, between 5 and 6 p.m. with a female servant of tenant's attorney being contained in a sealed envelope. The tenant's attorney was then absent from the city of Toronto. The papers were not received at the office of the tenant's attorney, or by any one belonging to it until the forenoon of the 27th, which was too late. The office was open until