CHAPTER VII,

Of the Appearance of Parties.

OF THE APPEARANCE OF PARTIES OF FULL AGE.

§ 142. May appear how.—"Every plaintiff of full age, may appear and conduct his suit or defense, either in person or by attorney; but the constable who served either the original or jury process in the cause, shall not appear and advocate for either party at the trial."[1]

§ 143. Appearance by attorney, authority must be proved.—"The authority to appear as attorney for any party may be either written or verbal; and such authority shall be proved by the attorney or other competent testimony, in all cases where requested by the opposite party, or where the opposite party shall not appear."[2]

1—C. L., § 761; Westbrook v. Blood, 50 Mich., 445; 15 N. W., 544. A written request by the plaintiff or his attorney that a case be adjourned or held open is an appearance by the plaintiff and gives the justice jurisdiction to act if presented to him within one hour after the return hour of the process by which the suit is commenced: Wagner v. Kellogg, 92 Mich., 616; 52 N. W., 1017.

2—C. L., § 762. The authority of an attorney who appears in a justice's court extends no farther than the proceedings before the justice: Berkery v. Circuit Judge, 82 Mich., 160; 46 N. W., 436.

The office of attorney, in the professional sense of the term, is not known in justices' courts. They are not courts of record, and have no such control over those who practice in them as to render it safe to give such persons any very liberal power to conclude the rights of those whom they claim to represent. Bailey v. Delaplaine, 1 Sandf., 13. But a party may appoint an attorney in fact, who will be entirely competent to appear for and represent him in justices' court:

The former law did not require "an attorney of a court of record of this state" to prove his authority to appear. He is now on the same footing, in that respect, as other persons. No good reason, it is conceived, can be given why a defendant should be shut out from ascertaining the fact that the attorney has, in fact, the right to recover judgment and receive the money.

When the authority of an attorney to appear is in writing, the hand-writing of the client may be established presumptively. Thus, where letters were directed by the attorney to the client, at the residence of the latter, in relation to the subject matter of the suit, and several answers were received by him in due course of mail, purporting to be signed by the client, all in the same hand-writing, and dated at his residence, which letters contained a general authority to the attorney to take any steps, legal or otherwise, as he might deem advisable, for the recovery of the debt, it was held the authority was sufficiently proved. The court said: "An authority to appear may be by parol or in writing, and the attorney himself may prove his authority."[3] If the authority is in writing, evidence of the hand-writing must be produced. This may be established, however, presumptively; as, where letters were directed to a particular person on business, and answers were received in due course of mail, a fair inference arises, that

Hughes v. Mulvey, 1 Sandf., 95. The statute, however, is peremptory in its requirements that, in justice's court, where the defendant does not appear, the person appearing as the plaintiff's attorney shall prove his authority; and his failure to do so is not cured by C. L., § 950: Scofield v. Cahoon, 31 Mich., 206. The purpose of the statute is to provide for ascertaining with certainty, in all cases, whether any one assuming to represent another is able to bind him: Westbrook v. Blood, 50 Mich., 446; 15 N. W., 544. And the fact that the person appearing for the plaintiff as his attorney did not prove his authority, is ground for reversing a judgment for the plaintiff, if neither he or the defendant appeared, and the objection is a proper ground for a special appeal: Woodbridge v. Robinson, 49 Mich., 228; 13 N. W. 527. But a justice's judgment cannot be attacked collaterally on the ground that the person appearing as attorney failed to prove his authority: Reed v. Gage, 33 Mich., 180; Mahew v. Snell, 33 Mich., 182; Fruitport Twp. v. Judge of Muskegon Circuit, 90 Mich., 20; 51 N. W., 109.

3—Gaul v. Groat, 1 Cow., 113. A mere verbal request is a sufficient authority for a person to appear and manage a cause for another in a justice's court: *Ibid.*, Murray v. House, 11 John., 461; Tullock v. Cunningham, 1 Cow., 256. But a person cannot prove his authority to appear as attorney for a party by producing a letter from a third person who is an attorney at law, without proving that the latter is himself attorney for the party: Westbrook v. Blood, 50 Mich., 445; 15 N. W. 544.

the answers were written by the person from whom they purport to come.[4]

A justice is not bound to require proof of the authority of a person who claims to appear as attorney for one of the parties, if the other party does not object to such appearance;[5] by not requiring proof of the authority of the opposite party to appear by attorney, he will be deemed to have admitted it; if the defendant does not appear, the authority of the attorney to appear must be proved.

The justice cannot act upon information which he has received out of court in relation to the appointment of an attorney, even though the information came from the party for whom the attorney appears.[6] Therefore, when the justice examined the attorney on oath, as to his authority, before the time mentioned for appearance in the process, or the defendant had appeared, it was held that the examination was extrajudicial, and in judgment of law proved nothing.[7] An authority from the party on the record authorizes the appearance, although he is but a nominal plaintiff, and not the party in interest.[8]

The attorney cannot delegate his authority to a third person, unless authorized by his power.[9] In such case the authority of the attorney and the substitute must be proved.[10]

§ 144. Who may be authorized to appear.—Infants and married women may be authorized to appear for either party.[11]

4—Bush v. Miller, 13 Barb., 481. As to when an attorney's authority will be presumed, see, Wilcox v. Kassick, 2 Mich., 165.

5—Ackerman v. Finch., 15 Wend., 652. If either party wishes proof of the authority of the attorney who appears for the opposite party, such proof must be required when the attorney first appears: Merritt v. Thompson, 3 E. D. Smith, 596, 599; see, Underhill v. Taylor, 2 Barb., 348; and, Andrews v. Harrington, 19 Barb., 343. It seems that if a party himself does not appear, the authority of an attorney to appear for him should be proved under oath: Morton v. Crane, 39 Mich., 530. But the right to object to an appearance as attorney in justice's court for want of authority, is not waived by having demanded a plea of him before making the objection: Westbrook v. Blood, 50 Mich., 445; 15 N. W., 544.

6—Beaver v. Van Every, 2 Cow., 429.

7—Fanning v. Trowbridge, 5 Hill, 428; see, Westbrook v. Blood, 50 Mich., 444; 15 N. W., 544.

8—Culver v. Barney, 14 Wend., 161.

9—Bac. Ab.; "Authority," (D). The employment of one member of a firm is the employment of all and any one of them may act: Eggleston v. Boardman, 37 Mich., 14.

10—Fanning v. Trowbridge, 5 Hill, 428; and see, Spier v. M'Queen, 1 Mich., 252.

11—Bac. Ab., "Authority," (B). A defendant's wife, as such, is not au-

"But the constable, who served either the original or jury process in the cause, shall not appear and advocate for either party at the trial."[12]

When the constable, who served the summons, answered for the plaintiff, and presented to the justice the note on which the suit was brought, and stated the plaintiff's demand, it was held not to be an appearing and advocating the cause within the meaning of a like statute.[13] But where the constable appeared on the day of trial for the plaintiff, and proved the note declared on, the defendant not appearing, it was held to be within the meaning of the statute, appearing and advocating at the trial.[14] The party by whom the constable was employed could not object that his appearance was erroneous.[15]

A general authority to collect, implies an authority to appear for the plaintiff.[16]

It would be irregular to allow the same person to appear for both parties.[17]

§ 145. **Appearance by townships.**—"The supervisor of each township shall be the agent for his township for the transaction of all legal business, by whom suits may be brought and defended, and upon whom all process against the township shall be served."[18]

OF THE APPEARANCE OF INFANTS.

§ 146. **Why not allowed to appear personally.**—An infant is regarded in law as incapable of properly caring for, guarding and enforcing his rights. It is therefore required that some

thorized to appear for him in a suit before a justice, but she may be authorize so to do: Hughes v. Mulvey, 1 Sandf., 92. Nor is the law partner of one who is the official attorney for a municipal corporation entitled, on proof of that fact, to appear as attorney for the corporation in justice's court: Wilcox v. Clement, 4 Denio, 160.

12—C. L., § 761. One serving a summons issued by a justice, under a special authority given him by the justice for that purpose, is to be deemed a constable as to that action, and cannot act as counsel on the trial: Wilkinson v. Vorce, 41 Barb., 370.

13—Pinney v. Earl, 9 Johns., 352, 354.

14—Ford v. Smith, 11 Wend., 73.

15—Smith v. Goodrich, 5 Johns., 354.

16—McMinn v. Richtmeyer, 3 Hill, 236.

17—Sherwood v. The Saratoga & Washington Ry. Co., 15 Barb., 650.

18—C. L., § 2336. An action by the treasurer in the name of the township is improperly brought: Laketon Twp. v. Akeley, 74 Mich., 695; 42 N. W., 165.

one shall be appointed to represent him, to stand for him whenever he comes into court as a party, either plaintiff or defendant. The person so appointed to represent him, if plaintiff, is called a "next friend," and if defendant, a "guardian *ad litem.*"

§ 147. Infant plaintiffs.—"No process shall be issued for an infant plaintiff, nor shall any issue joined by such plaintiff without process be heard, until a next friend for such plaintiff shall be appointed."[19]

"Whenever requested, the justice shall appoint some suitable person to be named by such plaintiff, who will consent thereto in writing, to act as his next friend in such suit, who shall be responsible for the costs therein."[20]

The consent must be in writing, and be filed with the justice.[21]

The full age of man or woman is twenty-one years; every person under that age is an infant.

If process issue in favor of an infant plaintiff before the appointment of a next friend, it may be set aside on motion as irregular.[22]

If the appointment is to be made in a suit instituted by joining issue without process, the consent should be entitled in the cause.

After making the appointment, it should be noted in the docket.

The next friend must be a responsible person,[23] as he is responsible for the costs. In what manner the costs are to be collected of him, is difficult to say, unless an agreement to pay

19—C. L., § 756. Where suit is prosecuted by next friend, the suit being appealed, the appellate court will presume the appointment regular: Kearney v. Doyle, 22 Mich., 294; Dillon v. Howe, 98 Mich., 168; 57 N. W., 102. The proper practice where an infant brings suit is indicated in Haines v. Oatman, 2 Doug., Mich., 429.

20—C. L., § 757.

21—C. L., § 760.

22—Wilder v. Ember, 12 Wend., 191; Fitch v. Fitch., 18 Wend., 513; Fellows v. Niver, *Ibid.*, 563; Haines v. Oatman, 2 Doug., Mich., 430. As to when an appointment will be presumed to be regular, see, Kearney v. Doyle, 22 Mich., 294.

But the infant, and not the next friend, is the party to the suit, and is not bound by any relinquishments of its rights by the next friend, nor can the next friend admit away its rights: Burt v. McBain, 29 Mich., 260, 265.

23—People v. N. Y. Com. Pleas, 11 Wend., 164; Haines v. Oatman, 2 Doug., Mich., 430.

them is contained in the consent of the person who proposes to become next friend, which may be done.[24]

The rule that an infant shall appear by next friend, and not by attorney, relates to the appearance *upon the record,* but it is not intended to deprive the infant of the professional aid of an attorney.[25] The next friend may, after his appointment, authorize another person to appear and prosecute the suit. It would be the same in respect of a guardian for the defendant.

If an infant plaintiff appear and prosecute a suit in person or by attorney, the defendant can take advantage of it only by moving to set aside the proceedings for irregularity, or by pleading it in an abatement.[26]

§ 148. Infant defendants.—"After the service of process against an infant defendant, the suit shall not be any further prosecuted until a guardian for such defendant be appointed; and the justice, upon the request of such defendant, shall appoint some person who will consent thereto in writing, to be guardian of the defendant, in the defense of the suit."[27]

"If such defendant shall not appear on the return day of the process, or if he neglect or refuse to nominate such guardian, the justice may, on motion of the plaintiff, appoint any discreet person to be such guardian."[28]

"The consent of every such next friend or guardian shall be filed with the justice; and the guardian for the defendant shall not be liable for any costs in the suit."[29]

24—1 Cow. Treat., 2d ed., 542-3. The responsibility for costs is to the defendant. Sick v. Michigan Aid Assn., 49 Mich., 50; 12 N. W. 905. As between the infant and the next friend the infant is responsible for costs unless by reason of some misconduct or failure to exercise ordinary prudence the next friend has caused the infant to carry on fruitless litigation. See Waring v. Crane, 2 Paige Ch., 79; 21 Am. Dec. 70. The language of the statute "who shall be responsible for the costs therein," does not mean that the next friend must be financially able to pay the costs, but rather that he shall be liable for the costs: Rabidon v. Muskegon Circuit Judge, 110 Mich., 297; 68 N. W., 147.

25—People v. N. Y. Com. Pleas, 11 Wend., 164.

26—Schemerhorn v. Jenkins, 7 Johns., 373. And if no objection is made until after issue joined on the merits, all objection and irregularity is waived: Treadwell v. Bruder, 3 E. D. Smith, 597; Schemerhorn v. Jenkins, 7 Johns., 373.

27—C. L., § 758. No person should be appointed guardian who has any interest in the suit adverse to the infant. Damouth v. Klock, 29 Mich., 289, 296.

28—C. L., § 759.

29—C. L., § 760.

If a guardian is not appointed for an infant defendant, and judgment is rendered against him, he may reverse the judgment because of the error: Mockey v. Gray, 2 Johns., 192; Alderman v. Tirrell, 8 Johns., 418. But if there are several defendants, and they

The consent of the guardian must be in writing, and the appointment noted in the docket, as in the case of a next friend.[30]

OF THE TIME FOR APPEARANCE, ETC.

§ 149. Effect of failure to appear at time fixed.—"Judgment of nonsuit with costs shall be rendered against a plaintiff prosecuting an action before a justice of the peace in the following cases: * * * * * *

1. If he fail to appear on the return of any process within one hour after the same was returnable;

2. If after an adjournment he fail to appear within one hour after the time to which the adjournment shall have been made."[31] * * * * * *

are sued as joint debtors, and judgment rendered against all, it is no cause for reversing the judgment that one of them was an infant and no guardian was appointed for him: Mason v. Denison, 11 Wend., 612; Mason v. Denison, 15 *Ibid.*, 64

30—A judgment is not void, but voidable merely, because no guardian *ad litem* was appointed: Schimpf v. Wayne Circuit Judge, 129 Mich., 103; 88 N. W., 384. Neither is an administrator's sale invalid for the reason that no guardian *ad litem* was appointed for an infant heir already represented by a general guardian: Wheelock v. Lake, 117 Mich., 11; 75 N. W., 140. Such guardian *ad litem* may be appointed in the circuit court after appeal: In re Sanborn's Estate, 109 Mich., 191; 67 N. W., 128.

31—C. L., § 836; Morris v. Bleakley, 1 Hilt., 90; Redman v. White, 25 Mich., 523. And the justice's docket must show that the appearance was within the hour: *Ibid.;* Mudge v. Yaples, 58 Mich., 307; 25 N. W., 297; Post v. Harper, 61 Mich., 434; 28 N. W., 161; Stolte D. & F. Co. v. Cochran, 111 Mich., 193; 69 N. W., 247.

The failure of the plaintiff to appear within an hour of the time to which a cause has been adjourned, operates as a discontinuance, and deprives the justice of jurisdiction except to render judgment of nonsuit: Brady v. Taber, 29 Mich., 199; Cagney v. Wattles, 121 Mich., 469; 80 N. W. 245. And the failure of the plaintiff to appear within one hour of the time for the return of a garnishee summons to show cause, etc., works a discontinuance of the garnishee proceedings: Johnson v. Dexter, 38 Mich., 695. To constitute an appearance, the party must do some act or take some step in the action: if, when the cause is called, a party refuses to answer, or merely answers "here," but refuses to put in any pleading or take any other step in the cause, there is no legal appearance on his part: Fanning v. Trowbridge, 5 Hill, 428, 430; People v. Wilgus, 5 Denio, 58, 62. A written request by the plaintiff or his attorney that the case be held open, or adjourned, constitutes an appearance: Wagner v. Kellogg, 92 Mich., 616; 52 N. W. 1017. An appearance may be general or special. It is general, when the party appears for the purpose of litigating the cause upon its merits, and upon all questions that may arise; it is special, when he appears merely for the purpose of making some motion or objection, raising some question or pleading some special matter which does not relate to the merits of the case: See Wright v. Russell, 19 Mich., 346, 350. An appearance will not be deemed to be special unless the party states that it is special, and he ought to state distinctly the purpose for which he appears. And the justice should state in his minutes

In practice, the justice gives one hour for the parties to appear, and unless both appear, he ought not, within that time to proceed in the cause.[32] In this case it was decided, that, as a general rule, a justice should wait one hour for the appearance of the parties, and no longer unless a reasonable excuse was shown for further indulgence. The preceding provision of the statute was not intended to change this rule. "Many circumstances may exist rendering it necessary to delay beyond the hour to call the cause, such as being engaged in other official duties, and the like."[33]

and docket whether the appearance is general or special; and if the latter, the grounds or purpose of the appearance.

32—Shufelt v. Cramer, 20 Johns., 309; Sherwood v. Saratoga & Washington Ry. Co., 15 Barb., 650.

Our statute does not require the justice to wait an hour for the defendant, still it is reasonable and proper that he should wait that length of time: Smith v. Brown, 34 Mich., 455, 458; Talbot v. Kuhn, 89 Mich., 30; 50 N. W., 791. The justice ought to wait an hour for the defendant to appear in the same cases in which by the terms of the statute such time is given to the plaintiff. There is no good reason for giving an additional hour to the plaintiff and withholding it from the defendant. Justice requires that both parties shall have equal chances, and the justice ought to wait a reasonable time for the defendant, and that, by analogy to the time allowed for the plaintiff, may ever be regarded as an hour: Bossence v. Jones, 46 Mich., 492; 9 N. W., 531. As to waiting an hour for the defendant, see, Chair Co. v. Runnels, 77 Mich., 104; 43 N. W., 1006; Talbot v. Kuhn, 89 Mich., 30; 50 N. W., 791; Hodge v. Bagg, 81 Mich., 243; 45 N. W., 841. In Talbot v. Kuhn, *supra*, it is held that while the statute does not require the justice to wait one hour, if defendant fails to appear, before rendering judgment, yet by judicial construction it is the right of the defendant that he should wait the hour and that if he fails to do so the error may be corrected by application to the proper court. If the plaintiff fails to appear within the hour the justice loses jurisdiction to do anything but render a judgment of nonsuit, and this by virtue of the express language of the statute. On the other hand, if the defendant fail to appear and judgment is rendered before the expiration of the hour, the judgment is good unless reversed in a proceeding taken to that end. No appeal lies from a judgment of nonsuit against a plaintiff who fails to appear within the hour after the time fixed. Such judgment is regarded as a voluntary nonsuit from which no appeal lies, notwithstanding C. L., § 902.

33—The absence of the justice for a few minutes beyond the hour to which the cause was adjourned, for the purpose of holding a coroner's inquest, was held not to work a discontinuance of the case. The court says the justice was absent on official duty, and both duties could not be performed at the same instant, and the absence of the justice for a few minutes more than the hour to which the cause was adjourned, could not be allowed to operate as a discontinuance, though the defendant might have remained at the office till the expiration of the hour and then left. But in such case, if the defendant had gone away ignorant of the cause of the justice's absence, the justice should have notified him of his return at the earliest opportunity, and should have required proof that he had received such notice before taking any other step in the cause; and if the defendant had in good faith dismissed his witnesses, he would, on showing cause, be entitled to the necessary time to procure their attendance: Stadler v. Morse, 9 Mich., 264-6.

But where upon the adjourned day

"If no reasonable excuse exists or appears, the cause should be called within the time designated by the statute, and the refusal would be error. Independently of this construction, the justice was right in this case, as the defendant wilfully abandoned the defense when the suit was about to be called."[34]

The defendant at the expiration of the hour, the plaintiff not appearing, requested the justice to call the case, who told him he had made it a rule to wait five minutes on account of variation of time-pieces, and should wait that time, and if the plaintiff did not appear he would dismiss the cause, but if he did appear he should go on with it. The defendant left, and soon after, within five minutes, the plaintiff appeared, and the justice proceeded to try the cause. This was, on *certiorari*, alleged as error. The court say: "The first question is, whether the defendant was bound to wait five minutes after an hour had elapsed from the time appointed for his appearance. I think not. The words of the statute are, 'Judgment of nonsuit, with costs, *shall* be rendered against a plaintiff, if he fail to appear on the return of any process, *within one hour* after the same was returnable.' If the plaintiff had appeared before the defendant left, or if he had been in sight and approaching, and the justice had told the defendant, then, it seems, the defendant would have gone away at his peril.[35] But here the plaintiff had neither arrived, nor was there anything to show that he

the justice was absent in the performance of duties as superintendent of the poor, and returned to his office about thirty minutes after the expiration of an hour from the time to which the cause had been adjourned, and the defendant not being then present, the justice found him near by and informed him that he was ready to proceed with the trial, but the defendant refused to appear, whereupon the justice adjourned the case and caused notice thereof to be served upon the defendant, and then upon the adjourned day, the defendant not appearing, the cause was tried and judgment rendered against him: *Held*, that as the justice was not absent in the performance of any official duty as a justice, but in the performance of the duties of another office, the judgment should be reversed: Ruberts v. Hathaway, 42 Mich., 592; 4 N. W., 307. See, Woempener v. Ketchum, 110 Mich., 34; 67 N. W., 1106, holding that a justice may hold open a cause from day to day for performance of other official duties without losing jurisdiction. Attention is called to sections 799 and 800, being Act 114, Pub. Acts of 1885. This act provides for the transfer of causes to another justice in cases of vacancy occurring in the office of justice before whom such actions are pending; also for such transfer in cases where the justice is sick or "unable for any cause, temporarily or negligently, to perform the duties of his office."

34—Barber v. Parker, 11 Wend., 51; and see, Cornell v. Bennett, 11 Barb., 657.

35—Baldwin v. Carter, 15 Johns., 496; Barber v. Parker, 11 Wend., 51.

intended to appear; and the justice was not engaged in any other official business. If, under such circumstances, the defendant must, at his peril, wait beyond the hour, the statute is, in effect, repealed. When the law says that the plaintiff shall have but one hour, the justice has no right to say that he shall have sixty-five minutes."[36]

If the defendant fails to appear in proper season, there may be a final judgment against him, which will be a bar to any further litigation of the same matter, and it may also deprive him of the advantage of a set-off. And it has been held, that if the defendant appears on the return day of the process, and the justice and plaintiff are still present in the court, the defendant may interpose his defense as a matter of right, even if the plaintiff has put in his declaration, and the cause has been adjourned to a subsequent day for trial, and for the purpose of allowing the plaintiff an opportunity of getting his witnesses.[37] The plaintiff does not lose any rights in such a case, and to deprive a defendant of his defense under such circumstances would seem to be unjust. But if the defendant does not appear on the return day of the process nor on the adjourned day, until after a witness has been called and examined on the part of the plaintiff, it seems that he will be too late, even if the justice is disposed to admit the defense.[38]

36—Wilcox v. Clement, 4 Denio, 160.

37—Pickert v. Dexter, 12 Wend., 150; Lowther v. Crummie, 8 Cow., 87. And it is said that if the defendant appears on the return day, though not at the time mentioned in the process, nor within an hour of it, yet he may still interpose his defense if the plaintiff is proceeding with the trial on that day, and the trial is then in progress: Sweet v. Coon, 15 Johns., 86; Atwood v. Austin, 16 Johns., 180; Lowther v. Crummie, 8 Cow., 87; Pickert v. Dexter, 12 Wend., 150. If the defendant does not appear on the return day, but does appear on the day to which the cause may have been adjourned for the convenience of the plaintiff, the justice may, in his discretion, then permit the defendant to interpose his defense: Sammis v. Brice, 4 Denio, 576; Jenkins v. Brown, 21 Wend., 454; Mead v. Darragh, 1 Hilt., 396. But it is said that he cannot at this time claim to put in his defense as a matter of right: Sammis v. Brice, 4 Denio, 576; Jenkins v. Brown, 21 Wend., 454; Snell v. Loucks, 11 Johns., 69.

38—Monfort v. Hughes, 3 E. D. Smith, 591, 593-9; Mead v. Darragh, 1 Hilt., 396.