The Guardian Ad Litem

George Whitworth Hoyt
Cornell Law School

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THESIS.

THE GUARDIAN AD LITEM,

With Special Reference to Procedure under the New York Code.

PRESENTED BY

GEORGE WHITWORTH HOYT,

for the degree of

BACHELOR OF LAWS.

CORNELL UNIVERSITY.

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INTRODUCTION.

Guardianship under the Roman Law.

In the Roman Law, there were two different kinds of Guardianship recognized, viz., Tutela, or Tutorship, and Cura, or Curatorship.

The Tutorship of minors, by the Roman Law, was the power and right of a Roman citizen to supply, by his authority the declaration of Will of a Minor Roman citizen who was sui juris in his legal acts, to fully represent him therein where this was allowed, and to manage his estate. From an original right of the nearest legal heirs of the minor, or on him by whom the father, by virtue of his paternal power, by his last Will conferred it. At a subsequent period it became a legal duty, which every person to whom for any legal reason it was offered, had to accept, viz., on testamentary appointment on legal prescript or by direction of the Government. The person to whom it was given was termed the Tutor, the subject was termed the Pupil. The Tutorship of the minor was legally necessary, and did not depend on the Pupil's will, whether
he should have a Tutor or not. Tutorship was made a public duty, every one to whom it had rightfully been offered was bound to accept. There was, however, certain excuses which could be given, namely, If the Tutor was more than seventy years of age, or filled a Governmental position. All Tutors were required to give security for the performance of their duties, except the Testamentary Tutor, who was absolved from giving security. Every Tutor, called to Tutorship, if he did not properly excuse himself, must undertake it from the moment that he was apprised of his appointment; in default thereof, he was liable to all damages to the Pupil that might arise from such neglect. Every Tutor also had to be sworn. The rights and duties of the Tutor during Tutorship, related partly to the Pupil's physical person, to his legal personality, in the legal training undertaken by him, and also to the management of the Pupil's estate. The Tutor's chief duty consisted in the protection of the Pupil, that is, he must wholly represent the Pupil's legal personality in his lawful acts, or supply it by his authority, and thereby protect him against harm, which otherwise might result
from either total lack of, or at least imperfect legal
capacity to act. Hence, so long as the Pupil was an
infant and could not act for himself, the Tutor must
represent him in such lawful acts as could not be
committed without harm to the Pupil; but as soon as the
Pupil became of age, and could act for himself, the im-
perfect legal personality was then supplied by the
Tutor consenting to the Pupil's transactions. This
authority is requisite in all transactions of the
Pupil which affect a change of his status, or whereby
something of his was relinquished, or any of his
rights were conceded to another, and where an obliga-
tion was assumed by him. Such authority was not
requisite to a transaction whereby the Pupil only
acquired rights, or was released from an obligation.
If the authority was wanting where it was required by
the strict civil law, the transaction was invalidated,
and if it depended upon mutual performances, the Pupil
could sue thereon, but could not be sued; but, if the
Tutor interposed his authority by the strict civil law
the transaction bound the Pupil. However, if the
Pupil was injured by it, he still had his right to
prayer for restitution. Every Tutor was clothed with
authority. If, however, the Tutor himself or a person subject to his power, entered into a transaction with the Pupil, he could not, by reason of this authority conferred upon him, validate the transaction. The form of the Tutor's authority required that he be present at the undertaking of the transaction. The Tutor at such time, must verbally and without force, unconditionally consent, and if one of these requisites was lacking, the authority was invalid. Every one who was not a Tutor, but yet acted as such, was termed a False Tutor, but, in a narrower sense, there was the following distinction. When one not a Tutor managed the property of the infant, he was termed the Protector or one who transacted business for a Tutor, and if he acted as a Tutor, he still took upon himself, the same duties as the Real Tutor. The Pupil had the right to insist on his immediate removal, as soon as it appeared that he was not the Real Tutor. The Tutorship was ended in two ways: 1. Rightfully, (a) When the Pupil reached the age of puberty, (b) When the Tutor died, or (c) suffered a loss of status, (d) When he was appointed for a certain period of time only, or until the performance of a condition, and the time had
expired or the condition had been performed, or (e)
when the mother who ministered the Tutorship of her
children, married again. 2. By Judicial permission,
(a) at the Tutor's instance, if sufficient excuse be
given, (b) against the Tutor's will if he be suspected of
not performing his duties with proper fidelity, or
even if he only give cause to fear this, and his re-
moval was therefore necessary or at least advisable.

Curatorship.

Curatorship was a charge imposed upon one by the
Law or Government, for the care of the person or the
management of the affairs of another, who, for a par-
ticular reason was incapable, or was regarded as
incapable to care for himself or his estate. He upon
whom such charge was imposed, was termed the Curator.

With respect to the extent and capacity of Curatorship,
it was divided as follows: 1. Perfect and imperfect
Curatorship; according as they have had the full right
of administration conferred upon them, or only the
custody of the property connected with a right to
alien things which could not be preserved. 2. Curator-
ship of the person or of the property, the former re-
lated to the wellfare and personal necessities of the Curatee, the latter related only to the management of the property. 3. Curatorship general and special; the former related to the entire estate, the latter, to only a particular transaction of the Curatee. The Curator must be capable of undertaking the duties of his office; if he was capable, he was bound to undertake it. Curators were appointed in the following cases:
(a) When the minor was in litigation, (b) When he was to receive payment of a debt from his debtor, (c) When his former Tutor rendered an account of his administration, Excepting in these cases, the minor received a Curator only for the management of his estate. When the Pupil himself petitioned for one, he must retain him till he reached his majority. When the Curatee received at his solicitation, a permanent Curator for the management of his estate, he could, notwithstanding, bind himself and his estate without the Curator's consent, by contract, and other lawful acts. Such transactions were not invalid because of the lack of the Curator's consent, but if the interests of the minor were injured, he might, to be restored, petition to have his
age investigated, even if his Curator should have con-
sented to the transaction. When he had sold, pledged, or hypothecated his things, or undertook a transaction for which, by a legal prescript, every minor must have a Curator, then the Curator's consent was necessary for its validity. By the lack of such consent, for the minor's advantage, such transactions were invalid, and restitution was required, but if the Curator consented, then by the strict civil law the minor was bound. However, the minor always had his right, by petition, to be restored. The Curatorship of a minor ceased, (a) When the minor or Curator died, (b) When either suffered a loss of status, (c) When the minor attained his ma-
ajority, (d) When the Curator was removed because sus-
ppected of some wrong, (e) When the Curator was appointed for some period of time, and the time has expired.

After the Tutorship and Curatorship had expired, they were bound to give an account of their administration. The ward's father could not release them from this duty, but however, he who was ward, might, if the account be stated to the ward during his minority. A Tutor was appointed to assist him in the account. The inventory formed the basis of the account, and the
receipts and expenditures had to be precisely specified, and every item must be supported by vouchers. After the account had been closed, the Tutor or Curator must transfer the remaining estate, with interest from the day of closing. The ward had a lien on the Guardian's entire estate as security for the faithful administration of the Tutorship or Curatorship, for the transfer of property, and for the payment of damages by the Tutor or Curator. The Pupil could sue the Tutor for the performance of his duties, especially in relation to the administration of the estate, against which the Tutor had his action for indemnity for what he expended of his own means, for the Pupil's benefit. The Tutor or Curator who had fraudulently appropriated the ward's property, was liable for a double amount of the property so appropriated.
CHAPTER I.

A Short History and Classification of the Different Kinds of Guardianship in the English and American Law.

The Guardian in England and America, performs both the office of the Tutor and Curator of the Roman Law. The species of Guardianship in the English law, are as follows: (a) Nature, (b) Nurture, (c) Cocage, (d) Chancery, (e) Ad litem, (f) Probate, (g) Testamentary, (h) Chivalry, (i) Estoppel. These may be grouped into two main divisions: 1. Those that exist by operation of Law without appointment being necessary, they are as follows: (a) Guardian by Nature, (b) Nurture, (c) Socage, (d) Estoppel; and 2. Those appointed by the Courts, as (a) Guardian in Chancery, (b) Ad litem, (c) Those appointed by the Probate and Surrogate Courts.

In this Country the Laws of inheritance have wrought important changes upon the forms of Guardianship of the first class. A Guardian by Nature, by the English law, had charge of the person, but not of the property of the heir apparent until he reached the age of twenty-one. This Guardianship did not extend to the other children, and was vested in the father or in
case of his death, in the mother. Under the laws of inheritance in the United States, by which all the children inherit equally, this guardianship extends to all the children, and is in fact, substantially equivalent to the relation of parent and child, and has the usual legal consequences considered in law under that topic. A Guardian by nurture also had charge only of the child's person, but his right continued only until the child became fourteen. This guardianship applied to all the children except the heir apparent, and was vested first in the father, and secondly in the mother. In this Country, where there is no distinction between an heir apparent and other children, it is the same as guardianship by nature. A Guardian in Socage had the custody of the infant's lands as well as his person, but only of lands obtained by descent. This Guardianship devolved upon the next of kin who could not possibly inherit the estate. It continued until the infant became fourteen, and would then cease if the infant chose another Guardian, as he might do. In some of the United States, this kind of Guardianship still exists, though the rule that the Guardian must be incapable of inheriting the estate,
has been generally changed. There may also be, by the common law, a Guardian by estoppel; thus, when one wrongly meddled with an infant's property, as by receiving the rents and profits, he would be called to account as a Guardian, and would be estopped to deny that he had acted in that capacity. In the first two forms of Guardian-ship by appointment of the Court, the appointment is made by virtue of an inherent power in the Court; in the last one, the power to appoint is conferred by statute generally. In England the Court of Chancery has, from an early period exercised the power of appointing guardians to take the custody of minors and their estates. In the United States, Courts of Equity are generally vested with the same authority, their power in this respect being generally prescribed by Statute. A Guardian ad litem may be appointed by any Court in which an action is pending to which the infant is a party. It is quite common to confer power by Statute upon Probate and Surrogate's Courts to appoint Guardians. The infant if over fourteen, may usually choose the guardian, but not if under fourteen. Such
Guardians were primarily under the control of the Probate Courts, the Court of Chancery also had jurisdiction over them. Testamentary Guardians are those appointed by the father's will. The Statute 12 Charles II, which first gave this power in England, has generally been adopted in this Country, or Statutes of similar purport have been enacted. Such Guardians are also under the control of Courts of Equity. Their powers generally last during the wards minority, and extend both to his person and property.

CHAPTER II.

The Guardian ad Litem, or Next Friend, treated Historically, with Reference to the Early Common Law.

No part of the early English law was more disjointed and incomplete than that which deals with the Guardianship of infants. When it issued from the middle ages, it knew some ten different kinds of Guardians, and yet there was never laid down any definite rule that there is or ought to be, a Guardian for every infant. It had been thinking almost exclusively of infant heirs, and had left other infants to shift for themselves and to get Guardians as best they might, from
time to time, for the purposes of litigation. The law
had not been careful, even to give the father a right
to the custody of all his children; on the other hand,
however, it had given him a right to the custody of
the heir apparent only, whose marriage he was free to
sell. It looked at Guardianship and paternal power
merely as profitable rights, and, it only sanctioned
such rights when they could be made profitable. A
statute was required even, to convert the profitable
rights of the Guardian in socage into a trust to be
exercised for the infant's benefit. (Statute of
Marlboorough, Chap. 17). The law, at all events the
temporal law, was not at any pains to designate any
permanent Guardian for children who owned no land,
although the Ecclesiastical Courts did something to pro-
tect the interests of children by obliging Executors
and Administrators to retain for their use, any legacies
or parts to which they had become entitled. But all
infants had some rights which must be enforced. The
infant was incapable of enforcing them himself. How
then were they to be enforced? The infant could
not prosecute in person, so some person of full age
must conduct the litigation for him. In the year 1275, the third year of Edward the First's reign, the Statute of Westminster II was passed, Chapter 48 of which reads as follows: "If a Guardian or chief Knight enfeoff any man of land that is the inheritance of a child within age and is his ward, to the disinheritance of the heir, it is provided; 1. That the heir shall forthwith have his recovery by disseisen against his Guardian and against the tenant. 2. The disseisen shall be delivered by the Justices if it be received, or to the next friend if the heir to whom the inheritance cannot descend, to improve to the use of the heir and to answer for the issues until he shall become of full age, and if the infant shall be carried away by the Guardian or by the feoffee or by others, by reason thereof he cannot sue, his action then may be brought by his next friend, who will sue for him, and shall be thereunto admitted." This was further augmented in the year 1285 by the Statute of Westminster II, Chapter 5, which reads as follows: "In every case whereas such as be within age may sue, it is ordained that if such as be within age and eloined so that they
cannot sue personally, their next friend shall be admitted to sue for them." The Courts then, in all cases when the infant could not sue for himself, appointed a prochien amy as its officer to conduct the suit for him, and to look after the interests of the infant, and no appointment or subsequent confirmation by the infant was requisite; nor did it matter at all whether he was cognizant of the proceedings, or whether he be in the Country or abroad, he cannot disavow the action. The judgment in the action is binding on the infant, and he cannot, on attaining age, commence fresh proceedings on the same cause of action. The admission of the Prochien Ame to prosecute for an infant gives no authority to prosecute or defend in any but the particular action or actions specified. A prochien amy who appears to be such upon the record is priam facie liable for the payment of costs. The practice is to compel the prochien amy to give security for costs, has not however, met with uniform holdings in the early English law, two of which directly opposite are hereby given. In the case of Yarmouth vs. Mitchell, 2 B & R 423, the prochien amy
was the father of the infant. The Court refused to make the parent give security for the costs, though the father was insolvent, while in Mann Vs. Burton, 4 M & P 215, the prochien amy was not related to the infant, and was sworn to be insolvent also; security for costs, however, was required. Since the prochien amy was in some courts liable for costs, in those courts he could not be a witness.

CHAPTER III.

A short account of suits by infants in Equity.

An infant is incapable by himself of exhibiting a Bill in Equity, as well on account of his supposed want of discretion, as his inability to bind himself, or to make himself liable for the costs of the suit. Yet it is frequently requisite, in justice both to the infant and others, that his rights should be ascertained and enforced without waiting until he becomes of age. For instance, there is no regular mode of calling an Executor to account for an infant's property in his hands by a bill in Equity. Although there
may be no cause for litigation, it is frequently desirable to obtain for the infant the general protection of Chancery. When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the Court of Chancery, or when it is desired he should become a ward of the Court, his nearest relative is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or vindicate his wrongs. The person who institutes a suit on behalf of an infant in Equity, is termed the next friend, but as it may happen that the nearest relative himself withholds this right, or does the injury complained of, or neglects to give the protection to the infant which his consanguinity or affinity calls upon him the give; the Court, in favor of the infant, will permit any person to institute suits on his behalf, and whoever acts thus the part which the nearest relative ought to take, is also termed the next friend of the infant. The consent of the infant to a Bill filed in his name is not necessary nor is his approbation or disapprobation of the proceedings regarded.
CHAPTER IV.

The General Law of the American Courts, with Reference to the Liabilities, Rights, Powers and Duties of the Guardian Ad Litem.

In England, the Guardian ad litem is always appointed by the Court, before the plaintiff can proceed in the action, and no legal right of parentage or Guardianship will enable anyone to act for the infant without such appointment. The proceedings in the appointment of the Guardian ad litem in the United States, vary very greatly. In Connecticut, Massachusetts, Virginia, Maine, and Mississippi, no entry of record is requisite admitting a person to sue as Guardian ad litem or next friend. The recital in the writ being deemed sufficient evidence of admission, while in Iowa, Alabama, Illinois, infancy must first be proved to show the right to sue by next friend. In this Country, more deference seems to be shown to the infant's wishes than in England. For instance, in Massachusetts, the Court, on the personal petition of a minor twenty years of age, withdrew the authority of the Guardian ad litem, and ordered all
further proceedings in the action postponed until the minor should attain full age, (Gould vs. Cranston, 8 Cush. 506), and even a minor of fourteen has been given much latitude of discretion; when he becomes of full age, he may enter the fact upon the record and proceed to conduct the action for himself, (Shuttlesworth vs. Hughey, 6 Richmond 329).

Upon the question of liability for costs, there is great diversity of opinion and holding in the different States of the Union. In England, the Guardian is universally liable for costs, and the remedy against him is by attachment. In Massachusetts, Nebraska, Tennessee, Kentucky and Maine, the Guardian ad litem is not liable for costs; and in the holding in the case of Brown vs. Hall, 16 Vt. 673, the Court said, by Hebard, Justice: "The next friend is not regarded as a party to the suit at all, for any purpose whatever.

An infant can appear and defend in civil suits by Guardian ad litem only; he cannot answer by next friend. The process is the same as in all ordinary cases, and every Court wherein an infant sues or is sued, has power to appoint a Guardian ad litem for the
purposes of the suit. The Guardian ad litem is one appointed generally for the infant to defend in a particular action brought against him, or to bring a particular action for him, and must be distinguished from the Guardian of the person and estate. The Guardian must not be a person with interests adverse to those of the infant, and the rules which have been mentioned previously as applying to the prochien amy, may be said to apply in general, to the Guardian ad litem. The two correspond, and the principles of law applicable to one are in general to be applied to the other.

An interesting question may perhaps be brought up here as to the effect of a judgment when no Guardian is appointed. There are a variety of holdings in the different States upon this question. It seems, by the decided weight of opinion, however, that the judgment is not void, but voidable. This is the holding in the following States: Alabama, Arkansas, Illinois, Indianna, Iowa, Kentucky, Mississippi, Massachusetts, Vermont, Nebraska, California, Florida, North Carolina and New York. A typical and recent case is Millard
vs. Marmon, 116 Ill. 649, the facts of which were as follows: It was an action of debt, brought by William M. Marmon against one Millard, on a judgment which the plaintiff had recovered before a Justice of the Peace. The plea of infancy was put in by the defendant and also that no Guardian ad litem had been appointed for him by the Court. The Court said, by Mr. Justice Gregg, "The question has often been raised as to the validity of a judgment rendered against a minor where no Guardian ad litem has been appointed for him, and so far as we know, the decisions are uniform, that such judgment is not void, but voidable, and a failure to appoint the Guardian ad litem is merely an irregularity." But it has been held to be void in the case of Nicholas vs. Wellborn, 13 Ga. 467; Finley vs. Robinson, 17 So. Carolina 439; Taylor vs. Robinson 26 Texas 293. But however, the judgment of the Court cannot be attacked collaterally. It is held in South Carolina that a minor can commence an action, but he will be nonsuited at the trial, unless some one be appointed his Guardian ad litem, (McDaniels vs. Nicholson, 2 Reports for Constitutional Courts 344).
The infant may sue by his next friend, though he have a Guardian, if the Guardian does not dissent, in Texas and Vermont. In some States the rule is even more liberal, as in Alabama, where it is held that the infant may in every case sue by his next friend. When an action is brought by an infant, he sues in his own name, by a certain person as next friend. A prochien amy commences his authority with a written declaration, and can only maintain actions for such causes as may be prosecuted without special demand, as for personal injuries done the infant, or for sums of money, where the writ itself is considered as a demand. The old practice in England as to the appointment of a prochien amy, was for the person intended as prochien amy to attend with the infant before a Judge at Chambers, who granted what was called a fiat, for one of the Masters to draw up the rule, or if it was in a Court of Law, the Judge would at once grant the admission. The admission was left with the Clerk, or Register of the Court, and the rule was entered in the Office of the Clerk or Register. A copy of the rule or admission was annexed to the declaration before it was served.
If the prochien amy and infant could not attend, a petition was written and signed by the infant, praying to be admitted to prosecute his action by the person proposed as his Guardian, and stating the cause of action in the petition. At the foot of the petition the Guardian signed his consent to act for the plaintiff or defendant. To this was annexed an affidavit of the signing of the petition and consent, and then all was presented to the Judge of the Court, who granted his fiat or admission, and the same was filed. This is substantially the practice today in a great many of the American States, but it is largely regulated by Statute in all the jurisdictions.

CHAPTER V.

The Guardian ad Litem in New York, with Special Reference to Procedure under the Code.

The following are the Sections: "When an infant has a right of action, he is entitled to maintain action thereon, and the same shall not be delayed or deferred on account of his infancy". -Sec. 468.

"Before a summons is issued in the name of an
infant plaintiff, a competent and responsible person must be appointed to appear as his Guardian for the purposes of the action, who shall be responsible for the costs thereof." - Sec. 469.

If the next friend is irresponsible, proceedings will be staid till security for costs is given, or a responsible person substituted for the next friend. (Robertson vs. Robertson, 3 Paige 387.) If the person appointed for the plaintiff's guardian is not pecuniarily responsible, the defendant must raise the objection as soon as he learns of the appointment. (Wise vs. Insurance Co. 7 Daly 258.) A guardian ad litem is responsible for costs, although the Code does not require him to file security therefor. (Steinburg vs. Manhattan Ry. Co. 10 Week. Dig. 346.) Failure to appoint a Guardian for an infant plaintiff does not deprive the Court of jurisdiction in the action. (Simms vs. College, 35 Hun 344.) However, the defendant may move to set aside the summons etc for irregularity. (Freyberg vs. Pelerin, 24 How. 202.) After answer served a defendant is too late to move to set aside proceedings on the ground that the action is prosecuted without the appointment of a Guardian. (Parks vs. Parks,
19 Abbott 161.)

The Guardian must be appointed upon the application of the infant if he is of the age of fourteen years or upwards, or if he is under that age, upon the application of his general or testamentary guardian if he has one, or of a relative or friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary Guardian if he has one, or to the person with whom the infant resides". - Sec. 470.

A Guardian ad litem cannot be appointed for an infant over fourteen years of age without the infant's consent. (28 Barber 299).

"An infant defendant must also appear by Guardian, who must be a competent and responsible person, appointed upon the application of the infant if he is of the age of fourteen years or upwards, and applies within twenty days after personal service of the summons; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. Where the application is made by a person other than the infant, notice thereof must be given to his general or
testamentary Guardian if he has one within the State, or if he has none, to the infant himself, if he is of the age of fourteen years or upwards and within the State, or if he is under that age and within the State, to the person with whom he resides." - Sec. 471.

A guardian ad litem can only be regularly appointed for an infant defendant after personal or substituted service. (Ingersol vs. Mangam, 84 N.Y.622.) And the appointment of a Guardian ad litem for an infant who had not been served with summons is void. (Glover vs. Haws, 19 Abbott 161). The person selected for Guardian should be the one most likely to protect the rights of the infant. (Grant vs. Schoenhoven, 9 Paige 255.)

"The Court in which the action is brought, or a Judge thereof, or if the action is brought in the Supreme Court, the County Judge of the County where the action is triable, may appoint a Guardian ad litem for an infant, either plaintiff or defendant. The Clerk must act in that capacity for an infant defendant, where the Court or the Judge appoints him. No person other than the Clerk shall be appointed a Guardian ad litem unless his written consent, duly acknowledged is
produced to the Court or Judge making the appointment." - Sec. 472.

"Where an infant defendant resides out of the State, or resides within the State and is temporarily absent therefrom, the Court may, in its discretion, make an order designating a person to be his Guardian ad litem, unless he or someone in his behalf, procure such a Guardian to be appointed as prescribed in the last two sections within a specified time after service of a copy of the order. The Court must give special directions in the order respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the Guardian so appointed with like effect as where a summons is served without the State upon an adult defendant, pursuant to an order for that purpose, except that the time to appear or answer is twenty days after the service of the summons exclusive of the day of service." - Sec. 473.

"Except in a case where it is otherwise especially prescribed by law, a Guardian appointed for an infant as prescribed in this article, shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the Guardian by the
Court until he has given sufficient security, approved by a Judge of the Court or a County Judge, to account for and apply the same under the direction of the Court".

Sec. 474.

"The security must be a bond to the infant, in such penalty as the Judge directs, not less than twice the sum or the value of the property, to be received, executed by the Guardian and at least two sureties approved by the Judge, and filed in the Office of the Clerk. The infant or any other party to the action may afterwards apply for an order directing a new bond to be given with an increased penalty or the Court may so direct of its own motion". - Sec. 475.

"The last two sections do not apply to the general Guardian of the infant who has been appointed as a Guardian ad litem as prescribed in this article; but the Court may at any time require the General Guardian to give additional security for the faithful discharge of his trust, before receiving money or property of an infant, under a judgment or order in the action". - Sec. 476.

"A person appointed Guardian as prescribed in this article, for an infant defendant in an action, is not
liable for the costs of the action unless specially charged therewith by the order of the Court for personal misconduct." - Sec. 477.

Guardian ad litem for infant in Partition.

An action for the Partition of real property shall not be brought by an infant, except by the written authority of the Surrogate of the County in which the property or a part thereof is situated. The authority shall not be given unless the Surrogate is satisfied by affidavit or other competent evidence that the interests of the infant will be promoted by bringing the action. A judgment for a partition or sale shall not be rendered in such an action unless the Court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment".- Sec. 1534.

"A guardian ad litem for an infant party in an action for partition can be appointed only by the Court".- Sec. 1535.

A general Guardian appointed by the Surrogate cannot act for an infant defendant. There must be a
Guardian ad litem appointed by the Court. (Clark vs. Clark, 14 Abbott 299.) A Guardian ad litem for an infant cannot be appointed until the infant is brought into Court by personal or substituted service. (Walter vs. DeGraff, 19 Abb. N.C. 406.) If no Guardian has been appointed the decree ordering the sale is irregular and the error cannot be cured, though the infant has come of age and tendered a release. (Kohler vs. Kohler, 2 Edwards 69.)

"The security to be given by the Guardian ad litem for an infant party in an action for partition must be a bond, to the People of the State, executed by him and one or more sureties as the Court directs, in a sum fixed by the Court, conditioned for the faithful discharge of the trust committed to him as Guardian, and to render a just and true account of his Guardianship in any Court or place when required. The bond must be filed with the Clerk, before the Guardian enters upon the execution of his duties, and it cannot be dispensed with, although he is the general Guardian of the infant." - Sec. 1536.

The bond must be executed by the Guardian himself. A bond by sureties in his behalf, in which he does not
join is not sufficient. (Jennings vs. Jennings 2 Abbott 6.) An order of the Court, appointing a Guardian ad litem of the defendant in partition, which fails to direct the Guardian to give a bond in compliance with this section, is fatally defective. (Walter vs. DeGraff 19 Abb. N.C. 406. Even if the Clerk of the Court is appointed such Guardian he must give security. (Fisher vs. Lyon, 34 Hun 183)

"A commissioner or other officer making a sale, as prescribed in this title, or a guardian of an infant party to the action, shall not, nor shall any person for his benefit, directly or indirectly, purchase or be interested in the purchase of any of the property sold, except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit or in behalf of the ward." - Sec. 1679.

A purchase by a Guardian ad litem of an infant party to a partition suit of land sought to be partitioned in such suit, for his own benefit, is void. (Lefevre vs. Laraway, 22 Barb. 667).

"The Guardian ad litem of an infant in whose favor an action is brought, must, unless he is also the Gen-
eral Guardian, execute and file with the Clerk, before the commencement of the action, a bond to the infant, with at least two sufficient sureties, in a penalty fixed by a Judge of the Court, conditioned that the Guardian will fully account to the infant when he attains full age, or in case of his death, to his personal representatives, for all money or property which the Guardian may receive by reason of a legacy or distributive share". - Sec. 1820.

"Where costs are awarded against an infant plaintiff, they may be collected by execution or otherwise, from his Guardian ad litem, in like manner as if the latter was the plaintiff". - Sec. 3249.

But, after arriving at majority an infant plaintiff, for whom a guardian ad litem had been appointed, continues the action under his own management, without any change of title, and judgment was entered against him for the costs, held that the guardian ad litem was not liable for the costs. (Sparmann vs. Keim, 6 Abb. N.C. 353.)
"Before a summons is issued in behalf of, or an issue is joined without summons, by an infant plaintiff, the Justice must appoint a competent and responsible person, nominated by the plaintiff or his general guardian to appear as his guardian for the purposes of the action. The written consent of the person so appointed must be filed with the Justice before his appointment. The Guardian so appointed is responsible for the costs." - Sec. 2887.

"After the service and return of a summons against an infant defendant, no other proceeding shall be taken in the action until a person has been appointed to appear as his Guardian for the purpose of the action. Upon the nomination of the defendant, the justice must appoint a proper person for that purpose. If the defendant does not appear upon the return of the summons, or if he neglects or refuses to nominate, the justice may, on the application of the plaintiff, appoint any proper person as his guardian. The written consent of the person so appointed must be filed with the Justice before his appointment. The Guardian so appointed is
not responsible for any costs". - Sec. 2888.

When the fact of infancy is first disclosed on the trial, the Justice should dismiss the action, and such judgment of dismissal will not bar a second action. (Harvey vs. Large, 51 Barb. 222.)

Proceedings in Surrogate's Courts.

"Where a person cited or to be cited is an infant of the age of fourteen years or upwards, the Surrogate may in his discretion, e with or without an application therefor, and in the interest of that person, make an order requiring that a copy of the citation be delivered in behalf of that person, to a person designated in the order, and that service of the citation shall not be deemed complete until such delivery. Where the person cited or to be cited is an infant under the age of fourteen years, and the Surrogate has reasonable ground to believe that the interests of the person to whom a copy of the citation was delivered in behalf of the infant, is adverse to that of the infant, or that for any reason he is not a fit person to protect the latter's rights, the Surrogate may likewise make
such an order; and as a part thereof or by a separate
order made in like manner; at any stage of the pro-
ceedings he may appoint a special guardian ad litem to
conduct the proceedings in behalf of the incompetent
person". - Sec. 2527.

"Where a party who is an infant does not appear
by his general guardian; or where a party who is a
lunatic, idiot, or habitual drunkard, does not appear
by his committee, the Surrogate must appoint a competent
and responsible person to appear as Special Guardian
for that party. Where an infant appears by his general
guardian, or where a lunatic, idiot or habitual drunk-
ard appears by his committee, the Surrogate must in-
quire into the facts, and must, in like manner ap-
point a special guardian, if there is any ground to
suppose that the interests of the general guardian or
committee is adverse to that of the infant or incom-
petent person, or that for any other reason the inter-
ests of the latter require the appointment of a Spe-
cial Guardian. A person cannot be appointed such a
Special Guardian unless his written consent is filed,
at or before the time of entering the order appointing
him." - Sec. 2530

The appointment of an improper person to be the Special Guardian of an infant is not per se a ground for reversing the Surrogate's order, refusing to set aside the decree upon motion after the time to appeal has expired. (Story vs. Dayton 22 Hun 450.)

The parent of an infant party to a special proceeding in Surrogate's Court, cannot appear as Guardian ad litem for his ward. (The matter of Bowne, 6 Den. 51.)

"Where a person other than the infant or the committee of the incompetent person applies for the appointment of a Special Guardian as prescribed in the last section, at least eight days notice of the application must be personally served upon the infant or incompetent person if he is within the State, and also upon the committee, if any, in like manner as a citation is required by law to be served".- Sec. 2531.

General Duties of the Guardian Ad Litem.

It is the duty of the Guardian ad litem to prosecute for the plaintiff, to ascertain his rights, and to bring them to the notice of the Court. (Knickerbocker vs. DeFreest, 2 Paige 304.)
In executing a deed, he should sign the infant's name to it, and add 'by A B, his guardian ad litem'. (Hyatt vs. Seeley, 11 N.Y. 52.)

In the case of Knickerbocker vs. DeFreest, supra, Chancellor Walworth in his opinion, said: "It is the duty of the Guardian ad litem in every case to ascertain from the infant and his friends, or from other proper sources of information, the legal and equitable rights of the ward. If a special answer is necessary or advisable for the purpose of bringing the rights of the infant properly before the Court, it is his duty to put in such an answer. If the infant has no defense against the complaint, and no equitable rights as against his co-defendant which render a special answer necessary, the general answer will be sufficient. If the infant has any substantial rights which may be injuriously affected by proceedings in the cause, or if the claim against him is of doubtful character, it is also the duty of the Guardian ad litem to attend before the Court on the hearing and the taking of testimony in the case, and on all other proper occasions to bring forward and protect the rights of the ward."
The Guardian ad litem, must, like other agents and attorneys, act in good faith towards the infant, and take no advantage of the office for his personal gain, and all the benefits derived from his position, will inure to the benefit of the infant. (Spelman vs. Terry, 8 Hun 205.)

If the Guardian neglects his duties, in consequence of which the rights of the infant are not properly attended to or are neglected, he may be punished for such neglect. He will also in such case, be liable to the infant for all damages he may sustain. (Knickerbocker vs. DeFreest, supra.)

In concluding, I would say, I have endeavored to give a short outline of the rights, powers and duties of the Guardian ad litem, with special reference to procedure in New York. I have also endeavored to give a short sketch of Guardianship under the Roman law, and of proceedings in the early Chancery Courts of England. Owing to the somewhat limited scope of this branch of the law, and from the fact that in this Country most of it is purely statutory; it has been impossible, in some cases, to treat the matter as fully as I should liked to have done.