THE LEGAL POSITION OF THE CHILD OF UNMARRIED PARENTS.

(*Continued.*)

The general rule in English law has been not to recognize the natural relationship between an illegitimate and his natural parents, or either of them, for the purpose of those civil effects and consequences which result from the relation of a legitimate child to its parents. In this respect, let us note that Lord Campbell's Act[1] and statutes of like purport contemplate legitimate children, and an illegitimate, therefore, cannot maintain an action under any such statute;[2] nor can its parents recover thereunder in respect to the death of the illegitimate.[3] Except, however, in regard to those matters which affect relationship and the rights and obligations connected with it, there appears to be no distinction between an illegitimate and any other person.[4]

Guardianship and Custody.

It will be useful, first to consider the different kinds of guardian recognized by English law in respect to legitimate children. There is the guardian by nature, strictly speaking, appointed only in respect to the heir apparent, and restricted to blood relations of the ward, particularly the father and, after his death, the mother. By statute passed in 1660[5] the father was able to defeat the mother's right by appointing by deed or will a guardian to exercise, by way of trust, control over the custody and tuition of the infant. It should be mentioned here, that although neither the mother[6] nor the father[7] can legally appoint a guardian of an illegitimate child, yet the rule was not enforced in Chancery, which appointed persons nominated by the will of the putative father as testamentary guardians of an illegitimate child, without any reference to the master to report as to a fit guardian.[8] This kind of guardianship continues until the

[1] 9 & 10 Vic. c. 93.
[2] *Dickinson* v. *The North Eastern Railway Co.* (1863), 2 H. & C. 735.
[3] *Clarke* v. *Carfin Coal Co.*, [1891] A.C. 412, at pp. 427-8; *The Town of Montreal West* v. *Hough*, [1931] S.C.R. 113.
[4] 2 Hals., p. 438.
[5] 12 Car. 2, c. 24.
[6] *Ex p. Glover* (1835), 4 Dowl. 291.
[7] *Horner* v. *Liddiard* (1799), 1 Hag. Con. 337; *Re Darcys* (1860), 11 I.C.L.R. 298; *Sleeman* v. *Wilson* (1871), L.R. 13 Eq. 36.
[8] *Peckham* v. *Peckham* (1788), 2 Cox Eq. 46; *Ward* v. *St. Paul* (1789), 2 Bro. C.C. 584; *Barry* v. *Barry* (1828), 1 Mol. 210.

ward is twenty-one years of age.[9] In 1886, the Guardianship of Infants Act[10] enacted that, on the death of the father, the mother shall be the guardian, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father; and in certain cases the mother may, by deed or will, appoint a guardian to act after the death of herself and the father. A guardian for nurture is only appointed in cases where there is no other guardian, and is restricted to the father and mother of the infant. The guardianship extends until the child attains the age of fourteen years, both in the case of males and females: but in the case of illegitimate children, the courts appear, for the purpose of the Poor Laws, artificially to have set the age of nurture as extending till the child was seven years of age only.[11] In certain cases the infant may elect a guardian; and since the end of the seventeenth century, at least, Chancery has exercised the right to appoint general guardians; which right has at times been exercised in respect to illegitimate children.[12] The Ecclesiastical Courts, from the seventeenth century onwards, also claimed the right to appoint guardians respecting an infant's personal estate, and also his person, if no other guardian existed; but this was the subject of dispute, particularly in the eighteenth century. Guardians *ad litem* may be appointed by all courts in respect to litigation therein; and it may be noted in passing, that in the thirteenth century an infant could sue and be sued without the intervention of a guardian, until the complexity of procedure caused the necessity for the appointment of many kinds of guardians.[13]

The exercise of the jurisdiction of the courts respecting the guardianship and the custody of children is discussed at length by Lord Esher, M.R. in *Reg.* v. *Gyngall.*[14] At common law, unless the right of the parent was affected by some misconduct, or some Act of Parliament, the right of the parent to the custody of the child as against other persons was regarded as absolute. Chancery, on the other hand, exercised a paternal jurisdiction, on behalf of the Crown, as being the guardian of all infants, superseding the natural guardianship of the parent and acting "in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child."[15] Since the Judicature Act, if a person proceed in the Queen's

[9] H. & B.'s note No. 66 to Co. Litt. 88*b*.
[10] 49 & 50 Vic. c. 27.
[11] H. & B.'s note No. 67 to Co. Litt. 88*b*.
[12] *Ib.* Note No. 70.
[13] 2 P. & M. 440 *et seq.*
[14] (1893), 2 Q.B. 232, at pp. 238-41.
[15] *Ib.*, at p. 241.

Bench Division under the common law jurisdiction, and the case raise questions to which the Chancery jurisdiction is applicable, the Queen's Bench Judges will not send the suitor to the Court of Chancery, but will exercise the Chancery jurisdiction themselves.

1. Right of the Mother as Against Strangers.

It is doubtful whether at common law the mother has, strictly speaking, any more legal rights or duties in respect of the child than a stranger; and in former times there was a disposition to carry out rigorously to its logical conclusion the doctrine that an illegitimate child was *filius nullius* and that no one possessed in relation to it the full parental rights which the law recognized in the case of legitimate offspring.[16] But since the statutory imposition of responsibilities upon parents of an illegitimate, the law has gradually acceded to the view that they ought to have rights; and in modern times, decisions relating to the custody and education of legitimate children are applied in cases which affect the guardianship and custody of illegitimate, and principles affecting the former are adopted in respect to the latter.

It has been said that neither the putative father nor the mother has the legal right of guardianship.[17] But it is unlikely that a stranger will be appointed against the wishes of the parent, while the parent is alive, unless the parent be unfit to have the control of the child; and as respects mere custody, a child under seven years of age will not be separated from its mother so as to deprive it of the benefit of nurture, if the mother be capable of nurturing the child.[18]

The mother of an illegitimate child has a natural right to its custody, which will be regarded by the court.[19]

Under English law, an adoption agreement does not deprive a mother of the right of control over her child or absolve her from the duty of taking care of it;[20] and it was held as far back as 1468,[21] that a mother by committing her child to anyone for the purpose of education has not lost her right to re-take the child. In some jurisdictions in Canada, however,[22] a parent who, by an instrument in writing approved by the director of a Child Welfare department, has surrendered the custody of a child, will not thereafter, contrary

[16] Lord Herschell in *McHugh* v. *Barnardo*, [1891] A.C. 388, at p. 398.
[17] Lord Mansfield in *R.* v. *Felton and Wenman* (1758), 1 Bott's Poor Law, 5th ed., p. 478.
[18] *R.* v. *Hopkins* (1806), 7 East, p. 579.
[19] *R.* v. *Nash* (1883), 10 Q.B.D. 454; *R.* v. *Lewis* (1893), 9 T.L.R. 226; *Re C. (an Infant)* (1911), 25 O.L.R. 218.
[20] *McHugh* v. *Barnardo* (*supra*); *Re Davis* (1909), 18 O.L.R. 384.
[21] Y.B. Mich., 8 Edw. 4, fol. 7, B. 2.
[22] E.g. Manitoba, Child Welfare Act, C.A. 1924, c. 30, s. 162.

to the terms of such instrument, be entitled to the custody of, or have any control or authority over, or any right to interfere with, such child; and the surrender and acceptance of the custody of a child without the written approval of the director will be null and void and render the persons violating the statutory provision liable to a penalty.[23]

The modern rule of English law respecting the mother's right to the custody of her illegitimate child is that laid down in *Barnardo* v. *McHugh* (*supra*) namely, that in determining who is to have the custody and control over an illegitimate child, the Court, in exercising its jurisdiction with a view to the welfare of the child, will primarily consider the wishes of the mother. Acting as a wise parent, however, the court will not sacrifice the child's welfare to the fetish of parental authority.[24]

2. Right of the Mother as Against the Father.

The mother is preferred to the putative father, who, in order to deprive the mother of the custody, must show that the mother is for some reason unfit to be intrusted with the care of the child;[25] and during the years of nurture the mother will be preferred to the putative father, even though from his circumstances the father may the better able to educate it.[26] If the putative father obtain possession of the child from its mother by fraud, the court will interfere and order the child to be restored to the mother.[27]

3. Rights of the Father.

The father's common law paramount right in regard to the control over the person, education, and conduct of his children has no force in respect to a putative father. While, however, the mother is preferred to the putative father, yet as against a stranger the putative father is entitled to the child;[28] and it seems that after the mother's death the putative father is entitled to the custody of his legitimate child, even as against a person appointed as guardian by, or acting on the wishes of, the mother.[29]

[23] E.g. *ib.*, s. 163.
[24] *Barnardo* v. *McHugh* (*supra*) at p. 399; Meredith, C.J.O., in *Re Gefrasso* (1916), 36 O.L.R. 630, at pp. 638-9.
[25] *Barnardo* v. *McHugh* (*supra*); *Re C.* (*an Infant*) (*supra*).
[26] *Ex parte Knee* (1804), 1 Bos. & P. (N.R.) 148; *R.* v. *Nash* (1883), 10 Q.B.D. 456.
[27] *R.* v. *Soper* (1793), 5 Term R. 278; *R.* v. *Moseley* (1798), 5 East 224*n*; *R.* v. *Hopkins* (1806) (*supra*).
[28] *Ord* v. *Blackett* (1725), 9 Mod. 117; *Felton* v. *Wenman* (*supra*).
[29] (1889), 24 L.R. Ir. 59; *Re Crowe* (1883), 17 I.L.T. 72.

4. Consulting the Wishes of the Child.

If the child be of an age to exercise a choice (i.e. not under seven years of age), the Court will consider the child's wishes; but the wishes of a child of tender years will not be permitted to subvert the whole laws of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured.[30] *In re Lloyd*,[31] the child was eleven years old, and Tindal, C.J., held that the child was old enough to choose for herself, and, therefore, he did not feel called upon to exercise a discretion for her; but in *R.* v. *Nash* (*supra*) where the child was six years old, Jessel, M.R., said, that he had never consulted a child so young as that, and that it had not been the practice of the Courts of Equity to do so. For other cases in which the child's wishes have not been followed. See *R.* v. *Clarke* (1857), 7 E. & B. 186; *Barnardo* v. *McHugh* (*supra*); *In re O'Hara* (*supra*).

In this respect, the case of *Barnardo* v. *McHugh* (*supra*) is an illustration of how a court will, at times, disregard the clearly expressed wishes of a child fully capable of exercising a choice. The Judges of the Divisional Court (Lord Coleridge, C.J., and Mathew, J.), examined the child, and (see the judgment of Lord Coleridge),[33] found the child very intelligent, well nurtured, well clothed, apparently healthy, well taught, perfectly happy and contented, and desirous to stay where he was. They found it "impossible to talk to him without coming to the conclusion that he was very happy and well cared for at Dr. Barnardo's home." Furthermore, it appears from the judgments that the child had been baptized and brought up in one faith; the mother of the child did not desire the child for herself and had no religious feeling of her own upon the matter, but was under priestly influence and had been "persuaded that she wished the child removed from Dr. Barnardo's home."[34] Despite these facts, however, the court did not give effect to the child's wishes, but removed the child from the home where the learned Judges had found that he was perfectly happy and well cared for and desired to stay, and placed him in the custody of a person who was of another faith to his and whose intention it must have been to bring up the child in that other faith. *Barnardo* v. *McHugh* as an authority is not affected by the fact that it was "a dispute not over the body but over the soul of the child";[35] and its importance lies in the fact that

[30] Fitzgibbon, L.J., in *In re O'Hara* (1900), 2 I.L.R. 232, at p. 240.
[31] (1841), 3 Man. & G. 547.
[33] *The Queen* v. *Barnardo*, [1891] 1 Q.B., at p. 200.
[34] *Ib.*, p. 206
[35] *Ib.*, Lord Esher, M.R., at pp. 205-6.

it is a decision applying principles of English law, by which those of the Dominions whose law is based on English law will be bound.

5. Religion.

The rule observed in equity is, that the father of a legitimate child, during the father's lifetime, has the absolute right to decide what religious education his children shall receive, and after his death his widow and the guardian of his children are bound to see that the child is brought up in the religious faith of its father; and this is so, even though the guardian may be the child's mother. This parental right may be forfeited by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all, or by his abdicating such right. The Guardianship of Infants Act, 1886, and similar statutes passed in the Dominions, which so greatly enlarged the rights of mothers after their husbands' deaths, have not changed the law in this respect. The wishes of the father, if not clearly expressed by him, will be inferred from his conduct; and if the father be dead, it will be inferred, in the absence of evidence to the contrary, that his wish was, that the children should be brought up in his own religion. This inference is practically not distinguishable from a rule of law, to the effect that a child is to be brought up in its father's religion, unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed.[36]

As respects the religious education of an illegitimate, the latest English case upon the subject is that of *In re Carroll.*[37] In this case reference is made to statutes which would seem to have been designed to affect only legitimate children, and practically all the reported cases dealing with the points involved from 1732 onwards are referred to. The Court of Appeal (consisting of Scrutton and Slesser, L.JJ., Greer, L.J., dissenting), held that, where the character of the parent of the child is not attacked, the court is bound to give effect to the views as to education, religious and secular, of the parent of a child too young to have intelligent views of its own. Particularly is this so in the case of a mother of an illegitimate child, whose character is not attacked, who has a right to require that the child shall be brought up in her religion in which the child has been baptized.

Mention may here be made, perhaps, that under certain of the English Poor Law Statutes, it is specifically provided that for certain purposes the creed of an illegitimate child is to be taken to be

[36] *In re Scanlon* (1888), 40 Ch. D. 200; *In re McGrath (Infants)* [1893] 1 Ch. 143.

[37] [1931] 100 L.J.K.B. 113.

that of its mother;[38] and that in some of the Provinces of Canada,[39] there is statutory provision that where an illegitimate child is placed in an institution the first determining factor as to the religion of the child shall be the preference of the mother, if she be living, and, in case she be not living, the religion of the mother at the time of her death, if it can be ascertained.

STATUTES.

It will be seen from the foregoing, that the tendency of modern cases is to place the illegitimate child in the same position as a legitimate child so far as possible, and to construe statutes which have been passed respecting the custody and guardianship of children as applying equally alike to illegitimate as to legitimate children.

Space does not admit of our considering in detail the various statutes which have been passed to deal with the subject of guardianship and the right to the custody of children, and we must content ourselves with a few general observations. The English statutes which deal specifically with illegitimates from the sixteenth to the nineteenth century in almost every case are designed to indemnify the parish against the child becoming a charge on the parish, and afford no help to our enquiry; nor do later English and Canadian statutes which deal specifically with illegitimates. In many jurisdictions in Canada statutes have been passed giving the father and mother joint right to the grant of letters of guardianship and to the custody and control of their children, but allowing an order to be made in appropriate cases that the child may be delivered into the custody and control of either the father or the mother. The statutes in this respect do not specifically distinguish between legitimate and illegitimate children, and the definition of the words "child," "infant," "minor," given in many modern statutes would include both legitimate and illegitimate. In some cases it is provided that an official administrator or officials of child welfare departments or certain institutions may be appointed or, under certain circumstances, automatically become, guardians of the estates and persons of infants; and no distinction is drawn between legitimate and illegitimate; although specific statutory provision is occasionally made that an official of a child welfare department may be appointed guardian of a child born out of wedlock.[40]

[38] E.g. 31 & 32 Vic. c. 122.
[39] E.g. Manitoba, C.A. 1924, c. 30, s. 186(4).
[40] E.g. R.S.B.C. 1924, c. 34, s. 6.

In the result, therefore, it would seem that, subject to any specific provision by statute upon the subject in any particular judisdiction, the court will decide questions affecting the custody and control of the persons and estates of illegitimate children upon the same principles as in the case of legitimate children, but with a very strong preference to the wishes of the mother.

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A FABLE FOR THE LEAGUE.

Before the bench of magistrates were brought
Two men who in the market-place had fought
About their rights to a disputed stand.
Each urged his claim with fervour; but Their bland,
Inexorable Worships made reply:
"Our Court was open, your dispute to try;
Yet you with blows upon each other fell
And marred our Sovereign's peace. Consider well,
If, trusting to the justice of his cause
In his own eyes, each man should flout the laws
As you have done, our Fair would pass away
In one long riot. Later in the day
We'll judge your case (and may the right prevail!)—
Meanwhile you'll cool your hot blood in the gaol."
Next came some wretched shopkeeper, to state
That Blank Esquire, himself a magistrate,
With force and fraud had made the laws a mock,
Illegally distraining on his stock.
With blank dismay the Bench surveyed the drudge
And whispered each to each, with wink and nudge:
"What's now to do? If for Squire Blank we send
(You know, of course, Lord So-and-so's his friend)
He may deny to come; and if by force
We needs must fetch him, 'tis no easy course."—
"Think of our loss, too, if Squire Blank should quit
The Bench itself"—"The Squire's a man of wit,
And would not thus unlawfully proceed
Had not great wrongs constrained him." Thus agreed,
Their Worships, still inexorably bland,
Gave forth their verdict: "Let the matter stand
Until the Squire and tradesman shall agree
Just what the rights of their dispute may be.
Meanwhile the Squire, as suits his rank and fame,
Shall keep the chattels, to secure his claim."

* * *

I trust that by the time these lines you scan
They'll have no relevance to the Council's plan
For dealing with the Balkans—and Japan.

MACFLECKNOE in *The New Statesman and Nation.*