THE CONTROL OF THE CUSTODY OF CHILDREN BY THE SUPREME COURT OF VICTORIA.

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It is the purpose of this article to discuss the principles upon which the Victorian Supreme Court exercises jurisdiction over the custody of children. In doing so it will first be necessary to consider shortly the principles upon which in former times various Courts claimed similar jurisdiction; then to notice successive statutes which have altered the basic principles upon which the jurisdiction is exercised; and finally to consider the present statute law in Victoria and certain problems of procedure which are affected by its legal history.

"The position was originally this, that the father was by nature the guardian. He was the person whose child it was, although in that point of view it would not be altogether inexcusable to suppose that the mother had some part. At any rate, in the times when the feudal system prevailed, the father had on that ground the charge of his child; though in reality a very strong reason why he should have it was that, if it were a male he should maintain it and train it up in arms to do its duty to the overlord, or if a girl that he might bestow her in marriage in a way to conserve the rights of the overlord. If the father died, the overlord had the wardship in the case of a male for the same reason, that he might be trained up to arms and carry out his duties, and in the case of a female because the overlord had a strong interest in that he would receive a sum of money on her marriage. In that case the wardship of the children went from the father to the overlord, and the mother had no right of guardianship, because she might not do her duty, but deprive the overlord of his dues. The father's position has always remained the same."[1]

"The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right 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 he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right."[2]

This passage was cited with approval by the High Court of Australia in *Goldsmith v. Sands*[3]—a case in which it was held that the father had abdicated his right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children and was therefore not entitled to have their return to him ordered on a writ of *habeas corpus*.

1. *R. v. Waters* (1912) V.L.R. 372 *per* Madden C.J. at 375-6.
2. *Re Agar-Ellis* (1878) 10 Ch.D. 49 at p. 72.
3. 4 C.L.R. 1648.

The Act 12 *Car.* II, c. 24, ss. 8 and 9 enabled a father by deed or will to dispose of the custody and tuition of his children during their minority to any person whom he appointed guardian. The testamentary guardian so appointed might be given control of the property as well as of the person of the children and might maintain an action of trespass if the children were taken from him. (The full text of this provision may be found in the Imperial Acts Application Act 1922, Part II., Div. 10).

During his lifetime there could be no conflict between this right of the father and any rights of the mother, for the mother had no rights. And if the father appointed a testamentary guardian, against him also the mother had no rights.

Where a wife had separated from her husband on account of his ill treatment of her, and the husband was confined to gaol where he was co-habiting with another woman who daily took the six years old child of the marriage to the gaol with her, the Court of Common Pleas held that it had no jurisdiction to order that the child be given into the custody of its mother.[4]

And the Court of King's Bench took the same view in the case where the infant was less than a year old.[5]

If anyone other than the father obtained possession of the child, the father could obtain a writ of *habeas corpus* for the recovery of the child. In spite of the absolute nature of the father's right, the Common Law Courts seem to have felt themselves able to place some qualifications on the issue of a *habeas corpus*—a remedy which had always been regarded as to some extent discretionary. Thus in *Reg. v. Howes,*[6] a father applied on *habeas corpus* to recover the custody of his daughter then aged fifteen and succeeded. But Cockburn C.J., said: "Although a father is entitled to have the custody of his children up to their attaining the age of 21 years, the Courts of law will not interfere by *habeas corpus* to withdraw a child from the custody of the persons with whom it may be, and hand it over to the custody of its father if it has attained the age of discretion. We wish it to be understood that we wholly repudiate the notion that mental precocity can entitle a female child to withdraw herself from the custody of her father, for that very precocity may be the very reason for its being inadvisable that she should do so; it might very likely lead a young girl into difficulty and danger."

The attitude of the common law Courts in a case where the father was dead may be seen from *Re Race,*[7] in which it was held that where the father appoints no testamentary guardian, the mother is the guardian for nurture (i.e., education and upbringing) until the children attain 14, and is entitled to their custody and to obtain it by *habeas corpus.* But if in such a case the child has reached years of discretion at the time of the application, and it appears to be in her interests as well as in accordance

4. *Ex. p. Skinner* (1924 9 Moore 278.
5. *R. v. De Manneville* (1804) 5 East 221.
6. (1860) 30 L.J. M.C. 47.
7. 26 L.J.Q.B. 169.

with her wishes that she should not be handed over to the mother, the Courts will not interfere by *habeas corpus*.[8]

Before leaving the Common Law jurisdiction it is desirable to emphasise its formal limitations. If a Common Law Court made absolute a rule *nisi* for *habeas corpus* at the instance of a father, the order merely directed the defendant to set the child at liberty; it did not affirmatively direct that the child be delivered into the custody of the applicant. For the writ of *habeas corpus* applied where any person wrongfully imprisoned or detained another—whether that other was an infant or an adult. Hence the refusal to direct the writ to issue where the child had reached years of discretion and was voluntarily staying with someone other than the applicant. There being no forcible detention, the foundation for the writ was absent.[9] Hence also the refusal of the Common Law Judges to interview the child with a view to ascertain what was best for its welfare. For the proceeding by *habeas corpus* was a proceeding simply to determine the legal right of the defendant to retain possession of the infant.[10] This explains the apparent harshness of such common law decisions as *Ex. p. Skinner,*[11] *R. v. Greenhill,*[12] *and R. v. De Manneville.*[13]

The whole atmosphere changes when one comes to consider the jurisdiction in equity. "That was not a jurisdiction to determine rights between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Court of Chancery was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent . . .

"The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate and careful parent would do. The Court may say in such case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right."[14]

It may be noted at once that this jurisdiction is conferred on the Supreme Court of Victoria by the Supreme Court Act, 1928, s. 16.

It was at one time suggested that here as elsewhere the basis of the equitable jurisdiction was property. See *e.g., Re Agar-Ellis,*[15] *Knipe v.*

8. *Re McDonald* 26 V.L.R. 332.
9. *Reg. v. Howes supra.*
10. *Re Wigmore* 16 V.L.R. 123.
11. 9 Moore 278.
12. 4 A. & E. 624.
13. 5 East 221.
14. *Reg v. Gyngall* (1893) 2 Q.B. 232 *per* Esher M.R. at pp. 239, 241.
15. 24 Ch. D. 317, 322.

Alcock.[16] But in *Reg. v. Gyngall*,[17] Lord Esher denied that the jurisdiction was limited to cases in which there was property[18] and founded his denial upon a statement of Lord Cottenham in *Re Spence*.[19]

Reference to the report of that case in 16 L.J., Ch. 309, shows that it is more than doubtful whether Lord Cottenham ever made such a statement or whether, if made, it was any more than a suggestion thrown out during argument. However, *Re McGrath*[20] conforms with *Reg. v. Gyngall* and the wider view is firmly established in Victoria—*R. v. Waters*.[21]

But doubts as to the extent of the jurisdiction are of small importance compared with the vague and uncertain manner of its exercise. One might think from the language of Esher M.R., in *Reg v. Gyngall*, quoted above, that once the Court of Chancery assumed jurisdiction, its sole concern was the welfare of the children. But the following citation from the last stage of the protracted Agar-Ellis litigation shows how strong was the right of the father even in a Court of Equity.

"It has been said that we ought to consider the interest of the ward. Undoubtedly. But this court holds this principle—that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of the children, and really for the interest of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child. In my opinion we should be breaking through the principle on which this court has so long acted if we were to be persuaded by any argument addressed to us to interfere in this case and take upon ourselves the duties which the father has to exercise."[22]

The uncertainty in application of the equitable jurisdiction was a matter of real importance, since the Judicature Act 1873 by s. 25 (1) provided that in questions relating to the custody and education of infants the rules of equity should prevail. This provision appears in Victoria as section 62 (5) of the Supreme Court Act 1928, though it is now "subject to the express provisions of any other Act."

Even before the Judicature Act the equitable jurisdiction had been to some extent modified in favour of the mother by legislation. When a child was in the custody of the father or his testamentary guardian, the Custody of Infants Act 1839 (2 & 3 *Vict.*, c. 54) enabled the mother to apply for, and obtain on suitable terms, access to the child. The Act also provided that if the child were under seven years of age custody might be given to the mother until he attained that age. Whether this Act was in force in the Australian Colonies was doubtful. Molesworth J. thought it was—*Murphy v. Kelly*,[23] but in South Australia, Gwynne J. decided it was not—*Re. Johns*.[24]

16. (1907) V.L.R. 611.
17. *Supra*.
18. See (1893) 2 Q.B. at 240.
19. (1847) 2 Ph. 247.
20. (1893) 1 Ch. 143.
21. (1912) V.L.R. 372 at 379.
22. *Re Agar-Ellis* (1883) 24 Ch. D. 317 at 334.
23. (1871) 2 V.R. (E) 139.
24. (1873) 7 S.A.L.R. 101.

This was the state of the "parental" jurisdiction when the Matrimonial Causes Act 1857 (20 & 21 *Vict.*, c. 85) greatly increased the scope of its application. S. 35 of that Act gave power to the newly established Divorce Court in proceedings for judicial separation, nullity and divorce to make interim and final orders respecting the custody, maintenance and education of the children of the marriage. It also enabled the Divorce Court to direct that the children be made wards of the Court of Chancery.

When jurisdiction in divorce was granted to the Supreme Court of Victoria a similar provision was inserted in the Marriage and Matrimonial Causes Act 1864 s. 79. S. 80 of the same Act enabled orders regarding children to be made from time to time even after the final decree in the suit—a provision which had been added in England by the amending Act of 1859—(22 & 23 *Vict.*, c. 61, s. 4). These two sections without any substantial alteration are now to be found in ss. 104 and 105 of the Marriage Act 1928.

It is interesting to observe from decided cases how the divorce court exercised these powers.

In a suit for judicial separation in 1862 brought by a wife on the ground of cruelty an application was made *pendente lite* for the custody of a child only seven months old, who had been left behind when the mother left home. Cruelty was denied and that issue was of course undetermined at the time of the application. The Judge Ordinary said: "There are certain principles which I am bound to attend to, and there can be no doubt that by the common law the father has a right to the custody of the child. The statute has given this Court discretionary power to make orders for the custody of children *pendente lite*, and these powers are the same as are given to the Court of Chancery by 2 & 3 Vict., c. 54. That discretion I must exercise however keeping in view the *prima facie* legal right of the father; and to take that away the mother must establish something more than her mere maternal right."[25]

In one respect the new Court took a liberal view of its powers. It was held that in proceedings for divorce or judicial separation the Court had power under the Matrimonial Causes Acts of 1857 and 1859 to give leave to a stranger to intervene and claim the custody of the children in priority to the claims of either parent.[26]

This matrimonial jurisdiction, though it might be exercised from time to time even after decree absolute, came to an end when the suit was no longer in existence. Thus, in proceedings for judicial separation the petitioning wife was given the custody of the children. The wife died and her mother applied in the Divorce division for the custody of the children. It was held that the Court had no power to make such an order since the suit for judicial separation had come to an end with the death of the petitioner.[27]

It is time now to turn to the legislation which in England comprised the Custody of Infants Act 1873 (36 & 37 *Vict.*, c. 12); the Guardian-

25. *Cartledge v. Cartledge* (1862) 31 L.J.P. & M. 85.
26. *Chetwynd v. Chetwynd* (1865) L.R. 1 P. & D. 39 and *Godrich v. Godrich* (1873) L.R. 3 P. & D. 134.
27. *Davis v. Davis* 14 P.D. 162.

ship of Infants Act 1886 (49 & 50 *Vict.*, c. 27); the Custody of Children Act 1891 (54 & 55 *Vict.*, c. 3) and finally the Guardianship of Infants Act 1925 (15 & 16 *Geo. V.*, c. 45). It is not necessary to detail their provisions. The mother's right to custody was put on a level with that of the father; the supremacy of the father's testamentary guardian was abolished; and parental rights were to some extent made conditional on the performance of parental duties.

In Victoria the course of legislation though parallel was by no means identical. The relevant Acts were the Marriage & Matrimonial Causes Act 1883 (No. 787); the consolidating Marriage Act 1890; the Custody of Children Act 1912 (No. 2439); the consolidating Marriage Act 1915; the Custody of Infants Act 1917 (No. 2928); the Marriage Act 1928 (No. 3620) which adopted most of the English Act of 1925; and the present consolidating Marriage Act 1928 which contains all the presently operative legislation.

S. 136 Marriage Act 1928 which comes from the English Act of 1925 via Act No. 3620 provides: "Where in any proceeding before any Court . . . the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father." This fundamental section applies in all jurisdictions, whether common law, equitable or matrimonial and apparently sets at rest the last vestages of the conflict of principle between them. But it may well be that it leaves room for more argument than at first sight appears.

The preamble to 15 & 16 *Geo. V.*, c. 45 reads: "Whereas Parliament by the Sex Disqualification (Removal) Act 1919 and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby."

This suggests that while the Act is designed to place the parents of a child on an equality *inter se*, it is not concerned with the respective rights of a parent and one who has no legal standing in relation to the child.

Clearly such an enactment does not alter the nature of the writ of *habeas corpus*. If one parent seeks by means of that writ to deprive the other of the *de facto* custody of a child no doubt in deciding between the rights of the parties the Court will treat the welfare of the child as the first and paramount consideration. But suppose a stranger applies on *habeas corpus* in a case where the child is in the custody of one of its parents, will the writ be issued? It is submitted that it will not and that the parent's legal right to custody would be a sufficient answer. And if a parent applies on *habeas corpus* in a case where the child is *de facto* in the custody of a stranger, it is submitted that the writ will issue unless

the parent be shown to have "abdicated" his right or to be unfit to exercise it.[28]

This is borne out by the provisions of ss. 152 and 154 of the Marriage Act 1928. In neither of the cases supposed does s. 136 of the Marriage Act 1928 entitle the Court, when all that is before it is an application for the issue of a writ of *habeas corpus*, to exercise the parental jurisdiction as modified by that enactment. Procedure remains unaffected by alterations of the substantive law. Where the contest is one between the parents it is not necessary to have recourse to the writ of *habeas corpus*. S. 145 of the Marriage Act 1928 provides: "The Court may upon the application of the mother of any infant . . . or of the father of any infant make such order as it thinks fit regarding the custody or control of such infant and the right of access thereto of either parent having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father and may alter vary or discharge such order on the application of either parent, or after the death of either parent on the application of any guardian under this Part . . ."

An application under this section is made on summons in chambers (Marriage Act 1928 s. 157)—but again it should be noted that only applications by a parent or a statutory guardian are included.

It is unnecessary to consider the new provisions regulating the appointment of a testamentary guardian by either parent contained in s. 138 of the Marriage Act 1928.

As stated above the provisions introduced by the original Matrimonial Causes Act are still to be found in substance in ss. 104 and 105 of the Marriage Act 1928. It might be thought that they were superfluous having regard to the terms of s. 145 just quoted. It is submitted that their retention shows that historical origins are still of importance. S. 145 is derived from the Guardianship of Infants Act 1886 (49 & 50 *Vict.*, c. 27) under which applications were made to the Chancery division and not to the Divorce division. It is therefore submitted that when proceedings for judicial separation or divorce are brought, any application for custody should be made "in the suit" under ss. 104 and 105 so long as the suit is alive. It is also submitted that in its matrimonial jurisdiction the Court still has the power to grant custody of the children to an intervener.[29]

This power is reinforced by s. 148 which enables the Court pronouncing a decree for judicial separation or divorce "to declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children (if any) of the marriage; and in such case the parent so declared to be unfit shall not upon the death of the other parent be entitled as of right to the custody or guardianship of such children."

The sections of the Marriage Act 1928 which have already been mentioned provide a complete code in cases where the party invoking the jurisdiction of the Court is the father or mother of the child in question.

28. See *Re Agar-Ellis* 10 Ch.D. at p. 72 (cited *supra*).
29. See *Chetwynd v. Chetwynd* and *Godrich v. Godrich supra*.

And it has been submitted above that no stranger can apply to the Court on *habeas corpus* for the custody of a child which is *de facto* in the custody of either. Is there any procedure by which a stranger can obtain an order depriving a parent of the custody of his child?

That brings us to s. 144 of the Marriage Act 1928 which has no counterpart in the English legislation and has had a curious history in Victoria. S. 8 of the Marriage and Matrimonial Causes Act 1883 (No. 787) provided: "Upon hearing the petition by the next friend of any infant alleging cruelty, ill treatment or gross abuse of parental authority towards such infant by the father, mother or guardian thereof the Supreme Court may order—

(1) That such infant shall be freed from the custody and control of such father mother or guardian as the case may be.

(2) That the custody or control of such infant shall be given to some suitable person to act as the guardian either of the person or estate or of both the person and the estate of such infant.

(3) That the father mother or guardian shall pay to the acting guardian appointed under this section such weekly sum for the maintenance and education of such infant as the Court, having regard to the means of the father or mother or the property in the guardian's hand legally available for such purpose respectively, may think fit . . ."

To this section the marginal note is: "Infant's remedies for ill treatment."

In the consolidating Marriage Act 1890 it appeared as s. 37 and in the Act of 1915 as s. 68—though in the latter section some formal changes in draughtsmanship appeared and the application was no longer required to be by petition.

The section was amended by the Custody of Infants Act 1917 (No. 2928) which enacted—"The powers conferred on the Court by s. 68 of the Marriage Act 1915 shall extend and apply to any case where the Court, on hearing the application by the next friend of an infant alleging that the father mother or guardian of the infant has been guilty of adultery, habitual intemperance or other misconduct, is satisfied that the adultery, habitual intemperance or other misconduct disentitles him or her to continue to have the custody or control of the infant."

Presumably this amendment was intended to extend the category of "ill treatment" which the court might remedy by removing the infant from its influence. Clearly it did not convert the section into one dealing with disputes between the parents.

The present s. 144 reproduces s. 68 of the 1915 Act with the above amendment incorporated in it; and the marginal note is still— "Infant's remedies for ill treatment."

It is at this point that the question raised above as to the scope of s. 136 of Marriage Act 1928 becomes important. If as has been suggested s. 136 may be limited in its application to cases where the claims of the parents are in conflict *inter se,* then the only questions which would arise in an application under s. 144 are: (i) Has the next friend established that the parent has been guilty of cruelty, ill treatment, gross abuse of parental authority, adultery, habitual intemperance or other

misconduct? (ii) If adultery, habitual intemperance or other misconduct is established, is it such as to disentitle the parent to have the custody of the child?

And on the second of these questions the burden of proof would presumably rest upon the next friend.

Where the facts are contested, the burden of proof may well be the deciding factor. But if s. 136 applies and the first and paramount consideration is the welfare of the infant then it is difficult to see how either party can be said to have the burden of proof on the second of the questions above stated.

So far there appears to be no reported case in which this question has been considered. In fact the cases on custody of children appear to be cited in the footnotes to the Marriage Act without regard to the nature of the application made or to the state of the legislation at the time of the decision.

The change made in the law in 1928 seems as yet not to have been authoritatively considered and when the time comes it is to be hoped that the history adverted to in this article will not be overlooked.