THE RELIGIOUS EDUCATION OF CHILDREN AND THE LAW

IT has been said that on the whole it is more important that the law should be certain than that it should be just. Perhaps it is by a similar process of reasoning that criminologists are led to aver that it is the certainty of punishment following the crime in a short space of time rather than the amount of punishment which provides the chief element in its deterrent effect.

The law prior to 1925 relative to the authority of the father over the religious education of his children was certain. It was also, on the whole, just. Difficulties arose from time to time in its application, but at least there was some fixed law to be applied. It will be well, therefore, to consider this law and afterwards to attempt to understand what alterations have been made by the Guardianship of Infants Act, 1925.

The Law of England may be classified under two headings, Common Law and Statute Law. Common Law is the Law of decided cases—case law. It finds its authority in the fiction that such law always existed and to such pre-existing law the judges appeal. In fact, of course, case law is judge-made law.

The position of the father at Common Law was peculiar. The absolute dominion of the father, the 'patria potestas' of Roman Law, was not given to him. He had no power over life and death. But almost every other power was his. Moreover, such paternal rights were not counter-balanced by corresponding duties.

He had and has a right to the services of his children. He was under no legal duty to maintain, to feed, to clothe, or to educate them, though Statute Law, in particular the Vagrancy Acts, the Children's Act 1908,

and the Education Acts, has now imposed upon him, either directly or indirectly, such obligations. Interference with his paternal rights would be restrained by the Chancery Court. On the theory of the Chancellor being the Keeper of the King's Conscience, the Chancery Court implemented and watched over the Common Law. It would accordingly restrain by injunction any interference with parental rights. In order to make such interference actionable without argument any child could be made a ward of Chancery. This was effected by settling any sum of money in trust for the child and then applying to the Court to have the trust administered by the Court. Interference with the custody or upbringing of such child would constitute contempt of Court, for which the punishment was fine and imprisonment. It will be seen, therefore, that adequate methods of enforcing the father's common law rights existed prior to 1925.

Remembering, then, that the authority of the father was supreme (the mother had no rights whatever) the position as to a child's religion is clear. Vice-Chancellor Malins, in the case of *Re Agar-Ellis* reported in 1878 10*Ch.D.p.*49, states the legal position in this unambiguous way: 'The father is the head of his house. He must have the control of his family. He must say how and by whom they are to be educated, and where they are to be educated, and this Court never interferes between a father and his children unless there be an abandonment of parental duties.'

Most of the decided cases concern questions as to whether certain proved facts constituted abandonment. It must be further noticed that it was abandonment, and abandonment only, which took away the father's rights. After his death the children were still to be brought up in his religion, and in default of special directions in his will, or other evidence, that religion was presumed to be Church of England.

This right of the father could be lost first by his immoral character. Thus, in *Wellesby v. Wellesby*, decided in 1828, the custody and guardianship of his children was taken away from the father, who, himself of notoriously immoral life, brazenly wrote to his son counselling him to the same tune.

The second class of case, exemplified by the case of *Re Newberry* (1866) 1 *Ch. App, p.* 263, is more remarkable in that the Court departed from its usual neutrality, which consisted in treating all religions alike, and prevented the mother from bringing up her children as Plymouth Brethren. The attitude of the Courts was to favour some definite religious teaching and (where possible) to discourage changes of religion. Thus one judge has said: 'Change might wholly confuse her religious beliefs, and the ultimate effect might be that she would cease to have any religious convictions at all.'

The objection to the Plymouth Brethren was thus stated in the judgment of Sir C. L. Turner, L.J.: 'Nothing can be more prejudicial to children than to place them in a community where there are no persons of authority to teach them what is their duty or what they should believe.'

Perhaps one may digress here and remark on the change of ideas since the last century. In these days the cry is often heard that children should be allowed to find and decide their own religion. The amateur etymologist points out that education is drawing out, not putting in, and that to thrust a religion on an ignorant child is the worst kind of parental tyranny. That merry philosopher, G. K. Chesterton, has dealt with this piece of muddled reasoning in a sentence. 'I know,' writes Mr. Chesterton, 'all about the word education meaning drawing things out and mere instruction meaning putting things in, and I respectfully reply that God alone knows what there is to draw out: but

we can be reasonably responsible for what we ourselves are putting in.'

The Court has objected to the Plymouth Brethren as not sufficiently authoritative. Ninety years ago the Jesuits were under suspicion. Said one learned Judge: 'I should require more exact information than I possess before committing the education of a ward, though a Roman Catholic, to a branch of the Order.'

The third way in which a father might forfeit his rights was by acquiescence. Thus, if during his lifetime a father acquiesced in the bringing up of his children in another religion, the Court would not allow that religion to be changed after his death, if the children had already attained settled convictions. It must be noticed that, whilst alive, the father was fully entitled to alter the religious education of his children, whatever the length of time during which he had acquiesced in a particular religious instruction. The reason for this has been succinctly stated in these words: 'If a good and honest father taking into his consideration the past teaching to which his children have been in fact subject and the effect of that teaching on their minds and the risk of unsettling their convictions, comes to the conclusion that it is right and for their welfare, temporal and spiritual, that he should take means to counteract that teaching and undo its effect, he is by law the proper and sole judge of that, and we as judges of the land have no more right to sit in appeal from the conclusion which he has conscientiously and honestly arrived at than we should have to sit in appeal from his conclusion as to the particular church his children should attend, or the particular religious books to be placed in their hands.'

Thus where a father retained the custody of a child, his will was law. He had the power, and indeed it was his duty, to decide the religion of his children. It followed that he could not make a binding contract not

to exercise this discretion. Lord Lindley held that pre-marital contracts regarding the religion of any children to be born of the marriage were against public policy and consequently void. In delivering the judgment of the Court he said, 'We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, the rights which the law gives him for the benefit of his children and not for his own.'

The Guardianship of Infants Act, 1886, for the first time made the mother legal guardian of her children on the death of the father, and it was once believed that therefore on his death she had full power to change the religion of her children. But such contention failed when tested in Court, so that the law remained unaltered in this respect until 1925.

The preamble to the Guardianship of Infants Act, 1925, 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 purpose should obtain with respect to the Guardianship of Infants and the rights and responsibilities conferred thereby be it therefore enacted . . . .'

Lost, then, is the old doctrine that the father is the head of the family. No longer can a wife be reproved for having 'entirely forgotten that by the laws of England, by the laws of Christianity and by the constitution of society where there is a difference of opinion between husband and wife, it is the duty of the wife to submit to the husband.'

The difference of opinion may well be over the religious education of their children. Formerly, unless there had been abandonment, the Court would support the authority of the father, and even the presumption that children must follow their father's religion

after his death could only be upset where the welfare of the children clearly demanded it.

We can now see how this well-tried code fares under the 1925 Act. Section I, the all-important section, runs as follows : ' Where in any proceeding before any Court . . . . the custody or upbringing of an infant, or the administration of any property belonging to or held in 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 claims 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.'

Section II provides that the mother shall have the like powers to apply to the Court in respect of the infant as are possessed by the father.

In plain English this would appear to mean that when husband and wife disagree about the education of their children the Court will decide between them, taking as the basis of its decision ' the welfare of the infant.'

Upon the subject of the welfare of the infant the Courts have from time to time expressed themselves. '-The Court will not treat the matter as one of barter,' said Bowen J., ' and direct the child to be brought up in the religion of one set of relations merely because they offer a better provision for the infant than those on the other side.'

And again, ' The welfare of a child is not to be measured by money only nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be

considered as well as its physical well-being. Nor can the ties of affection be disregarded.'

But generally the Court has wisely recognised that the prime responsibilty is that of the parent. Thus we may find in the reports such dicta as, 'It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law that the father knows far better, as a rule, what is good for his children than a Court of Justice can.' And again, 'Not mere disagreement with the view taken by the father of his rights and the interests of his infant can justify the Court in interfering.'

But no longer can a Court wisely place responsibility where nature and reason has placed it. If husband and wife disagree, the invidious task of deciding what is best for the children is thrust upon a hitherto reticent Court.

Naturally, practical considerations will, in many cases, prevent the question ever coming before the Court in the lifetime of husband and wife.

The Court has stated that it will not apply the property of either party during the party's lifetime against his or her will to educate the child in that form of religious faith from which he or she conscientiously differs and the adoption of which by the child is perhaps believed to be dangerous to, if not destructive of, his eternal welfare. Yet under Section III, 2 of the Act the Court has the power when giving custody to the mother to order the father to contribute to the child's support. Oddly enough the Court has not the power to order the mother to contribute to the support of the child when the Court awards custody to the father. This is hardly equality in law between the sexes.

Suppose, however, that both parties have sufficient means or the child is, in any case, destined for an elementary school, what then? Monetary advantage

there is none. Social advantage would perhaps favour the adoption of the father's religion.

An argument based upon ties of affection might divide the children (as was a common occurrence tolerated by the Catholic Church until about 1870) and boys follow the father's, girls the mother's religion. If the children are of an age of understanding the Court might interview them to ascertain if there are any settled convictions it would be dangerous to upset.

These, it is submitted, are considerations which it is believed would influence the Court, but they are not the kind of considerations of which it can be foretold that they would decide the matter beyond question.

One precaution the legislature has taken. Section III, 3, of the Act provides that, 'No such order, whether for custody or maintenance, shall be enforceable and no liability thereunder shall accrue while the mother resides with the father and any such order shall cease to have effect if, for a period of three months after it is made, the mother of the infant continues to reside with the father.'

The effect of this appears to be that the wife (not the husband), in order to enforce a judgment in her favour for the custody and maintenance of a child, must leave her husband. Otherwise, as it can readily be imagined, one continual law-suit would be waged upon the domestic hearth.

In what circumstances a Catholic wife, for example, would be morally justified in leaving her husband in order to enforce an order giving the religious education of the children to her is a question which is perhaps easier to ask than to answer.

To take another case, namely when the father is dead, in what religion should the children be brought up? It is conceived that unless they have attained settled convictions or are mainly supported by persons other than the mother, she will be able to decide the

religion for them. Here the ties of affection would seem to be superior to all else. But one can conceive the most common case to arise will be that of the poor orphan child whose parents die whilst it is a baby. Upon what principle of law will it be taught any particular religion? It is difficult to see how any particular religion can be assured for it; not the father's, not the mother's, not that of the surviving parent. Supposing there are no ascertainable or interested relations who can claim any authority in the matter, to what law can anyone appeal? Two courses would seem to be open to the Court. Either to hold that a vague or general Church of England religious education should be given, or the Court might hold that in the absence of any positive benefit accruing to the child from any parcular religion, then it should be brought up in its father's faith. Some support for this latter view may be found in *Re Thain*, decided in 1926, where the Court pointed out that the words in the 1925 Act were not 'the sole consideration' but 'the paramount consideration,' so that the existence of other conditions was contemplated. Further the Court recognised first of these 'the parental right of an unimpeachable parent.'

Prior to 1925 some children whose fathers were Protestants but whose mothers were Catholics were probably brought up as Protestants when they were left as poor orphans. But at least where the father was a Catholic, his rights remained and whatever, in fact, happened, any person as next friend of an infant could have secured that the child be educated a Catholic. There is now no certain law to which a next friend could appeal.

One suggestion might be made. At the time of a mixed marriage the parties might be requested to execute a deed appointing some Catholic to be guardian of the children after the death of both spouses. This

would enable such guardian to be in a position of having a *prima-facie* right to determine the nature of the religious education of the child. The burden would then be upon the other parties to upset the guardian's decision upon the child's religion.

Finally it is possible to regard the Guardianship of Infants Act 1925 as yet another covert attack upon the sanctity or unity of the family. Such, in effect, it may prove to be. But from the grandiloquent preamble to the Act it might as easily be deemed only another phase of that ambiguous campaign for equality for women.

Equality, it might be suggested, does not contradict the necessity for authority, and it is not all subjection which is servile.

The law, at what expense only the years can show, has decreed that there shall be equality between the sexes as regards the rights and responsibilities relating to children.

P. INGRESS BELL.