CHAPTER VIII

PARENTAL POWER AND DEVELOPMENT OF WELFARE PRINCIPLE UNDER ENGLISH LAW

On the authority of Maitland and Vinogradoff it may be opined that there was no *patria potestas* over full grown under English common law! That probably it existed might before the Conquest might be conjectured (2).

Even an infant child was not under the dominion of the father in the sense in which children were under Roman law. His control over his children above the age of sixteen was very loose.

An infant under English law has capacity for rights and he may hold property or acquire it, such as by inheritance or any other way, provided it did not involve into a legal transaction on his part. In respect to legal transactions, he possesses only partial capacity.

We have seen in preceding Chapter of this work, that both curatorship and tutorship were, mainly even in the maturity of Roman law, mainly concerned with the management and administration of minor's property; they were least concerned with his person. But such has been the development in English law - most probably due the emergence of the institution of trusteeship - that parental control is least concerned with


(2) Pollock and Maitland have expressed the opinion that even if patria potestas existed in England before conquest, it has disappeared completely before the thirteenth century, and there is no such thing under English common law.
the property of infant children. In no case parental control over children's property extends beyond the management and administration of property, and then English law, unlike Hindu law, does not make any distinction between the parental management and administration and third person's management and administration.

On the other hand, we find that parental power over the person of infant children have been very wide and sweeping, almost despotic. English law was originally wedded to the doctrine that since the father is the natural guardian of his infant children, he has absolute rights of custody and upbringing, of controlling the religion and education, of his children. Guardianship then was looked at more as a right than as an obligation. It was a later development that paternal power - or parental control, to be more precise - was curbed and judged on the touchstone of welfare of children. It may be safely opined that today guardianship and parental control are squarely looked at as an obligation, than anything else. It is the welfare principle which has been enshrined on the altar of parental control. No sacrifice is considered bigger on this altar and everything should be sacrificed in the welfare of children.

This chapter is devoted to its survey, this development – rather transformation – from supremacy of paternal control to the paramountcy of welfare principle.

It is proposed to study this transformation in the following three stages:

(i) Before 1839,
(ii) Between 1839 and 1925, and
(iii) After 1925.

Before 1839:

Before 1839 it was an established common law doctrine that the father has absolute rights over his children. His rights of custody and upbringing were absolute. It was he who determined all questions relating to the education and religion of his children. He has the right to control acts and conduct of his children. He has the right to inflict correction by personal or other chastisement in case the child disobeyed his orders. He has the right to the services of his children. So long as the father was alive, the mother has no say, no rights, no powers.
In King Vs. Annervil (1) the absolute right of the father was upheld. After the separation of parents, the child was in the custody of the mother, from where the father removed it by force. On mother's petition for a writ of habeas corpus, the court said that the father has the legal right of the custody of his children, irrespective of their age — in this case the child was at the breast of the mother —, and he could be deprived of it only if he has abused his right to the detriment of the child. In re Pearson (2) the court granted a writ of habeas corpus to the father against a third person with whom the child was living as an apprentice.

Again, in R. Vs. Henrietta Lavina Greenhill (3), the court said that the proper custody of a child is that of the father, and whenever a father is deprived of it, the court would enforce it, unless such enforcement would be attended by danger to the child, as where there is an apprehension of cruelty, or of contamination by some exhibition of gross profligacy (4).

The court of Chancery, exercising the king's prerogative jurisdiction as parens patriae, was also reluctant to interfere with the paternal right, and more or less took the same view as the common law courts did, it was, then, no less a respecter of father's rights. Vice Chancellor Bacon said:

"This court, whatever be its authority or jurisdiction has no right to interfere with the sacred rights of the father over his children." (6)

In De Annerville Vs. De Annerville (7) Lord Chancellor said that the single question before the court was whether it had jurisdiction against natural and legal rights of the father to have the custody of the person of his infant child; the law imposed a duty on the parents, and in general gave them credit, ability and inclination to execute it, but in a case where the father was unable or unwilling to discharge that duty

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(1) (1804) K.B. 5 East 221=7 R. & S. 633.
(2) (1820) 4 Burr. 366=22 Am. 690.
(3) (1836) 4 A. & E. 624.
(4) In ex parte Bailey, 49 N.Y. 727=1839 6 Bowling Pr. Cases, 511, where the father was convicted of felony, and the child was with an aunt, the court, on a habeas corpus petition, granted custody to the mother.
(5) That the court of Chancery has jurisdiction was established in Butler Vs. Freeman, 1 Amb. 341.
(6) In re Lokey, 47 L.T. (N.S.) 254.
(7) (1804) 10 Vesey 52-56=7 R. & S. 340.
or was actively proceeding against it, of necessity, the state must place somewhere a superintending power over children, who could not care for themselves and had not the benefit of that care. Under such circumstances, Lord Chancellor Eldon said, the court of chancery has jurisdiction. The court of Chancery also has jurisdiction to interfere if the father wants to remove the child out of jurisdiction.

In Lyons Vs. Blenkin (1) infant children were living with an aunt, who had provided considerable properties under trust for their education and maintenance. On the father's application for custody, the court said that if a father permits his children to be supplied with maintenance from a third source, and allows to be brought up with expectations founded upon a particular species of maintenance and education which he himself cannot afford to give them, he is not, according to the principles of Chancery court, at liberty to say that he would not allow them to continue that course. In Ex parte Skinner (2) allegations of cruelty were made against the mother by the father, and such were made. The court said that had the allegations been against the child it would have interfered. The court's power of interference in certain cases was reiterated. It was said that the court has power to control the rights of father to the possession of the child, and appoint a proper person to watch over its morals and to see that it receive proper instructions.

Lord Hedsdale in Wellensley Vs. Wellensley (3) said that the father's right to the custody of his children was not disputed, but the question was whether the father, having that right, was at liberty to abuse that right? The father was, their lordships said, entrusted with the care of his children because he was supposed to be the best person to execute the trust reposed in him. If the father abused that right, the court has power to intervene. (4)

The mother has no rights in respect to her children. Not even the right of custody or access. In Takbat Vs. Earl of Shrewsbury (4),

1. (1820) Ch.39=23 R.33.
2. (1824) 3 H.27=27 R.710.
3. (1828) H.L. 2 Wight, (R.31) 29=31 R.15. In this case the court found that the father was living in adultery, and was encouraging his children in swearing, in keeping law company, etc., the court said that it was a suit case where it would intervene and deprive the father of his right of guardianship and custody.
4. 43 Ch.203.
The father appointed testamentary guardian of his children and died. The children were in the custody of the mother. The guardian applied for custody. The Lord Chancellor said:

"in point of law, the [mother] has no right to control the powers of testamentary guardian. It is proper that mothers of children thus circumstanced should know that they have no right, as such to intervene with testamentary guardians."

The custody was given to the mother, but the Lord Chancellor made it clear that the custody was given to her not because she had any right, but in consequence of the power which the court has of controlling testamentary guardians.

Father's right to custody was considered so absolute, that even access was refused to mother. In Ball vs. Ball (1), the Vice Chancellor did not merely refuse to give custody to the mother, but he also refused grant custody access. However it seems that where the father agreed to give access, the court could compel him to grant access (2).

It was only in very exceptional circumstances that the father could be deprived of his rights. The father was deprived of the custody on his gross misconduct of the (3) for his serious unfitness (5).

A girl below the age of sixteen and a boy below the age of fourteen has no right or discretion to consent to leave the custody of her or his father (6).

Thus we find that during this period the doctrine of absolute right of the father over his children was given full effect. It was only in very exceptional cases the courts - both common law as well as Chancery - interfered with his rights; this was despite the fact that the court of Chancery claimed to exercise a very discretion in controlling the rights of the father.

The outstanding feature of this period is that the courts of Chancery asserted its jurisdiction as parens patriae to control the rights of the father, though it exercised this power very sparingly.

(1) (1827) 2 Sim. 35.
(2) See Ex parte Lytton, cited in 5 East 222. See Chapter XXIII of this work.
(3) R vs. Greenhill, 44 H.R. 440.
(4) Shelly vs. Westbrook, (1821) Jacob 226-23 H.R. 47.
(5) In re Goldsmith, (1876) 2 Q.B. 75.
After the decision in R. vs. Greenhill (1), there was a public feeling that something was necessary to be done to give some protection to the feelings — if not the right — of the mother, and that to deprive the children of tender years from any association of the mother was even injurious to the health and proper upbringing of children. The result was that the Talford's Act was passed in 1839. The Act laid down that the mother is entitled to be given custody as well access to her her children up to the age of seven years (2). The Act further laid down that a mother who is guilty of adultery could neither be given custody not access.

Turner, V.C. in Re Belliday's estate (3) said that the Act did not interfere with the right of the father, but introduced a new element for consideration under which the right was to be exercised. The learned Vice Chancellor further said that the Act proceeded on three grounds: firstly it assumed the duty and imposed the paternal right, and, secondly, it connected the paternal right with marital duty as the condition of recognizing the paternal du right, and, thirdly, the Act considers the interest of the child.

In this case, after the separation of parents, the child was living with the mother. One day the father secretly removed the child from the custody of the mother. On mother's application for custody, the court said that if custody was left with the father and access was given to the mother, the mother's statutory right could be maintained consistently with the father's common law right of custody.

In In Ex parte Finn (4), the Vice-Chancellor, Sir Knight Bruce observed that before the court exercised jurisdiction in must be satisfied

(1) (1836) 4 A. & E. 624.
(2) Sec 1 of the Act ran as under: “Upon hearing the petition of the mother of any infant or infants who being in the sole custody or control of the father thereof, or any person by his authority, or any guardian after the death of the father, if the court shall see it fit, to make orders for the access of such infant or infants, and subject to such regulation as the court shall deem just and convenient, and if such infant or infants shall be within the age of seven years, to make orders that such infants or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulation as the court shall deem convenient and just.”
(3) (1852) Ch. 17 Jurist 56-95 R.R. 347.
(4) (1848) Ch. 2 Dg. and Ca. 475-79 R.R. 284.
that the father had so conducted himself, or had shown himself to be a
person of such description or had placed himself in such a position, as to
render it not merely better for the children but essential to their safety
or to their welfare in some very important and serious respect, that his
right should be treated as lost or snapped and should be superseded or
interfered with. If the word 'essential' in Essex was too strong an expression,
it was not much too strong.

Again in In re Currie (1) Vice-Chancellor Kindersley said that the
court of Chancery could not decide upon the custody of infants simply with
reference to what is for their benefit and could not interfere with the
right of a father, unless he so conducted himself as to render it essential
to the safety and welfare of the children in some serious and important
respect, either physically, intellectually or morally, that they should be
removed from his custody. In this case, after a decree for judicial separa-
tion, the mother applied for custody of her child. Dismissing the petition,
the court said that since nothing was shown against the father, he could
not be deprived of custody.

In Ward v. Ward (2) Lord Cottenham, after saying that the object
of the Act was to protect mothers from that tyranny of their husbands
who ill-used, observed:

"Unfortunately, as the law stood before, however, much a woman
might have injured, she was excluded from seeking justice from her husband
by the terror of that power which the law gave him, of taking the children
from her. That was felt to be so great a hardship and injustice that
Parliament thought, the mother ought to have protection of the law with
respect to her children up to certain age, and that she should be at
liberty to assert her rights as a wife without risk of an injury being
done to her feelings, sometimes as mother."

This observation was quoted with approval by Vice-Chancellor, Sir
W. Paget in In re Siamese (3) where the parents have separated and the child
was in the custody of the father, the court rejected mother's application
for sex access on the ground that to subject the child to two influences,
that of the father and mother, would not be in the interest of the child.

A year after the Custody of Children Act, 1839, the Infant
Felons Act, 1840, was passed. The Act empowered the court of Chancery to

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(1) 113 H. & C. 344.
(2) (1859) 1 W. & Tr. 434.
(3) 144 Ex. 257 = 2 H. & C. 540-41.
grant custody of a child convicted for felony to any person who desired it upon such terms and under such regulations as it might think fit. However such an order was not binding upon the father or guardian and no person could use the custody of the child inconsistent with his right. (1)

These two statutes could not attack the doctrine of absolute right of father remained intact. Father's rights could be interfered with only if it was shown that the father had misconducted grossly (2) or if interference by the court was essential in the safety and welfare of the child in some 'very serious and important respect' (3). The Falford's Act, 1839 just touched the fringes of the fortress of paternal rights. The court of Chancery tried to build up weapon to penetrate the defences, but it did not prove more than a probing operation.

Not merely mother has no right at common law, her position was further worsened by the statute 12. &c. 2 c.24 which empowered the father to appoint testamentary guardians to the exclusion of mother. (4). In Salterley v. Ellersley (5), Lord Cottenham very aptly observed:

"I do not understand, in looking at the office of the guardian, how to distinguish between the testamentary guardian and the parent. The testamentary guardian deriving his title from the right of the parent, under the Act of Parliament, in the continuation of the same trust and whether it is exercised by the parent or by the person delegated by him, as is under the same control and liable to the same jurisdiction."

Again, in Talbot v. Earl of Shrewsbury (6), Lord Nottingham, M.C., observed:

"......... in point of law, she (mother) has no right to control the powers of testamentary guardian. It is proper that mother of children thus circumstance should know that they have no rights, as such to interfere with testamentary guardians."

Mother was guardian of for nurture unto the age of fourteen after the death of the father and in the absence of the testamentary guardian. Under such circumstances, she could also be appointed guardian by the court of Chancery.

(1) Nothing in the Act could interfere with the execution of sentence.
(2) This was the position at common law.
(3) This was the position at equity.
(4) The statute was inserted by the Bills Act, 1837. Under the Act mother has no such power.
(5) (1828) 2 All. (N.S.) 124, at p. 149-46.
(6) 40 A. 1. 263.
(7) W. v. Clarke, (1877) 7 L.C. 186; Thomas et al. v. Thomas, (1847) 225.
The position of illegitimate children was different. (1)

In 1857 the Matrimonial Causes Act was passed. Again in 1859 a statute under the same title was passed. The former statute provided for interim, and the latter for permanent orders for custody, education and maintenance of children. (2)

The Matrimonial Causes Acts conferred a very wide discretion and jurisdiction on the court in adjudication in respect to custody, maintenance and education of children, if the marriage of their parents was subject to any proceeding under the Acts. In Spatt v. Spatt (3), it was observed that nothing could be wider than the discretion and power conferred upon the court under these two sections of the Matrimonial Causes Acts (4). The divorce court could order parents to maintain and educate their children at their expenses, which no other court could do before.

Similarly, in Thomaset v. Thomaset (5), Lindley, L.J. said:

"......... in exercising such discretion the divorce court, which has all the powers of the court of Chancery is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting custody, maintenance and education of infants..... This jurisdiction can be exercised over the whole period of infancy."

But despite the wide jurisdiction conferred on the divorce court, and despite clear elucidation by courts, the position of the father and mother practically remained the same.

The first Judicature Act was passed in 1873. 25(10) of the Act provided that in questions relating to custody and education of infants

(1) See Chapter I of this work.
(2) s.3 of the Act of 1857 runs: In any suit or other proceedings for obtaining judicial separation or a decree of nullity of marriage, and on any petition for dissolution of marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think it fit, direct proceedings to be taken for placing such children under the protection of court of Chancery."
(3) 1 Sw. 1 Tr. 212; see also March v. March, 1 Sw. 3 Tr. 321.
(4) s.3 of the Act of 1857 and s.4 of the Act of 1859.
(5) (1891) 24 Ch. 317.
the rules of equity should prevail. It may be noted that the court of Chancery in habeas corpus proceedings has the same jurisdiction and the same powers as the common law courts, though it exercised wider discretion and jurisdiction on account of one monarch and powers under its inherent jurisdiction under the King's prerogative as parens patriae.

In re Agar (1) Lord Baber, L. J., thought that the Judicature Acts have no effect on the habeas corpus proceedings as he felt that in that respect there was no conflict between common law and equity: "The rules of equity... are not to prevail as there is nothing for them to prevail over". However, this view was repudiated by the Master of Rolls himself later on. In R. v. Gyde (2) the court took the view that the rules that prevailed in equity could also be applied in the habeas corpus proceedings.

The result of the Act was thus that after 1873 a wider jurisdiction was exercised by all divisions of the High Court even in the habeas corpus proceedings. Sutcliffe, L. J., said in Thomas v. Thomas (3): "This enactment enabled all divisions of the High Court, even on habeas corpus, to regard something more than the strict rights of the fathers and guardians, and require all divisions to recognize the cardinal principle on which the court of Chancery always proceeded, namely, that in dealing with infants the primary consideration was their benefit."

The Custody of Infants Act was also passed in 1873 which revealed the Reform Act of the Salford Act, 1873. Under the Act the age of the child unto which mother could be granted custody was increased to sixteen years. It was also laid down that in case custody was granted to the mother, it could pass orders as to access to the father or the guardian (4).

(1) (1853) 24 Ch. 317.
(2) (1873) 2 A. S. 282.
(3) (1874) 29 Ch. 90.
(4) 1 of the Act runs: "From and after the passing of this Act, it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by the next friend of the mother of any infant or infants under sixteen years of age, to order the petitioner shall have access to such infant or infants at such time as subject to such regulations as the Court shall direct, or to order that such infant or infants shall be delivered to the other, and remain in or under her custody and control, or, if already in her custody, or under her control, remain therein until such infant or infants shall attain the age of sixteen, or to order such custody or control shall be subject to such regulations as regards access of the father or guardian of such infant or infant, and otherwise as the court shall direct proper."
However, even after the act, the courts, apart from placing a little
more emphasis on the welfare of children, continued to pay tribute to the
doctrine of absolute rights of father.

In In re Colman (1) the court was compelled to deny custody to
the father because of gross misconduct of the father. Three years after
the court got an opportunity in In re Agar-Ellis (3) to reiterate and
elogise the sacred doctrine of paternal rights. Bowen, L.J. said that to
neglect the natural jurisdiction of the father over children until the
age of twenty-one would really be to set aside the whole course and order
of nature; only when it becomes obvious that the rights of the family
are abused to the detriment of children, the father no longer remains a
natural guardian, he becomes an unnatural guardian, but until that happens
there was no reason to interfere with the views taken by the father of his rights and
interests of his children could not justify court’s interference. If it
were not so, the learned Lord Justice said, the court might as well be
interfering all day and with every family. Cotton, L.J., also reiterated
the old principle by saying that the court has jurisdiction to interfere
with father’s rights only in exceptional cases, such as immorality or
criminal of the father.

The court again reiterated the principle laid down in In re
Halloway’s estate (4), though it gave custody to the mother (5).

The Custody of Infants Act, 1873 also removed the bar to any
petition made by an adulterous mother. It was also laid down that no
agreement contained in any separation deed made between the parents should
be held invalid by reason only of it’s providing that the father would give
up custody or control of any child to the mother. However, a proviso

(1) (1876) 2 C. & G. 75.
(2) It was found that the father habitually indulged in intemperance and in the
use of violence of language of a most abominable character that could be
conceived.
(3) (1852) 24 Ch. 317.
(4) (1852) 17 Jurist 56-99 141-947.
(5) In re Lierson (Infant), (1834) 25 Ch. 281. It was found that the
children were weakly, delicate and of nervous temperament, requiring
excessive care and were not fit to be sent to school. Under these circum-
stances the court felt compelled to give custody to the mother, if it was
not to be guilty of cruelty to children.
provided that the court should not enforce any such agreement if it was of the opinion that it would not be for the benefit of the infant to give effect thereto. This proviso was used in In re Reesant (1) to deny custody to a mother who was found to hold atheistical views, who prevented the children from getting any religious education and who had also published an obscene book.

Thus we find that the Act of 1873 also could not impeinge the citadel of paternal rights.

That the reforms introduced under the Act of 1873 were not adequate was soon realized. The Guardianship of Infants Act was passed in 1886. In 1893, the Prevention of Cruelty to and Protection of Children Act, was passed, which was later replaced by the Children and Young Persons Acts, 1932-33. The Poor Laws Act was further modified (2).

The Guardianship of Infants Act, 1886, popularly known as mother's Act, introduced certain basic changes in the law. The major changes introduced are:

(a) The mother is recognized as a guardian of her children, after the death of the father,(3)
(b) The court is empowered to appoint a guardian by her will,(4)
(c) The court is empowered to appoint or remove guardian

in certain circumstances.

(1) (1873) 11 Ch. 503.
(2) Some of these have now been replaced by the Children Act, 1948.
(3) § 2 reads: "On the death of the father of an infant, and in case the father shall have died prior to the passing of the Act then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant children, either alone when no guardian has been appointed by the father, or if the guardian appointed by the father is unfit, from time to time appoint a guardian or guardians to act jointly with the mother."
(4) § 3 reads: "The court may upon the application of the mother or any infant (who may apply without a next friend), make such order as it may deem fit regarding the custody of such infant and the right of access thereto or either parent, having regard to the welfare of the infant, and to the conduct of the parties, and to the wishes as well as of the mother as of the father, and may alter, vary or discharge such order on the
in certain circumstances (1).

It is evident from the cursory perusal of the provisions of the Act that it purported to effect far reaching changes in the law. But it seems that for quite some time the old doctrines continued to have their sway, and the citadel of parental paternal right appeared to be invincible.

In an Irish case arising immediately after the Act, FitzGibbon, L.J., observed:

"In exercising jurisdiction to control or ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be superseded or suspended." (2)

Quoting the observation of Knight-Fraser, V.C., in In re Finn (3) with approval, Lord Esher, K.G., said in In re Gyngeall (4):

"...... the court must exercise the jurisdiction with great care, and can only act when it is shown that either the control of the parent, or the description of person he is, or the position in which he is placed, is such as to render not merely better, but — I will not say essential — clearly right for the welfare of the child in some very important respect that the parent's right should be superseded."

Again, in R. v. New (5) Collins, K.B., reiterated the same thing in a different language.

Thus we find that shift was merely from 'essential to their safety' to 'clearly right for the welfare' of the child, although the statute used the words 'having regard to the welfare of the infant', the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just."

(1) 3.B. runs: "In England and Ireland the High Court in any division thereof, and in Scotland either division of Court of Session, may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from office the office any testamentary guardian or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed."

(2) In re O'Hara (1900) 2 I.R. 222.
(3) (1848) 2 De C & G. 457, 472; 234.
(4) In re Gyngeall (1893) 2 C.B. 232.
(5) 20 Tlem. 553.
courts still hesitated to say that the welfare of children was the paramount consideration.

The boldest exposition came from Lindley, L.J., in In re McRath:

"The dominant matter for consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comforts only. The moral and religious welfare of the child must be considered as well as its physical well being. For can the ties of affection be disregarded."

This passage has become since then a loco classic.

The outer defences of citadel of paternal right were impinged. Lindley, L.J. made it clear in In re A and B (7):

"... I do not say that it has much, if at all, diminished the right of the father except as regards wives; but to say that s.5 is to have no operation unless the father has so conducted himself towards his children as to justify in depriving him of his children, is to reduce the statute to nullity."

In the Chancery Division, Chitty, J. said in construing s.5 of the Act, the following matters are to be considered: (i) the welfare of the infant children, (ii) conduct of parents, and (iii) the wishes of the mother as well as of the father.

Thus, the first consideration is 'the welfare of children'. In 1952 - In re Halliday's estate (4) - the court said that the first consideration was: the existence of parental right.

The principle of welfare of children has a very old origin in the court of Chancery, though the court of Chancery procrastinated to give it full effect (5).

But it seems that even after the Guardianship of Infants Act, 1936, the citadel of parental right stood firm as if on granite rock. It still appeared invincible(6).

In 1941, the Custody of Children Act was passed. It empowered the court to refuse such custody to a parent who had deserted or abandoned the child (7). The Act further provided that where a parent has

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1. (1933) 1 Ch. 730.
2. (1937) 1 Ch. 730.
3. These considerations were approved by the court of Appeal.
5. In re Lyall (1846) 1 Ch. 457; In re Agar (1893) 24
7. The Act defines 'parent' to include any person at law liable to maintain the child or entitled to his custody.
abandoned or deserted the child, or allowed the child to be brought up by another person at (another person's) expenses, or by the guardians of the poor law union, for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court would refuse to make an order for the delivery of the child, unless the parent has satisfied the court that, having regard to the welfare of the child, he was a fit person to have the custody of the child.

This did not affect the suavity of paternal right.

Then, it seems that frontal assault on the citadel was made by the Guardianship of Infants Act, 1925. In 1919 the Parliament had passed the *Sex Disqualification (Removal) Act.*

With a view to apply the principle of equality of sex to the guardianship and custody of children the *sex of infant* Guardianship of Infants Act, 1925 was passed. (1)

... of the Act runs as under:

"where in any proceedings before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1866) 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 possessed by the father, in respect to 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."

2.2 of the Act runs:

"The mother of an infant shall have the like power to apply to the court in respect to any matter affecting the infant as are possessed by the father."

It has been seen that the Guardianship of Infants Act, 1866, 8 provides the mother to appoint a guardian by her will, but that appointment needed confirmation by the court and the court would confirm it only if it was shown that the father was unfit to be the sole guardian of his

(1) The preamble of the Act runs: "whereas Parliament by the *Sex Disqualification (Removal) Act,* 1919, and various other enactments, ha
children. That section has been repealed by 3.5 of the Act and now in
the matter of testamentary appointment of testamentary guardians, the
mother and father have been given equal powers; each parent can now
appoint a guardian, and such guardian will act as joint guardian with
the surviving parent unless the surviving parent objected. In case of an
objection by the surviving parent, the court would decide the question
on the basis of welfare of children. Further, after the death of the
surviving parent, the guardian appointed by him by both the parents
would act as joint guardians. If joint guardians are unable to agree on
any question relating to children, any one of them may apply to the court
for its direction and the court may pass such order as it may deem fit (1)
3.79 of the Children and Young Persons Act, 1932 (which has been given
retrospective operation to the coming into force of the Guardianship of
Infants Act, 1925) provides that where one of the joint guardians in
the mother or father of an infant, the order may deal with the custody
of, or right to access to, the infant to its mother or father, as the
case may be.

3.4(2A) of the Act provides that where an infant has no parents,
no guardian of the person and no other person having parental right with
respect to him, the court, on the application of any person, may, if it
thinks fit, appoint the applicant to be guardian of the infant.(2)

The Act does not say that the mother is a co-guardian or
joint guardian with the father during his life time, though after her
death the father is the joint guardian with that the guardian appointed
by her. The father continues to be the natural guardian of his children.

The plain meaning of 3.1 of the Act is that in the matter of
custody etc (the matters are fully enumerated in the Act) both the
parents are placed on equal footing, and in determining all questions relat-
ing any matter, including custody, the paramount consideration is the
welfare of children. In the interpretation of this section two trends in

sought to establish equality in law between sexes, and it is expedient
that this principle should obtain with respect to the guardianship of
infants and the rights and responsibilities conferred thereby."

(2) 3.6.

(3) 3.7 of the Act extends the jurisdiction to courts of summary
jurisdiction.
judicial opinion are discernable. Firstly, the Act of 1925 does not change the old law in respect to the right of the father. Secondly, old law stands changed and in all cases matters relating to children, such as custody, upbringing, the paramount consideration is the welfare of children.

The Chancery Division in the earliest case after the Act quoted the oft-quoted passage from the judgment of FitGibbon, i.e., in re O'Hara (2). Lord Haushworth said:

"The welfare of the child in no doubt the first and paramount consideration, but it is one amongst several other considerations: the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parent and be brought for that purpose into intimate relation with the parent."

In this case the father of the child after the death of the mother of the child handed it over to one Mr. and Mrs. Jones and remarried. On failing to get a child from his second wife, the father applied wanted the child back. Mr. and Mrs. Jones, being very fond of the child, declined to hand it back. In the father's application to the court, he was granted custody.

A similar question case in that year before the divorce division in re Thain (3). A wife obtained a decree for restitution of conjugal rights, and on the husband's failure to comply with it, applied for custody of the child of the marriage aged five years. The child was living with paternal grand parents with whose parents were living earlier. On the wife's plea that delinquent party was not entitled to custody, the court said:

"The matter of immediate consideration are the comfort, health, and the moral, intellectual and spiritual benefit of the child."

The court held that the child should remain where it was. Access was granted to the mother.

In the former case the child was taken away from a third person at the instance of the father, in the latter case the child was not removed from the custody of the third person, though despite the fact that the mother desired it. In both the cases the court seems to remark:

(1) In re Thain (1926) 2 Ch. 676.
(2) (1900) 2 L.T. 232: the passage has been quoted earlier.
(3) (1926) 1111.
have reached that conclusion on the basis of welfare of children.

Then came in re Carroll (1) before the King's Bench Division. The simplified facts of the case are: One Carroll has an illegitimate child, two years old. She applied to a Protestant Church Society to help her in making arrangements for the adoption of the child. The Society was able to find out some respectable person who was willing to adopt the child in adoption. Consequently, the child, with the consent of the mother, was placed in the custody of that person. The mother changed her mind and wanted back the child. In the background was a Roman Catholic Society which was willing to keep the child in her home for Children. The mother was a Roman Catholic and it seems that she was persuaded by the Roman Catholic Society.

Lord Heward, C.J. in the King's Bench Division said that there seems to have been between these few years, 1891-1925, a certain change of thought in the matter of custody of children, viz., it is not the wish of the parent which is paramount consideration, but the welfare of the child.

When the case went to the Court of Appeal, the majority felt that there was no such change of thought. In a very elaborate judgment, Slessor L.J., said that there was nothing either in the statute or 1891 or of 1925, which goes to modify the 'considerations of immemorial right of parents by nature and nurture'. The Lord Justice said that the Guardianship of Infants Act, 1925 dealt with the respective rights of the father and the mother. Scrutton, L.J., in another equally elaborate judgment expressed the same view and said that notwithstanding 8.1 of the Act of 1925, the court in deciding questions of custody and upbringing of children, especially in case the child was too young to have any view of its own, cannot disregard the desire of the parent, unless the parent has so neglected his or her duty as no longer deserving consideration.

On the other hand, Greer, L.J. in his dissenting judgment said that the welfare of the child is the paramount consideration. The carrying out of the wishes of the mother would, the learned Lord Justice said, mean that the child would be kept in an institution and not in a private home; and bringing up the child in a home is certainly much better than in an institution, however good an institution might be. Their

(1931) 1 K.B. 317.
Lordships commenting upon the observation of the Shaded Chief Justice, Lord Howard said:

"In my opinion all that the judgment intended to convey was that actually the attitude of public opinion and the courts towards the powers of a parent over his children had become modified, and that now a days less importance is attached to the right of, and the wishes of, the parent, and more importance is attached to the welfare of the child, and the Act of 1925 was pointed out as an illustration of the modification in one instance of what at common law were the strict rights of the male parent."

Shaw: The majority gave preference to the wishes of the parent over the welfare of the child. The reason was that it felt that the Act dealt with the rights of parents in ter se and not vis a vis third persons. In the former case the alone the welfare principle applied. Glesser, Lord Justice, said: that "This statute, however, in my view, has confined itself to questions as between the rights of the father and mother. The implication is that in all cases parental right will still have precedence, even over the welfare principle. That seems to be aimed at the Act the limitation of the Act.

we pass on to another trend.

In said Vs. Laverty(2) Viscount Cave said that the rule that a child was to be brought up in the religion in which his father desired him to be brought up is subject to the welfare of the child which is the paramount consideration. Again, in In re B's Settlement (3) the Chancery Division said that under s.1 of the Guardianship of Infants Act, 1925, the court was bound to consider the welfare of the child as the first and paramount consideration (4).

Wrottesley and Evershed, L.J.J., in Allen Vs. Allen (5) expressly differed from the view taken by the trial judge that a mother who had committed to murder was entitled to custody of her children.

(1) In re Caroll has been subjected to a very wide and divergent comments.
(2) (1925) A.C. 101.
(3) (1940) Ch. 54.
(4) Some of the aspects of the case having hearing on conflict of law has been criticised: See 4 Modern Law Review, Guardianship in Private International law, 65; Cheshire, Private International law (3rd Ed.) p. 537.
(5) (1948) 2 All E.R. 413.
wrottesley, L.J. said:

"The welfare of the child both moral and physical, was the
paramount consideration. It was impossible to say, because a woman once
committed adultery she was not a fit person vis a vis who has not, to
look after a child. There was no suggestion that mother was promiscuous,
or bad mother, or a bad housekeeper, or anything which made it undesirable
for her to look after the child."

Allen Vs. Allen (1) was followed in Willoughby Vs. Willoughby (2)
and Wakeham Vs. Wakeham (3).

It may be, however, noted that in all these cases adjudication
was between parents.

In In re Collins (4), where after the death of his parent a
child was living with his maternal grandparent who were Protestants,
paternal grandparents who were Catholics applied for custody. The father
of the child was Roman Catholic and the mother was Protestant. The child
was baptized as Roman Catholic. Overruled, M.R. said that historically a
father was treated as having absolute rights, which the law was bound
to recognize and enforce, unless he had forfeited his rights by his
misconduct. One such right was to dictate the religion of the child.
And that rule - rule of paternal supremacy - persisted till 1925, though
it might be that between this period there was possibly some change in
feeling in regard to it. The social philosophy of the times also
changed somewhat which resulted in the passing of the Guardianship of
Infants Act, 1925. Under the Act, the Master of Rolls said that the
paramountcy of welfare of children is recognized. On Counsel arguing
that the Act is confined on issues between parents, He said:

"That brings me back, therefore to the point: Is s.1 of the
Act of 1925 confined strictly to a case when the issue is between father
and half mother both living, or does it apply where the father or
the mother is dead or both the father and the mother are dead? In my
view there it is impossible to put that limitation on the intention of
the words used by Parliament."

(1) (1943) 2 All R. 413.
(3) (1954) 1 All R. 366.
(4) (1950) 1 All R. 1657.
Lord Siaonda uttered a note a caution by saying that too much
stress should not be laid on the provisions of Guardianship of Infants
Act, 1925. He did not introduce any new faster principle of law but
merely enacted the rule which has long being acted upon in the courts of
Chancery. In our submission, historically it is correct that the welfare
rule originated in the court of Chancery, but, before 1925, it was
rarely acted upon as the courts of Chancery always felt fettered on
account of desctosen of the doctrine of absoluteness of paternal right.
The Guardianship of Infants Act, 1925 emancipated that rule from the
fetters under whose weight it lay almost groaning.

In Mackee VS. Mackee (1) we find that an attempt was made to
mend the same defences of the citadels of paternal power. Sir Raymond
Evered, M.R. was called upon to meet this challenge in Sakeham VS.
Sakeham (2) and In re A (3), and the challenge was well withstanded.

In the former case, the father after obtaining a decree nisi in
divorce proceedings asked for the custody of children who was with
the mother in South Africa. These children also had an elder brother
who was living with the father. The court granted custody to the father
though left open the question of care and control as children were out
side the jurisdiction. Sir Raymond said welfare of children was
paramount consideration:

"... a matter which sometimes have to be considered is whether
it is not right that (as the child should be brought up to be aware of
the fact (i.e., he had an elder brother) and to have the advantage of
brotherhood as well as of fatherhood made available to him."

In the latter case the mother of an illegitimate child, about
three years old, parted company with the natural father, a married man,
who was living separately from his wife. The mother being very young,
wished to make a fresh start in life. With this view in mind, she
placed the child in the care of a charitable society so that the child
may be given in adoption. The natural father, who had never denied
paternity was very much attached with the child. He applied to the court
under the Law Reforms (Miscellaneous Provisions) Act, 1949, for the child
being made ward of the court and for her custody or care and control

(1) (1951) 1 All M.R. 155
(2) (1952) 2 All M.R. 454
(3) (1955) 2 All M.R. 202.
be given to him.

It was not a case, as Sir Reymond said, where the mother wished to have the custody and upbringing of the child, but a case where the mother insisted to exercise her right which she claimed to possess as a matter of law and of which she could not be deprived, even though she did not herself seek the company and custody of the child, unless, as counsel for mother put, it was shown that she had forfeited her right on account of some misconduct on her part. It was argued that the natural father of an illegitimate child has no rights whatever.

Sir Reymond said that if the mother's wishes of giving away the child in adoption were fulfilled, it would mean 'abandonment and extinguishment for all practical purposes of all the natural rights towards the child', and that 'cannot be for the welfare of the child'. In conclusion, the child was made a ward of the court and custody was given to one Mr. and Mrs. A, brother and sister-in-law of the father.

It may, however, be noted that in re A (1) was a case under the inherent jurisdiction of Chancery Division.

Sir Reymond Evershed, M.R. who withstood the assult so well in xkxaxk xakekav vs. xakekav (1) and in re A (2), succumbed to the assult, in Re C (3), which was a case under the Guardianship of Infants Act, 1925.

In in re C (3), the mother of an illegitimate child who was in the care of her putative father and who was well looked after under the care of the father, applied for its custody. The mother was a while woman and the father was a coloured man. Glyn-Jones, J., refused to make an order as he found that there was mutual attachment between the child and the father. The father then applied to have the child made a ward of court and for himself to be appointed her guardian. The mother applied for care and control. Glyn-Jerry, J. said that he could not consider the mother as unsuitable and passed an order in her favour. The learned judge said, 'I have decided to exercise my discretion by accepting mother's undertaking not at any time hereafter to have any contact with the putative father. I regard this as vital. On that undertaking I direct that the infant be handed over to the mother'. A direction was also issued that the child thereafter should cease to be the ward of

(1) (1954) 1 All E.R. 1057.
(3) (1956) 2 All E.R. 679.
court. From the latter part of the order the father appealed. The court of Appeal unanimously upheld the original order.

In court of Appeal there is no reference whatever to the welfare of the child and the case has been, it seems, decided purely in the basis of the right of the mother of an illegitimate child. Sir Raymond Beyaund everhedy said:

"...... in the case of an illegitimate child the limit of the obligation of the father will be to make financial provision for it in order to relieve other people, and particularly the general public, of such obligation. The only parent in that respect which is the law regards as responsible for the child is its mother."

The court seems to have taken the view that in proceedings which are not between the de jure mother and father (and putative father is not a father), the Guardianship of Infant Acts do not apply. That is also the answer given in In re C.T. and J.T. where the question came for consideration directly. In this case the father of two illegitimate children applied for their custody to the court of summary jurisdiction. Roxenburgh, J., after a very elaborate discussion said that there was no compelling reason for departing from the accepted meaning of the words, 'father' and 'mother' - that they mean de jure father and de jure mother and do not include de facto mother or de facto father. The implication seems to be that not merely a de facto father cannot apply but a natural mother also cannot apply under the Acts.

Thus In re C.T. (1) seems to fix the limitation of the Guardianship of Infants Acts by laying down that the Acts are applicable only in proceedings between de jure parents.

The Legitimacy Act, 1959, has mitigated the hardship caused in the decision In re C.T. (1) by laying down that the Guardianship of Infants Acts would also apply to proceedings between de facto parents. (2).

It seems that the other limitation continues: the Guardianship of Infants Acts would not apply in proceedings between a parent and a third person and in proceedings between third persons.

(1) (1956) 3 All E.R. 500.
(2) 3.3 of the Act. (this section has been quoted verbatim in Chapter III of this work, p.28 (footnote (1))

This section purports to apply to 3.5 of the Guardianship of Infants Act, 1936 and 3.16 of the Administration of Justice Act, 1925.
It seems that in appointment of guardian of an infant child the court would be guided by the principle of welfare of children. In re H (1), a sister of an infant child having the custody, with whom the child was already living, applied for appointment of herself as a joint guardian with the father. The sister and the father were in worst possible terms with each other. The court said that it would not be in the welfare of the child to appoint two persons as joint guardians who were not even on speaking terms with each other.

We will pass on to some recent adoption cases.

Under the Adoption Act, 1950, in making an adoption order the court is required to consider the welfare of the child as paramount. The consent of the 'parent' is also necessary. If the parents or pursuah the parent desire to (where there is no other parent) desire to give the child in adoption the court is not concerned with the question whether the parents should or should not give the child in adoption. The court considers the suitability of the proposed guardians to find out whether it would be in the welfare of the child to pass an order of adoption.

The question that has mainly arisen is whether a putative father can veto an adoption.

In re Carol (1) and in re A (2), the mother insisted to exercise her right that in the matter of her children, her wishes are paramount. In the former the putative father was not on scene. In the latter he was.

In re A (3) the question came directly. The father mother wanted to give away her illegitimate child in adoption. The putative father was opposed to it and wanted the custody himself. Lord Denning, L.J. said he is not a 'parent' and therefore he cannot veto adoption. This means that the consent of the natural mother is enough, and dissent of putative father is immaterial.

The question was considered in some details in In re Adoption Application 41/61 (4). After discussing the provisions of the Adoption Act, 1950, the court said the putative father has no right to veto an adoption and the court is paramount consideration before the court was the welfare of children. The mother of the child, was a physiotherapist desired to give the child in adoption, while the putative father, a medical student desired that the custody be given to him, so

(3) (1955) 2 All E.R. 211.
(4) (1963) 3 W.L.R. 357.
that the child might be brought up by his parents until he was in a position to undertake that duty himself. The qualifications of the proposed adopter were admirable. The Chancery judge felt that under the circumstances, the adoption of the child would be in the interest of the child.(1).

Again in In re O (2) similar question case before the court. The court of Appeal said that under the Adoption Acts, a legitimate father can withhold his consent (unless it was shown that he was withholding his consent unreasonably), while a putative father has no such power. The court pass the adoption order as it felt that that was the best interest of the child. The court said was:

"His fatherhood is a ground to which regard should be paid in seeing what is best in the interest of the child; but is not an overriding consideration."

18. fatherhood as well motherhood are considered as factors — and obviously very important factors — in finding out the welfare of children, no one would disagree. But what has happened in our submission is that the court has given a pre-eminence to the wishes of the parent who can, in law, have a wish in respect to the child. Would the decision of the court the same in all the above cases, has the father was a de jure gua father instead of putative? If an affirmative answer can be given to this question, then the paramountcy of welfare rule in vindicated.

In our submission is parenthood (motherhood as well as fatherhood) and guardianship are looked at as obligations, no difficulty would arise. Then it is immaterial whether the parents are de jure or de facto. In every case the paramount consideration is the welfare of children and in finding the welfare of children, the parenthood is the most important factor to be taken into consideration.

These cases indicate that in English law between the two ideas — the supremacy of parental rights and paramountcy of welfare principle — is still waged. The citadel of parental right (it seems now it is no longer exclusively paternal) still seems to be invincible. One very happy sign is the recent judgment of the House of Lords.

In Re K (3) the question was whether the parent has a right to disclosure of confidential reports said to the judge by the guardian ad litem, which formed the basis of the judgement? Lord Evershed said that

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(1) (1963) 3 W.L.R. 357 (Judgment of Chancery division)
(2) (1964) 2 W.L.R. 840.
(3) (1963) 3 W.L.R. 408.
in a conflict between the right of parent to disclosure and the welfare of the children, the right of parent must yield to the welfare of the child. Lord Evershed said:

"The interest of the infant is the paramount interest and purpose of the jurisdiction."

Thus the House of Lords laid down that the welfare of children is supreme. But it should be noted that the case was under the inherent jurisdiction of the Chancery Division.

In the year 1950 the Matrimonial Causes Act was passed. The Act consolidates earlier statutes on the subject. The question of custody in matrimonial proceedings has been discussed in Chapter XIX of this work, a reference may please be made to the same. Here we would note one or two things in which matrimonial law has made some unique contributions.

26 of the Matrimonial Causes Act, 1950, deals with the question of custody, maintenance and education of children. The section does not use the words that 'the paramount consideration shall be the welfare of children' but uses the words, 'make such provisions as appear just with respect to custody etc. of children. There has been never been any doubt that the matrimonial court possesses a very wide discretion in this respect to this. Further in view to the generality of the provision of 1 of the Guardianship of Infants Act, 1925, there has never been any doubt that the paramount consideration before the court is the welfare of the children.

It would be seen (1) that the jurisdiction of the court of Chancery or of the King's Bench is usually not exercised over children over the age of sixteen. But the divorce court has taken the view that the jurisdiction of the court under 26 exists not merely upto the whole period of minority, but can also go beyond that age, if the welfare of the children so requires (2).

Recently, the divorce court has made distinction between 'legal custody' and 'care and control'. In a case where the court feels that in the interest of a child legal custody should be given to one parent and 'care and control' to another, it can do so. In Allen Vs. Allen (3)...

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(1) See Chapters XX and XXI of this work.
(2) (1948) 2 All 214, 445.
(3) (1948) 2 All E.R. 260 (power to order maintenance.
(4) (1948) 2 All E.R. 413.
The court of Appeal granted care and control to the mother as the child was of tender years and gave legal custody to the father. This case was followed in Willoughby vs. Willoughby (1).

The splitting of custody into 'legal custody' and 'care and control' solves of how to retain the association of both the parents with the child. When the child, say, is under the care and control of the mother, the mother is in direct association with the child, and since the legal custody is with the father he has full say in the matter of upbringing and care of the child. Thus both the parents are actively associated with the child. It need not be stressed that ordinarily the best interest of the child is served by keeping it in the association of both parents, unless, under some special circumstances welfare may require otherwise.

The question came directly for consideration in In re A (2), before a Magistrates' Court. After their separation, parents issued cross summonses for the custody of their child of marriage aged about two years, who was living with the mother. The court said that the best way to subserve child's interest would be to allow it to continue to live with the mother, as there was nothing against her to deprive her of the custody, and at the same it was also necessary that the father should have 'a practical and effective interest' in the child. Pursuant to this he passed an order giving care and control to the mother and legal custody to the father. On appeal Pennycook, J. of Chancery Division reversed the order on the ground that the court does not possess any power of splitting custody under the Guardianship of Infants Act. The Court of Appeal restored the judgment original order. O'erod, L.J. said that it would not be correct to say that notion of divided custody did not exist in 1866, though it was true to say that since then it has developed considerably. It has been the usual practice of the divorce court to pass such orders, such orders can also be passed under the Guardianship of Infants Acts. O'John, L.J. said:

"In my judgment the section plainly (s. 5 of the Guardianship of Infants Act, 1866) plainly gives the power to deal with custody not individually but divisibly also, that is to say, in this sense, that the court can deal with each and every aspect of the consequent element of

(1) (1951) 1 C. 104.
(2) (1963) 2 A.L.R. 1671.
(3) (1963) 2 W.R. 769.
Thus, merely the divorce court but also the guardian courts under the Guardianship of Infants Act, 1925 have power to pass orders splitting the custody the way they deem it fit in the welfare of children.

The Royal Commission on Marriage and Divorce submitted its Report in 1956, with a view to incorporate certain recommendations of the Commission, the Matrimonial Proceedings (Children) Act, 1958 was passed. The recommendations of the Royal Commission and the Matrimonial Proceedings (Children) Act, 1958 are being discussed in Chapter XIX of this work, reference may please be made to the same.

One of the glaring deficiencies of the matrimonial proceedings have been that the question of children is considered in 'ancillary proceedings' and it is known as 'ancillary relief'. And it should not surprise any one that the courts more frequently than not treat the matter accordingly. The children are not represented as such either in matrimonial proceedings or in guardianship proceedings. That in such proceedings there is also a third party - the most important party - viz. the children, is not realized. The Royal commission has made some important recommendations in this respect. The court can take assistance from the welfare officers who represent the children. However, the recommendations of the Royal commission are confined to matrimonial proceedings.

The divorce court has exercised the power of giving custody to a third party. Now custody can also be given to a local authority. In F. V. F. (3) the mother of a child was not in a position to provide suitable home to the child and the father was considered not to be a fit person and proper person to have the custody, the court entrusted the care of the child to the local authority as, court felt, under the circumstances, that was for the welfare of the child.

Conclusion:

The common law was wedded to the doctrine of absolute, almost despotic, rights of the father over his children. The common law courts consistently refused to interfere with the exercise of paternal rights, unless a case of grave emergency was not shown - this was

(1) (1963) 3 W.L.R. 789.
(3) (1953) 3 All L.R. 181.
termed by thee as 'gross misconduct' (1).

When the court of Chancery assumed jurisdiction, it was not so fettered. Exercising King's prerogative jurisdiction as parens patriae, it has a wide jurisdiction. The King as the supreme guardian of all children within the realm and of all children, British subjects, was concerned in the welfare of the children. This enabled the court of Chancery to propound the principle that welfare of the children was the paramount consideration.

The Courts of Chancery began saying that the father's rights are recognized because law recognized their duties. And if a father fails to perform his duties, he can be deprived of his rights. The courts of equity on the one hand said that they would permit the father to have his control over the children during the entire period of infancy and refused to be bound by the common law doctrine that paternal authority ordinarily came to an end on child's attaining age of discretion. On the other hand it started controlling the rights of father and legal guardians to extend unknown to common law courts.

But we find that the court of Chancery propounded great principles, but it was reluctant to exercise it control over the parents and guardians. Thus we find, the great equity judge, Sir Kinght Bruce saying that the court would supersede the paternal rights only when it found it 'essential' to do so 'in some serious and important respect' (2). Kindlerley, V.C. repeated the same language with some elaboration. According to the learned Vice-Chancellor the court would interfere if the safety and welfare of children, physically, intellectually or morally required it, in some very serious and important respect. The very cautious approach of the court is clear from the words of Bowen, L.J. who said, 'the court must not be tempted to interfere with natural order and common course of family life, the very basis of which is the authority of the father, except in those exceptional cases in which the state is called upon, for reasons of urgency, to set aside the paternal authority and to intervene for itself'. (4).

In this background xxx the Talford's Act, 1839 could not have made much of a difference. Even after the passing of the Mother's Act...

(1) Shelley Vs. Westlake, (1821) 10 Sanb226=23 R. 47; R Vs. Greenhill, 44 R. 440; R Vs. Howe, 122 R. 723; In re Goldsmith (1876) 2 Q.B. 75.
(2) In re John Finn, 79 R. 284.
(3) In re Curtis, 113 R. 244.
(4) In re Agar Ellis, (1863) 24 Ch. 317 at p. 526.
the Guardianship of Infants Act, 1836 - the doctrine of paternal rights continued to have its sway.

Some very nice sentiments were expressed; the theory of welfare of children was further elucidated. For instance the now classical words of Lincley, L.J. that 'the dominant matter for consideration of the court is the welfare of children' and that the welfare has to be interpreted in a wider sense - it cannot be measured in money alone, but 'the moral and religious welfare of the child must be considered as well as the physical well being. For can the ties of affection disregarded?'. Viscount Cave said, "It is the welfare of the children, which, according to the rules now well settled, forms the paramount consideration in these cases." But such has been the all pervading influence of the doctrine of the supremacy of paternal power that law did not advance very much.

The Guardianship of Infants Act was passed in 1925.

After the passing of the Guardianship of Infants Act, 1925, the paramountcy of welfare principle is established. In some cases a view has been taken that the welfare is the sole consideration, but only paramount consideration which contemplates existence of other considerations, of which wishes of an unimpeachable parent are very important. In our submission no court can ever disregard other considerations and factors and in fact by considering all considerations and factors that comes to the conclusion that as to what is for the welfare of children. But it does not mean that the wishes of the impeachable parent are also paramount. Danckwerts, L.J. very aptly said that 'there can be only one "first and paramount consideration", and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it concides with the welfare of the child.'

The present position may be summed up as under:

(1) In re Emgrath, (1893) 1 Ch. 143.
(2) Ward vs. Laverty (1925) A.C. 101.
(3) In re Thain (1926) Ch. 676;
    in re 0. (1962) - All H.N. 10.
(4) In re Adoption Application 41/61, (1963) Ch. 315.
A. (i) In any adjudication between parents, in respect to custody, upbringing, education, access, management or administration of property or in respect to any other matter, the courts are primarily concerned with the welfare of children and the welfare of children is the paramount consideration.

(ii) (a) In any proceedings before any court under the Guardianship of Infants Acts, the terms 'parents', ex 'the father' or and 'the mother' include natural (i.e. de facto) parents also.

(b) In any proceeding under the Matrimonial Causes Act, 1950, the word 'parents' includes natural parents as legal parents, and also step-parents if the child was accepted by him (or her) as of the family.

(c) Under the inherent jurisdiction of the Chancery jurisdiction any person interested in the welfare of any child can bring proceedings in respect to the child.

(d) Under the sub-heads (a), (b) and (c) the welfare of children is the first and paramount consideration.

(iii) In an adjudication between a parent and a third party, the wishes of the parent would have supremacy, since the Guardianship of the Infants Acts do not apply to such proceedings. However, this would not be so if an application is made for appointment of guardian. Further, this would not apply to proceedings covered under sub-head (ii)(c).

E. Now a clear distinction exists in law between guardianship and custody. Not merely guardianship and custody are looked as two concepts, but custody is also being split up into two, legal custody and care and control. Access has been another aspect of custody. This clearly indicates that guardianship is now primarily accepted as an obligation, implying various duties towards children, in the welfare of children these duties can be assigned to different persons so that the interest of children may be best subserved.

C. The courts as supreme guardian of children have very wide discretion and jurisdiction over children, their guardians and custodians. The guardian court's role is much different from the role of court of law which enforces the rights and obligations of the parties. It is a parental jurisdiction and the main purpose of the court is the welfare
of children, where 'the mean whereby he reaches his conclusion must not be more important than the end'. Thus, it is now realized that in proceedings in respect to children there are not merely two parties, but there is also a third party - and it is this third party which is most important. This realization has given birth to welfare officers who represent the interest of the children. It is also realized that proceedings in respect to children are not like ordinary adversary litigation. Therefore stress is laid on a less formal procedure. The courts can now rely on confidential reports of the guardian ad litem or of the welfare officers who can go and make enquiries on the spot and in the surrounding where the children and their parents and guardian live.

In conclusion it may be submitted that the history of English law of parental control and guardianship has been a history of the transformation of a concept which began primarily and essentially as a right into a concept which is primarily and essentially considered to be as an obligation existing in the interest and welfare of children.