Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Skinner v. *Orde and others, from an Order of the High Court of Judicature, North-West Provinces; delivered 20th December*, 1871.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is an Appeal from an Order of the High Court of the North-West Provinces, in substance confirming an Order of the Zillah Judge, removing an infant ward and her property from the custody and guardianship of her mother the Appellant, and the second husband of that mother.

The application was made to the Judge under the provisions of the Indian Act, No. 9, 1861, which are as follows:—

"1. Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor, may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner, or his agent if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom

the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such minor shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

"3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their agents if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case."

The Judge accordingly made the provisional Order on the *ex parte primâ facie* case presented to him, appointed a day for hearing it, heard it, and made an Order, removing the ward from her mother. An Appeal was presented to the High Court, which pronounced the Order complained of. The Act gives no further power of Appeal, but on the statement that the real question was as to the religious education of the ward, and that considerations of importance as regards the religious feeling of the Christian and Mahometan populations of India were or might be involved in it, special leave was given by Her Majesty, on the recommendation of this Board, to present to Her Majesty in Council the Appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the High Court; and it is, obviously, of very great assistance to the Courts in India and to this Board to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this country have thought it best to act for the protection and welfare of infant wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that in the matter of religious education great, and, *in the absence of controlling circumstances*, paramount, weight should be given to the expressed or implied wishes of the deceased father. It was contended

with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power and to have imposed on him the duty of doing what, in his judgment, is best for the infant; and no other power or duty.

In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government. While Brahman and Buddhist, Christian and Mahometan, Parsee and Sikh are one nation, enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending in each case on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status; and it is therefore ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

What are the facts of the present case? Beyond all question the ward was the child of a Christian father, the issue of a Christian marriage. She was left an infant of very tender years, her father being one of the victims of the great outbreak and massacre at Delhi in the year 1857. She remained thenceforth under the protection of her mother, a lady, apparently, of ancestry not Christian, and with no great knowledge of Christian tenets or attachment to Christian habits. But she was

married to a Christian in a Christian Church, and does not appear to have professed any other faith or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred: The house of the widow became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and cohabited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalized thus—that the widow became a Mahometan, that John Thomas John became a Mahometan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahometan form a valid Mahometan marriage with the widow, the Appellant.

The High Court expressed doubt of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

But however this may be their Lordships can entertain no doubt that when the connection between John Thomas John and the widow was formed, whether it was merely adulterous or under the cover of a Mahometan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become in fact the home and guardianship of John Thomas John. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and John Thomas John and his wife, professing to yield to the suggestion, took the girl in June 1869 up to Simla, with the avowed object of placing her at a school—a Christian school there. They then represent that this project failed,

by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahometan religion, and the Oriental mode of feminine life in seclusion behind the purdu; and that at some period (the time is not exactly fixed) a Moulvie was introduced, who confirmed her in her resolution to become a Mahometan. The young lady, who by this time had attained the age of 14 years, or thereabout, made a deposition, which is at page 9 of the Appendix.

DEPOSITION of Victoria Skinner, otherwise Nau Shaba Begum, before me, on solemn affirmation, under Act V of 1840, on the 1st April, 1870.

I know Mr. John. I first knew him when we came to Meerut, and for the past two years know him well. No one has ever persuaded me to be a Mussulman. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the Purdah by my own free will.

I went up to Simla with my mother and Mr. John. They wished me to go to school, and pressed me very much to go, but I would not consent.

I heard of the marriage of my mother to Mr. John five or six days after it took place. I cannot say how long Mrs. James Skinner has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. Skinner's family must have known of it. I wish to return to my mother.

I believe Mrs. James Skinner to be a Mussulman; Mrs. Orde to be a Christian.

To Counsel for Petitioners.—My mother can read very little—small story books; but she cannot read Persian, nor write at all. She can only read the Urdu in print, not the written character, excepting very good text-hand.

I have read easy books on religion in Urdu, but not studied them. I am studying the Koran with a teacher.

There was a picture of my father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I therefore destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the hills. I heard that to keep pictures was prohibited after my return from the hills, from a preacher, a Moulavi, who came to the house and preached a sermon. No one advised me otherwise,

I had long thought of becoming a Mussulman, but when I was young did not understand the different religions; when I returned from the hills I turned my attention to it, and had the preacher called to preach. Almost all my family are Christians.

I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. Benu.

Since I have been in their house I have not had any letter of any kind from Mr. John.

I had some letters from my cousin Sophy, who is in Calcutta and Charlie, which were on my table. These I sent for. Two from Charlie I sent for the day before yesterday, which were old, and I tore them up; the other from Sophy I sent for yesterday, and showed it to Mrs. Aldwell. The two from Charlie I sent for by Achakrai, and the one from Sophy by my ayah.

To Counsel for Petitioners.—I know Mrs. Benu. I have seen her several times since I came from Simla. I know her to be a Christian.

This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the country, Urdu, recorded by the Court in English, and was read over to the witness in Urdu, and by her acknowledged to be correct.

The case of the Appellant was, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Mahometan home and mother, and committing her to the care of a Christian strange schoolmistress.

The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July, 1870, the order for the removal of the guardian, which would have been the only possible order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a mother under such circumstances to procure from a young daughter the expression of a wish to remain with her and to become a Mahometan like her rather than continue a Christian and go to a strange school; and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to Simla and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are therefore of opinion that the order,

in so far as it removed the ward from her mother and step-father, and placed her under a Christian guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that in their opinion the Order of the High Court ought to be affirmed, and this Appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the Ward concerning her future position; and considering the present age of the young lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the order, their Lordships feel that it would be very difficult for an Appellate Tribunal in this country to interfere without injury as to the details of the particular guardianship and scheme which must so essentially be a matter of *quasi* parental discretion to be exercised on the spot by those best acquainted or best able to acquaint themselves with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court of India in similar cases, that while selecting a school (such, for example, as Miss Scanlan's in this instance) it would be desirable, where practicable, to have some independent person as guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

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