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Christiane Zitscher:  
PARENTAL STATUS IN STATUTE LAW  
AND CASE LAW (ABSTRACT)

This thesis deals with the law of parental status in England from the beginning of the 19th century until the present time. It is concerned with the changes of the substance of law as well as of the methods of statutory drafting and judicial reasoning against the background of changing social conditions. Undergoing these changes the traditional English common law system acquires some features of a civil law system.

Chapter I contrasts the traditional common law approach with the traditional civil law approach. Chapter II describes the general legal and social developments of the relevant period as far as family life is concerned. Chapter III deals with the development of substantive law on parental status, thereby mainly concentrating on the status of the mother and the father rather than on the parent/child relationship. Finally, in Chapter IV, methods of statutory drafting and judicial reasoning are considered.

In the first part, it is shown how the changes take place in society and the law, it is also shown from which quarter the changes are initiated, which branches of society as a whole, including Parliament and the legal profession, show themselves particularly in favour of or opposed to reform. In the second part, particular emphasis is laid on the mutual influence of judge-made and statutory law during the period, it is shown that this mutual influence can take different guises. In the last part, possible mutual influences of the methods of statutory drafting and legal reasoning are considered, in particular showing the effects of increasing use of statutes which leads to a system of law which thus seems to take an appearance that shows some similarities with civil-law systems.

It is finally considered how the different threads of development relate to each other.

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Parental Status in Statute Law and Case Law

The Development from 1800 to the  
Present Day - Social, Legal and  
Methodological Aspects.

Christiane Zitscher

Submitted  
for the  
Bachelor of Civil Law

University of Durham  
Department of Law

1986



30. APR 1987

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## CHAPTER I

### COMMON LAW AND CIVIL LAW SYSTEMS CONTRASTED

#### A. Purpose of the Study

The object of this study is the development of the law of parental status since about 1800. Looking at this development the study will seek to demonstrate how not only the substance but also the methods of the law have changed. Thereby the law - at least in this branch - has lost some of its common law characteristics. It will be shown here that it has turned into something resembling a civil law system.

The law of parental status commends itself as an object for study for mainly two reasons. First, it is a narrow field which makes it possible to achieve a certain degree of depth even within a shorter study. Secondly, it provides a feature which is of particular interest here : it shows, since the beginning of the last century, a development from a nearly entirely case-based, to a nearly entirely statute-based law. As the basis of the law changed thus, the methods of the law also changed in several aspects. Traces of the development can be seen in statutory drafting, mainly in respect of compass and structure of statutes, and in judicial reasoning mainly in respect of construction of, and attitude towards status, the approach to precedent and to general legal principles.

Before giving an outline of the study as a whole, it will be useful at this stage to select the main characteristics of a common law system as compared to a civil law system, so as to provide the theoretical background against which the strands of development in the substance and the



structure of the law will be shown.

## B. Common Law and Civil Law

The characteristics of common law will be described as they present themselves in the English legal system, as on the one hand it stands for the traditional common law approach and on the other hand this study does not go beyond the English legal system anyway. It will be necessary here to rely mainly on the traditional and therefore perhaps old-fashioned understanding of the common law rather than on modern developments as it is the purpose of this study to show how these modern developments take place and what a shape they take. However, where appropriate, modern ideas of understanding shall be taken into account.

For characterizing the civil law system this study will rely on what is common to the different civilian systems - especially the French and the German systems - rather than on one specific representative.

In order to make a broad understanding of the issue possible, the outline of the differences between the two legal systems which now follows will in parts cover aspects which are not needed for the rest of the study.

### 1. The Legal Sources

The traditional common law consists of the holdings of a series of cases, or rather the rules derived from these cases as they are brought before the courts as individual disputes, and in addition to this, statutes passed by Parliament.

The traditional civil law consists of principles and



occasionally also rules, implanted in broadly termed codes, amplified by legal writers and sometimes also by court decisions.

a) Case Law and Judicial Reasoning

aa) Common Law System

The main source of law in a common law system is the body of cases as decided by the judges.

The judge, confronted with a new dispute, will turn to the cases decided in the past and reason from them inductively<sup>(1)</sup> by analogy<sup>(2)</sup> in order to find a decision for the set of facts before him.

He is guided by a notion of justice, according to which like cases should be treated alike. Thus he will take the set of facts which were the basis of the earlier decision and he will determine the rule upon which the earlier case was decided, the ratio decidendi. Then he will compare the two sets of facts and when he is satisfied that they are sufficiently similar to each other or, alike in their material points, he will apply the rule of the earlier decision to the case now before him.

This way of reasoning is due to a deeply rooted scepticism towards intangible ideas in English legal thinking.<sup>(2a)</sup> This scepticism in its turn leads to concentration

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1). Friedmann, Legal Theory, p.517.

2). Cross, Precedent in English Law, p.24.(hereafter cited: Cross, Precedent).

2a). Or 'pure theory' as Dowrick, Justice According to the English Common Lawyers, put it, at. p.217.

on the facts which can be perceived, to an attitude of empiricism<sup>(2b)</sup>. The judge considers the facts before him and settles the dispute as it appears fair to him. When conflict of the same type is brought before him, he will be guided by his experience of a successfully settled dispute and therefore apply the same rule he applied before. Accordingly when a new type of conflict comes before him he will look among previously decided cases in order to find out whether there is anything comparable to his present case - with some rule tested by practice to settle it. Only when he does not discover any applicable rule, will he find a new one to settle the new case fairly. From this stems the understanding of justice that two sets of facts that are alike should be treated alike.

Accordingly, on deciding a case before him the judge may be absolutely bound by previous decisions as this is the only way to achieve a fair treatment of the litigants and thus justice.

Hence - though there may be several ways of avoiding and irksome precedent without actually overruling it,<sup>(3)</sup> the 'worst the judge can do is to narrow a previous borderline decision down to the 'facts of the case'<sup>(4)</sup>, he cannot

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2b). Allen, Law in the Making, at p.517, speaks of the empirical tradition of common law.

3). cf. Julius Stone, Legal System and Lawyers' Reasoning, pp.241ff, 267; Llewellyn, The Bramble Bush, pp.66f. Friedman, op.cit., p.468.

4). cf. Llewellyn, op.cit., p.66.

wholly ignore it. (4a)

In earlier times there was also a special device for the judge to circumvent a displeasing precedent : as it was then maintained that the judge's work was to declare the law<sup>(5)</sup> (not to make it), a judge could always say that his predecessor had not declared the law correctly, therefore his decision was not law. As Blackstone put it:

"For it is an established rule to abide by former precedent, where the same points come again in litigation;...Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such sentence was bad law, but that it was not law." (6)

Though this theory is no longer adhered to there are still devices for a judge determined to circumvent precedent. However, this should not deceive the observer of the English legal system as to how deeply the doctrine of precedent itself is rooted even in today's English legal thinking. There is a good example not yet 20 years old :

- 
- 4a). The doctrine of precedent, however, does not mean that every judge is bound by a previous decision of any previous court. Everybody is bound by decisions of the House of Lords except, since the Practice Statement [1966] 1 W.L.R. 1234, the House of Lords itself. However, it had to be stated firmly as recently as 1972 in Broome v Cassell [1972] A.C.1027 that the Court of Appeal was not free to depart from House of Lords Decisions. Court of Appeal decisions are binding on every lower court, and also since Young v Bristol Aeroplane [1944] K.B.718, on the Court of Appeal of itself. High Court Judges are not bound by their own previous decisions. It seems somehow ironical that the court which has been most innovative in recent years, is most strictly bound by precedent.
  - 5). cf. Cross, Precedent, p.27 on the declaratory theory of judicial decision; as the declarative theory is a 'natural law' approach, it had accordingly to be abandoned when legal positivism came to its high-tide by the early 19th Century.
  - 6). Blackstone, Commentaries on the Law of England, Vol. 1 pp.69-70.

In 1966 the House of Lords decided that it would no longer be bound by its own previous decisions, if it felt they would better be set aside.<sup>(7)</sup> The power given to the House of Lords by this statement was sparingly used,<sup>(8)</sup> and in connection with the case of Conway v Rimmer the result has been aptly described as follows :

"When the opportunity presented itself...to overrule Duncan v Cammell Laird [1942] A.C. 624, at least eight reasons were adduced why Duncan should not govern. Only Lord Morris was bold enough to suggest that Duncan should be overruled." (9)

Leaving the doctrine of precedent aside for a moment : if a new set of facts is brought before the courts and no precedent can be found, it is the task of the judge to find a new rule for the new set of facts, thus creating a new precedent, in fact - making law.<sup>(10)</sup>

The shape and structure of the legal rules in a common law system are influenced by the way in which they are created, namely by adjudication in individual disputes : they deal with details not with broad principles, they are themselves in fact rules rather than principles, as shall be seen later<sup>(11)</sup>, they are more concerned with individuals' rights and their vindication than with the organization of society as a whole and the implementation of collective goals into the law which are necessary for

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7). The Practice Statement of 1966, [1966] 1 W.L.R. 1234

8). Paterson, The Law Lords, pp.162-165.

9). Lord Lloyd of Hampstead, Introduction to Jurisprudence, p.706; it is not clear, however, whether in this case the new power was in fact invoked or not, cf. Paterson, p.164.

10). As to judicial law-making other than this, see below.2.

11). See below 3.

this organization.

bb) Civil Law System.

In a civil law system the case-law has a function distinctly different from its function in a common law system. To the civilian judge the code is his main source of law. When a case comes before him, he will turn to a code and select a suitable provision possibly applicable to the case. He will then order the facts before him under the words of the provision and when he can do this successfully he will apply the code provision to the facts. This type of reasoning is called deductive<sup>(12)</sup> as opposed to the inductive reasoning from case to case.

As the source of legal truth for the continental judge is the code, he will look to previous decisions only for a gloss on the code, in order to understand how the general words of the code might be understood.

The important point in a civil law judgement is the result and not the argument. This way of reasoning and this approach to law has its roots in a legal thinking different from that of the common lawyers. The civil lawyer does not share the common lawyer's basic scepticism of everything intangible. He is much more inclined to idealism or, at least he thinks one can (and should!) work out a system of the law, if one only thinks thoroughly

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12). cf. Friedmann, op.cit. p.517.

enough<sup>(13)</sup>, hence the belief in general principles and the deductive reasoning. Accordingly, the idea of justice as found in code-law countries is different from that of the common law system. There is on the one hand also the aspect that like things should be treated alike, but this is only one and not the central part of justice, this is the formal justice. There is on the other hand the substantive idea of justice in that everybody shall receive his due. What is everybody's due, however, is dependent on time and circumstances. This aspect stands for flexibility of justice, flexibility of law, whereas the aspect of like things being treated alike stands for certainty.

Coming back to the civilian approach towards case law : as cases only provide a gloss on the code-law they cannot themselves be a binding precedent. However, a long line of similarly decided cases from a higher court or the Supreme Court does provide some authority for lower court judges, but the lower court has no legal obligation to follow the higher court's decision. If it has a different view of the law it may, perhaps aided by argument of legal writers, legally decide the cases before it, according to this view. The higher court can never reverse such a decision simply on the grounds that the court below did not follow the 'law as laid down' by the higher court

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13). This is only a rough sketch of the civilian approach to law to show its principal differences to the common law approach, rather than to describe it in full. Obviously, there have been powerful and successful movements of legal positivism - and along with the scepticism towards intangible ideas - on the continent both in the 19th and 20th century, but they were never as much part and parcel of the law than this kind of positivism is part of the English common law. For the latter cf. Atiyah, Law and Modern Society, pp.100-104.

but can only declare that the court below has misinterpreted the code.

Only if the line of cases is of long standing and firmly rooted it might amount to something like law by custom and be binding on the courts. But the Supreme Court itself could always find at some point in the future that the custom was in fact developed against the law and overrule it. A single decision of a higher court could never have a bearing on the lower courts' decisions, in contrast to the common law. This way of judicial reasoning has a bearing on the shape of 'legal rules' in a civil law system. They never really become 'rules' as in the common law system<sup>(13a)</sup>. As they are derived from the codes and the single cases only provide for application without normally forming independent rules, they remain broad principles. And even when a case lays down how a general principle should be understood, and thereby possibly narrows down the 'legal rule' of this case - which is not binding anyway - will still bear a strong resemblance to the principle itself.

### B) Statutes and Codes.

There are basically two types of parliamentary law; statutes and codes. Though it is not always possible to determine without doubt into which category a particular piece of legislation belongs, in principle they are quite distinct from each other.

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13a). cf. above as the character of legal rules in the common law system, p. 11

A code is an enactment which comprehensively covers a whole area of the law, e.g., the civil law and the law of civil procedure. Because it is meant to be comprehensive, it may contain many provisions governing situations of daily life which have never before been brought to court and are not likely ever to be brought there. One striking example of this may be taken from the Prussian Code of 1794 :

"A healthy mother is required to suckle her child herself. The father is to decide, however, how long the child is to be suckled". (14)

Contrary to this example, however, a code will normally contain broad terms, provision embodying principles; like §241 of the German Civil Code,

"The effect of an obligation is that the creditor is entitled to claim performance from the debtor. The performance may consist of refraining from acting",

as §1359 :

"The spouses answerable to each other in the discharge of the obligations arising out of the marital relationship only for such care as they are accustomed to exercise in their own affairs".

In contrast to this, statutes usually cover only a small area of the law, like the law concerning married women's property or the position of children born out of lawful wedlock. (15)

(16)

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14). Allgemeines Landrecht der Preussischen Staaten, Part II second title, second subtitle, paras, 67 & 68

15). There were several Acts of Parliament in England in this field during the second half of the 19th Century, see below, Chapter II.

16). Like the Legitimacy Act of 1926, 16 & 17 Geo.V., c.60



Statutory provisions tend to be more specialized than code provision and they normally do not embody general principles :

"On an application under section 9 of the Guardianship of Minors Act 1971, the court may, in any case where it adjourns the hearing of the application for more than 7 days, make an interim order, to have effect until such date as may be specified in the order and containing -

- (a) provision for payment for either parent to the other, or to any person given the custody of the minor, of such weekly or other periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the parent on whom the requirement is imposed; and
- (b) whereby reason of special circumstances the court thinks it proper, any provision regarding the custody of the minor as the right of access to the minor of the mother or father;

but an interim order under this subsection shall not be made to have effect after the end of three months beginning with the date of the order as of any previous interim order made under this subsection with respect to the application, and shall cease to have effect on the making of a final order or on the dismissal of the application". (17)

#### aa) Common Law

Parliamentary law in a common law system will normally fall under the category 'statute' rather than 'code'.

There are, however, Acts of Parliament with a broader compass, they are called 'consolidating' or 'codifying'

statutes. The consolidating statute just sums up previous

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17). Sub-section(i) (4), s.2 of the Guardianship Act 1973, 21 & 22 Eliz.II, c.29. cf. also Honore 'The Quest for Security : Employees, Tenants, Wives, pp.120-122, where he sets out provisions on maintenance after divorce from the German and French Civil Codes and from the Matrimonial Causes Act 1973, the English Statute dealing with this matter.

statutes on a certain topic, mostly using the old provisions as they are. A codifying statute embodies the common law as settled by the judges and possibly also previous statutes- if there are any - in a certain area of law.<sup>(18)</sup>

However, both these types of statute are not a main feature in the common law. Also, though their compass is larger than that of 'normal' statutes they still do not have the scope of traditional continental codes and their provisions are detailed and do not usually contain broader principles. The latter is especially true for the consolidating statute as it mainly contains provisions from previous statutes of the branch of law dealt with. It is conceded, however, that especially the codifying statute can resemble a code and that perhaps the difference between them is only a matter of degree.<sup>(19)</sup> Leaving this one point aside, it can be safely maintained that parliamentary law in a common law system means statute law.

The traditional approach to statutes in a common law system is that, though they are a source of law preceding the judge-made case law, they are an exceptional appearance, their functions mainly is to fill a gap in the common law as to mend a flaw in its web: i.e. to change it.

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18). cf. Cross, Statutory Interpretation, p.5;  
Bennion, Statute Law, pp.  
74-75.

19). cf. Ehrmann, Comparative Legal Cultures, p.25.

Blackstone mentions a case which provides a suitable example for this understanding :

"Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted (Stat. 112 12 W III c.4), that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the Lord Chancellor shall by order of court constrain him to do what is just and reasonable". (20)

Blackstone relates further that this was not held to apply to a daughter of a Jew who had become Christian so that another statute had to be passed to effect this object - It seems only too probable, having in view this approach and the attitude towards Catholics in those days, that a Protestant father could still starve his 'popish' child after the passing of the statutes.

According to this approach towards statute-law, as an exception of, and a substitute for, parts of the common law, especially the earlier statutes, take the shape of giving power or discretion to the Lord Chancellor as a court of law :

"That after the passing of this Act it shall be lawful for the Lord Chancellor and the Master of the Rolls in England...upon hearing the petition of the Mother of any Infant or Infants...if he shall see fit, to make Order for the Access of the Petitioner..."  
(21)

As the commonlaw is pronounced - if not made<sup>(22)</sup> - by the judges, Parliament, when it wants to change the law

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20). Blackstone, op.cit., Vol.I, p.437.

21). s.1. Talfourd's Act 1839, 2 & 3 Vict.,c 54; there is a similar provision in the Custody of Infants Act 1873, 36 & 37 Vict.,c.12.

22). cf. below, 2.

tells the judges how to approach a certain type of case in future.

Later statutes no longer take the shape of "it shall be lawful for the Lord Chancellor," but in the area of law dealt with in this study, they are full of provisions giving power to the courts to decide cases in a certain way.<sup>(23)</sup> There are few provisions setting out the law without mentioning the courts.<sup>(24)</sup>

Hand in hand with this form of statute, goes the judicial approach towards them. The traditional method of statutory interpretation is the literal rule,<sup>(25)</sup> this means, taking the words of a statute at their ordinary meaning and applying them to the case before the court. In case of doubts, the aid of the 'intention of Parliament' may be invoked. However, the intention of Parliament may only be derived from the words of the statute as a whole and possibly from other statutes in the same field of law.

This at least was the way in interpreting statutes at the outset of the period here examined.<sup>(26)</sup> There were also presumptions to be applied, if there was still some doubt. These included that penal statutes had to be construed narrowly.<sup>(27)</sup> When two meanings could still be

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23). As for one representative example, See s.2 ss4 of the Guardianship Act 1973, cited above, fnt.17.

24). This particular aspect will be looked into more thoroughly later, Chapter IV.B.

25). Cross, Statutory Interpretation, pp. 9-10, 13-15, Allen, op.cit., pp. 482 ff.

26). Montrose, Precedent in English Law, p.131; There were before that two other, more liberal approaches to statutes, more or less abandoned by the 18th century : the 'mischief'-rule (basically allowing for the social history of an Act to be taken into account when construing it) and the 'equity of a statute'. For both concepts see Allen, op.cit., pp.495f and 451ff.

27). Blackstone, op.cit., Vol.I. p.88.

given to a word, the meaning should be applied which caused the least change of the common law.<sup>(28)</sup>

Even today, though wide areas of the law are governed by statute, narrow methods of statutory construction do prevail.- This is presumably the reason for some academic writers still to maintain that there is even today a deeply rooted hostility towards statute in the English common law.<sup>(29)</sup>

However, the strict literal rule has been exchanged for an approach of contextual interpretation.<sup>(30)</sup> It is also allowed to take the social history of an Act of Parliament into account<sup>(31)</sup>. The presumption against a change of the common law has changed into a presumption against an unclear change of the law.<sup>(32)</sup>

- 28). cf. Cross, Statutory Interpretation p.31; having the practical affect of narrowing down the scope of the statute, Montrose, op.cit., p.131.
- 29). Friedmann, op.cit., p.72, cf. also p.452 for the statutes still being, from a psychological point of view, an exception; and David, Major Legal Systems in the World Today, at pp.336 and 355 stating that statute law for the English lawyer is 'abnormal in character' and 'something of a foreign element', Ehrmann, op.cit., p.23.
- 30). As set out by Driedger, The Construction of Statutes, at p.67, words are to be read in the entire context of the Act, in their grammatical and ordinary sense, in harmony with the scheme and object of the Act and the intention of Parliament.
- 31). Montrose, op.cit., p.131, maintains that this was as early as the second quarter of the last century. While there may be some doubt as to this allegation, there is enough evidence that social history may be used today; starting with Driedger, who points out that context of the Act means verbal (i.e. the meaning of words and the grammatical structure) as well as substantive context (i.e. the law as it was enacted by the legislature and why), whereby in case of conflict the substantive context is to prevail, at p. 106; cf. also Cross, Statutory Interpretation pp.123ff, citing authorities. Allen p.495 to the modern application and revival of the 'mischief'-rule in this century after it had been abandoned during the 18th and 19th centuries.
- 32). Cross, Statutory Interpretation pp.145f.

However, penal statutes still have to be construed strictly and there is still a strong presumption against an infringement of the jurisdiction of the ordinary courts. For both the latter rules there are recent examples :

The Criminal Attempts Act 1981<sup>(33)</sup> was enacted to reverse the effect of Reg. v Smith<sup>(34)</sup>. In this case the accused had waited to receive stolen goods brought by a lorry. The lorry, however, was intercepted by the police, so that the goods ceased to be 'stolen goods.' The lorry was then left to proceed on its journey to the accused and he received the goods and was caught. It was held that he was not guilty of an attempt to handle stolen goods as the completion of the offence was legally impossible, the goods being no longer 'stolen goods'.

The provision in the Criminal Attempts Act 1981, s1, which deals with the problem caused by Reg. v Smith is somewhat lengthy and not very clear.<sup>(35)</sup>

In the subsequent case Anderson v Ryan<sup>(36)</sup> the defendant had handled a video cassette recorder which she thought

33). 29 & 30 Eliz. II, c.47.

34). (Roger) [1975] A.C. 476.

35). 29 & 30 Eliz. II, c 47; s1(1), If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where :-

- a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence, - but
- b) if the facts of the case had been as he believed them to be, his intention would be so regarded then, for the purposes of subsection(1) above, he shall be regarded as having had an intent to commit that offence.

(4).....

36). [1985] A.C. 560.

had been stolen. It could not be established whether it had in fact been stolen. Their Lordships held that she was not guilty of an attempt to handle stolen goods under s 1 of the Criminal Attempts Act 1981. Though it is freely admitted that the Act was introduced to abolish the effect of *Reg. v Smith*,<sup>(37)</sup> one of the Law Lords even goes as far as to state that, if *Reg. v Smith* came again before the Court after the passing of the Act, it would still have to be decided the way it was in 1975.<sup>(38)</sup>

Though he states that :

"Statutes should be given what has become known as a purposive construction, that is to say that, the courts should, where possible, identify 'the mischief' which existed before the passing of the statute and then, if more than one construction is possible, favour that which will eliminate 'the mischief' so identified".<sup>(39)</sup>

Lord Roskill also maintains that the application of the mischief-rule "must not be carried to extremes",<sup>(40)</sup> carrying

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37). Lord Roskill at p.573, Lord Edmund-Davies (dissenting) at p. 572.

38). Lord Bridge of Harwich at p.584.

39). at p.573.

40). at p.578.

on :

"The problems to which the decision (Reg v Smith) of this House gave rise were many. It by no means follows that Parliament in its efforts to solve some at least of those problems intended by this legislation to solve them all,..."

There are also some cutting comments on the language of the Act,<sup>(41)</sup> and following this strand of argument, Lord Bridge of Harwich points out :

"I should find it surprising that Parliament, if intending to make this purely subjective guilt criminally punishable, should have done so by anything less than the clearest express language..."  
(42)

It becomes self-evident from these quotations that the presumption of narrow construction of penal statutes and the presumption against an unclear change in the law are still thriving in the common law of today.<sup>(42a)</sup>

The other example is the case of Anisminic v Foreign Compensation Commission<sup>(43)</sup>, where the defendant, a Commission, issued a "provisional determination" that the plaintiff could not participate in the fund set up for compensating like losses of property. Their reason given was that the plaintiff had not shown that he fulfilled all the necessary requirements to establish his claim.

There was a provision in the Foreign Compensation Act 1950<sup>(44)</sup> ousting the jurisdiction of the ordinary courts.<sup>(45)</sup>

41). p.578

42). p.583

42a). However, this proved to much even for the House of Lords. They have recently declared that Anderton v Ryan had been wrongly decided and over-ruled it accordingly in Reg. v Shirpuri, The Times, May 16th, 1986.

43). [1969] 2 A.C. 147.

44). 14 Geo.VI. c.12

45). S4(4) The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.



Nevertheless, their Lordships found that while entertaining the plaintiff's application the defendant had misconstrued the relevant legal provision, therefore their determination was a nullity and s<sup>4</sup> (4) of the Foreign Compensation Act could not be construed as to protect a nullity. They held that by creating this nullity the Commission had done something beyond the limits of its own jurisdiction and it was the task of the ordinary courts to ensure that these limits were observed. (46)

Again, only lip-service is paid to the intention of Parliament :

"If the draftsman of Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bold statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is no determination at all". (47)

This narrow way of construing at least a certain type of statute has at least two roots in common law thinking. One of them is the scepticism towards intangible ideas which makes the judges refrain from interpreting a 'spirit' from - or even into - the statute which may not be there, and makes them stick to the words which at least provide some certainty in the law, an important component (if not more)

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46). Lord Wilberforce, at p.208

47). Lord Reid, at p.170.

of justice. (48)

It is this scepticism towards ideas, and the belief in the word itself, both signs of a philosophy of positivism which is in many ways still prevalent in English legal thinking, (49) which makes common law judges look with suspicion on the 'unruly horse' of public policy which is really for Parliament to look after. Even when they implant public policy into their decision they will seldom overtly admit that they are doing it. (50) It is for similar reasons that English judges do not consult the Parliamentary history of an Act (51) it is the words of the Act themselves which Parliament enacted that matter, not how Parliament discussed and put them into the statute.

However, whereas Hansard is still not consulted, at least not officially, other Parliamentary materials are from time to time admitted by the courts, with the approval of academics. (52)

The other root for narrow construction of statutes in English legal thinking is the common lawyer's concern for the individual's liberty and the protection of his rights. (53)

Common law developed out of the rules found by the early judges to settle the disputes brought before them. These disputes naturally were concerned with very basic legal

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48). cf. above, p.

49). Dowrick, op.cit., p.206. Atiyah, Law and Modern Society, pp.100ff.

50). Atiyah, op.cit., pp.104f, stating, however, that there is a decline of this attitude in very recent times.

51). Allen, op.cit., pp.492-494, 510-513 citing authorities from case-law; Cross, Statutory Interpretation, pp.134ff, citing further authorities from case law.

52). cf. Cross, Statutory Interpretation, pp 129-134, 136-139, 141.

53). Atiyah, op.cit., pp.81,89. Dicey, An Introduction to the Study of the Law of the Constitution, pp.197,202, 394 (hereafter cited : Dicey, Constitution).

problems and values<sup>(54)</sup>. As the disputes were between individuals they were about one individual's interest colliding with another individual's interest, it was for the court judge to settle how far each of them could pursue his interest as against the other, and thereby help the aggrieved party. It follows from this that the first common law rules are concerned with the rights of individuals, how to vindicate them, how to settle the problems arising from them.<sup>(55)</sup> Remedies were provided for the individual as against the state power in the same vein, as can be seen by the Habeas Corpus Act.<sup>(56)</sup>

This tradition led to the 'Rule of Law' being the basic rule of the English constitution, meaning that

- (1) The regular law has supremacy as opposed to the influence of arbitrary power
- (2) everybody is equal to everybody else in the face of the law. <sup>(57)</sup>

And it is thus that the rights and the liberty of the individual~~are~~ protected by the 'ordinary law of the land'.<sup>(58)</sup> Hence there is a sound suspicion to everything which is not the ordinary law of the land, i.e. any kind of arbitrary power, especially when it is exercised against the individual.<sup>(59)</sup> And it is from this notion there springs

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54). Atiyah, op.cit., p.3.

55). cf. Atiyah, op.cit., p.81.

56). Dicey, Constitution, pp.197,199

57). Dicey, Constitution, p.202.

58). Dicey, Constitution, pp.202,195.

59). Dicey, Constitution, p.188, cf. also p.394.

the principle that penal statutes which substantially interfere with the individual's liberty, and other similarly infringing provisions, must not be used arbitrarily and cannot be seen as giving arbitrary power to anyone, and hence have to be constructed narrowly. English legal thinking has changed since Dicey<sup>(60)</sup> - even Dicey himself described a change from individualism to collectivism in public opinion which he credited to have influenced the law during the last century<sup>(61)</sup>. It is only the purpose of this outline, however, to show from where certain ideas and presumptions originate, not to give a full account of the development of English legal philosophy.

There are other features in common law calling for attention. There are the phenomena of Interpretation Acts<sup>(62)</sup> and interpretation clauses<sup>(63)</sup>, a comparatively recent feature, they are mainly devices of the draftsman to shorten his language, e.g. "the male shall include the female", "the singular shall include the plural", "In this

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60). cf. for example Jennings, The Law and the Constitution, who criticizes at p.55 that Dicey - wrongly - never considered the powers of authorities.

61). cf. p.69 in Dicey, Law and Public Opinion in England during the 19th Century (hereafter cited : Dicey, Law and Opinion).

62). An Act for shortening the language used in Acts of Parliament, 13 & 14 Vict., c 21 (1850) Interpretation Act 1889, 52 & 53 Vict., c.63. Interpretation Act 1978, 26 & 27 Eliz. II, c.30.

63). eg. s2(8) s13(1) of the Guardianship Act 1973, 21 & 22 Eliz. II c 29.

Act 'maintenance' includes education". (64)

There is also the phenomenon that common law develops on top of the statutes, and precedents are created from statutory interpretation. (65) Sometimes this is carried far indeed; as Allen describes it, "there is not a comma or a hyphen which has not its solemn precedent". (66)

Whereas this may have been the right approach in times where statutes mended a flaw, or filled a gap in the common law by one or two provisions, telling the courts how to proceed in future (67), there is some doubt whether this is an appropriate approach today when wide areas are governed by statute. (68) However, precedents are still created for statutory interpretation and it is only occasionally and in more recent times that the judges themselves call this procedure into question. (69)

#### bb) Civil Law

Parliamentary law in a civil law system will mainly fall under the category 'codes', rather than 'statutes'. However, there are statutes in modern civil law, often

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64). s 1 of the Interpretation Act 1889, cited in footnote 62 s 20(2) of the Guardianship of Minors Act 1971, 192 20 Eliz., II, c 3.

65). Atiyah, Common Law and Statute Law, 1985 M.L.R. for a modern view in this matter Montrose, op.cit., p.147 doctrine of precedent does apply to statutory interpretation, Cross, Statutory Interpretation, pp.30, 42, no binding precedent in statutory interpretation.

66). op.cit., p.507, he even gives an example for previous decisions being followed although they give a misinterpretation of the statute, for the sake of certainty of the law, at p.321.

67). cf. p.18 above.

68). Friedmann, op.cit., p.537, David op.cit., pp.336; 353, Ehrmann, op.cit., p.113.

69). Lord Denning, for example, would discriminate between two forms of statutory interpretation, as he states in Paisner v Goodrich [1955] 2 All ER 330, at 332: "When the judges of this court give a decision on the interpretation of an Act of Parliament, the decision itself is binding...but the words which the judges use in giving the decision are not binding... when interpreting a statute the sole function of the court is to apply the words of the statute to a given situation. Once a decision has been reached on that situation the doctrine of precedent required us to apply the statute in the same way in any similar situation : but not in a

enacted as auxiliary to, or a substitute of parts of a code, like the Marriage Law (Ehegesetz) which deals with the contracting of marriage and the validity of marriage and was enacted as a substitute for the second and third title of the first section of the fourth book of the German civil code, the book on family law. Even though there are statutes, the codes, though not in law superior to them, form the basis of a civil law system. Both together are the principal sources of law for the civil lawyer.

As said before the codes are meant to cover, comprehensively, a wide area of the law. They are organized in a particular way, which can be demonstrated by shortly describing the structure of the German civil code. It is divided into 5 books the first of which is called the General Part and it contains all the provisions that are common to the areas of law laid out in the subsequent books (Law of Obligations, Law of Property, Family Law, Law of Succession). This part contains a fair number of definitions, something like an equivalent to the English Interpretation Acts and interpretation clauses. However, they are much more broadly termed and allow for a range of objects or notions to be covered, quite in contrast to the English provisions. For example §90 "only corporeal objects are things in the legal sense". This can, e.g. also include things the legislative has not thought of when the code was enacted. Each of the other books of the code in

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Footnote 69 Continued...

different situation. Whenever a new situation emerges, not covered by previous decisions the court must be governed by the statute and not by the words of the judges."

their turn have some general provision to start with, most strikingly so the book of the law of obligations which contains 432 general provisions and 421 provisions on 'particular obligations'. Most of the sections and titles in the books of the civil code will also be headed by a general provision laying down the main principles

of the area of law to follow. An example is the concept of gift in §516 "A disposition whereby a person out of his own property confers a benefit on another is a gift, if both parties agree that the disposition is made gratuitously". There follows provisions defining what is not a gift, requirements of form, provisions on liability of the donor, on special types of gifts and on the possibility of revoking a gift.

This particular organization of a code helps its object to cover an area of law comprehensively : if a special term to apply to a certain cause cannot be found, recourse can be taken to one of the general principles embodied in the general parts of the code - and most of those are intentionally, so broadly termed it would be difficult not to apply them. An example of this may be §§241 and 242 of the German civil code, reading:

"The effect of an obligation is that the creditor is entitled to claim performance from the debtor. The performance may consist of refraining from acting".

and

"The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage".

The latter provision also demonstrates how notions of public policy are directly implanted into a provision, something unheard of in a common law statute. The

provisions of the civil code hardly ever expressly relate to the courts, and even if they do - like in §1666 where the Family Court may take a child away from his or her parents when his or her welfare is jeopardized - , they do it in general terms without mentioning, for example, who may apply for a court ruling to that purpose. This is partly due to the German legal system having a separate code for civil procedure and partly to the fact that the German civil code has not been developed to fit into a web of judge-made common law, but has been developed by a large committee of professors of law to spell out the civil law of the land systematically and comprehensively.

Codes do not solely provide for the settling of individual disputes, they also regulate parts of daily life that do not come to litigation and thereby influence the daily conduct of people in this area<sup>(70)</sup>, like the old version of §1356 of the civil code :

"The management of the household is the wife's individual responsibility. She is entitled to be gainfully occupied to the extent that this is compatible with her duties to marriage and family".

Provisions like this are just by their existence interfering with the individual's freedom.<sup>(71)</sup> Hand in hand with this structure of parliamentary law goes the judicial approach, to it. Though the canons of interpretation also contain rules of etymological and grammatical interpretation, these are not the only rules. The

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70). Lücke, The Common Law as Arbitral Law, pp.28,171.

71). Lücke, op.cit., pp.168 ff, statute law is by its nature intrusive.



judges may equally well employ rules of historical and teleological interpretation.<sup>(72)</sup> The historical interpretation is a rough equivalent of the rule in common law that the judge may take the social history of an Act into account. The teleological interpretation is a very broad version of 'determining the intention of Parliament' and it allows that old provisions are adapted to modern times in a way never thought of by the parliament enacting them. Continental canons of statutory interpretations generally allow the consultation of parliamentary materials.<sup>(73)</sup>

Continental judges are also encouraged to apply the spirit of the codes (if necessary against the word) and thereby applying provisions by analogy. This works as follows : if there is a set of facts not provided for by the code, the judge has to ask himself whether the gap in the code is deliberate or not. If he finds the gap is there by accident, he may draw principles from provisions applicable to related situations as from the general parts of the code and apply them to the facts before him. The whole German law on breach of contract other than the types defined by the code and breach of pre-contractual obligations has been developed by analogy.

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72). These four rules comprise the traditional German canons of interpretation, taught to any first-year law student, cf. Philip M. Blair, Federalism and Judicial Review in West Germany, at p.32.

73). For the French law, see Allen, op.cit., p.514, referring to 'travaux préparations'; also Lloyd of Hampstead op.cit., p.739.

The Swiss Civil Code has an opening article summing up the continental approach to analogy from statute :

"The code governs all questions of law which come within the letter or the spirit of any of its provisions. - If the code does not furnish an applicable provision, the judge shall decide in accordance with customary law, and failing that, according to the rule which he would establish as a legislator".

This structure of law and reasoning being so different from that of the common law has its root in the different legal thinking stated as above<sup>(74)</sup>, the continental lawyer puts more trust in general ideas and he believes that something like 'justice' or especially 'substantive justice' can be achieved by establishing the 'right' legal system, in short he is much more inclined to idealism. He sees discretion rather as a means to achieve this substantive justice than as a dangerous source for arbitrariness. In spite of historical experience he has a certain trust, lacking in the common lawyer, in the executive powers.

#### c) Legal Writers

There is a different approach to legal writers in both legal systems. In the civil law system they have a high reputation among the judiciary and are frequently quoted in judgments. In the common law system living legal writers are traditionally not referred to, as they may still change their mind and bring themselves into discredit.

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74). cf. above, p. 8f

This different view of legal writers has its source in the general understanding of the law in either system.

The bases of the civil law are broadly termed codes, embodying general principles which may even be social rather than legal principles, like §826 of the German civil code, which reads, "Whoever causes injury to another intentionally in a manner offending good morals is bound to repair the injury". These principles are often too broad to be directly applied, so academic writers provide a gloss on these principles to provide some help for interpretation for the courts. Also, as the continental lawyer is not hostile towards ideas and pure theory as is the common lawyer, there is no barrier against<sup>relying upon</sup> theoreticians, namely the academics. In addition to this, in Germany before the Civil Code and in the face of an overwhelming flood of particular laws and the partly received Roman law, legal writers were often relied on to give an opinion on some difficult matter, and professors of law were involved to a high extent in the shaping of the civil code. Thus there is a long tradition of inter-relation between academics and the judiciary or the legislature. (75)

In contrast to this the common law was moulded closely on the courts and its empirical tradition left little room for broader principles which might

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75). In Germany professors of law are for example eligible for the bench, even if they have not undergone professional training, and it is a frequent occurrence to see a professor sitting in a High Court perhaps once a month and hearing cases together with two professional judges.

induce academics to write on. And the scepticism towards theory did not help accepting writings which had not directly sprung from the law in practice. In addition to this, the links between the judiciary and the law faculties in England is traditionally not as strong as it is on the Continent : it is still possible to become a lawyer without having obtained a university law degree beforehand.

However, there is evidence that the rule against citing living legal authors has been relaxed in recent years<sup>(76)</sup>, and it is Lord Denning who went as far as placing a then living author above a well reputed academic of the past, when he said:

"In reading this conclusion, I should like to express my indebtedness to the articles and book of Dr. J.H.C. Morris, whose contribution to the conflict of laws has excelled even that of his great predecessor A.V.Dicey." (77)

## 2. The Judges.

Judges in the two legal systems differ as to their career and their personalities. Accordingly, there is also a different approach to judicial dissent and to judicial law-making in either system.

Common law judges are called to the bench after a long and outstanding work at the bar - at least in theory. The work as counsel will strengthen an individualistic outlook

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76). cf. Paterson, op.cit., pp.14-20.

77). Re Hollandia [1982] 1 All ER 1076, at 1081

on the law.<sup>(78)</sup> There are also very few judges at the higher courts of the country, they enjoy an extraordinary high social prestige, they are paid handsomely - as Atiyah points out, more than a Minister of the Cabinet<sup>(79)</sup> and they are practically irremovable.

In a civil law system judges enter their profession, when they are still under thirty years of age, in exceptional cases they may even be as young as 25. Their career can normally only be within the profession once entered. The structure of their career and the payment of their income, in method and amount, is closely modelled on the career and payment of civil servants. They hardly ever have any experience outside their profession.

Having never been forced for example to work for different clients, the civil law judge is from the beginning in the position of state authority. This and his concern for his own career<sup>(80)</sup>, will make him a much readier servant of the government and he will be prepared to stand up for collective goals as opposed to individuals' rights than his common law colleague.

According to this image of the judge in either legal systems there is also a different attitude towards judicial dissent, which is a frequent phenomenon in common law systems and extremely rare in civil law systems.<sup>(81)</sup> This

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78). Atiyah, Law and Modern Society, p.18.

79). Atiyah, op.cit., p.9.

80). As Dicey already pointed out, longing for advancement is bad for judicial independence; Constitution, at p.402.

81). However, there is some relenting of the rule against judicial dissent in judgments of the German constitutional court in recent times.

has its reasons, first, in the different personality or professional outlook of the judges. A civilian judge finding himself in a professional situation modelled on that of a civil servant will not be encouraged to develop ideas of his own or show his personality while acting professionally. It is in fact, a habit in civilian law courts to make the dissenting judge write the majority judgment.<sup>(82)</sup> In contrast to this, the common law judge who more or less is at the height of his career (at least the judges who come as far as having their judgments printed in the law reports), has no qualms of this sort.

The second reason for the different attitude towards judicial dissent is the different outlook on law. Here as well as in respect of the professional outlook, the common law judge has a much more individualistic approach than his civilian colleague, encouraged by the structure of the common law itself.<sup>(83)</sup>

The third reason lies in the function of judicial dissent. In the common law system, the argument, the reasoning of a judgment means at least as much as the result. Thus the dissent has a distinct task within the law : subsequent judges often use the arguments of a dissenting judgment in an earlier case to overrule or distinguish this earlier decision.<sup>(84)</sup> In a civil law

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82). Friedmann, *op.cit.*, p.532.

83). cf. above, p.11

84). Friedmann, *op.cit.*, pp.543f.

system it is the result rather than the argument of the judgment that matter as the law is laid down in the code itself and not in the judgment. An equivalent for this in the English system are the findings of the Privy Council. They are in theory advice to the sovereign and therefore only the result matters, there is normally no dissent, and in theory these findings have also - like civilian judgments - no binding force. They nevertheless are often persuasive to a high degree.

The last difference between the judges' position in the two systems is the attitude towards judicial law-making.

The common law judge does in fact make law in respect to the case law though he does it within limits and with due restraint. He does not make law in respect of statutory provisions, as they are law as they are and as Parliament intended, and any law-making with - or around - them would be usurping<sup>(85)</sup> the function of Parliament - this at least is the theory. Judicial law-making in the field of statute law would violate the principle of separation of powers.<sup>(86)</sup>

The civilian judge makes the law under the broad cover of the code by filling gaps by analogy from other provisions or expounding the general principles embodied

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85). "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation", were the cutting words of Lord Simonds when he censored Lord Denning's liberal approach to statute "filling the gaps", Magor R.D.C. v Newport Corp. [1951] 2 All ER 839 at 841.

86). cf. Friedmann, *op.cit.*, p.480

in it. It is true that whatever the judge evolves this way may be overruled by a higher or later court as not being in accordance with the principles of the code, but this will rarely be done.

In fact in the German legal system there are several examples of the extent to which the judges moulded the law. They developed the law of breach of contract other than in the ways specified by the code and the law of breach of pre-contractual duties. They also used §242 of the Civil Code :

"The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage".

in order to cope with legal and economic consequences of inflation after the First World War by adapting contracts made in the years before the changed circumstances. (87)

### 3. Equity

A last aspect of differences between the two systems is the understanding of equity.

Equity is traditionally a separate body of law<sup>(88)</sup> in a common law system, and though the two bodies of law were merged more than a century ago,<sup>(88a)</sup> there is still a difference between legal and equitable rules, e.g. the enforcing of

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87). David, op.cit., pp.110ff.

88). There is also a distinct body of law in civil law systems, the *droit administratif* or administrative law, which Dicey has likened to the law of equity as far as principle structure goes, Constitution, pp. 379f. It is, however, without importance for the present study.

88a). By the Supreme Court of Judicature Act 1873, 36 & 37 Vict., c 66.



an equitable rule is always at the discretion of the courts<sup>(89)</sup>. Equity never really had the function of pervading the whole legal system providing mitigation for every possible case as it had in the civilian systems. However, there are some signs of a tentative change in this respect.<sup>(90)</sup>

#### 4. General Implications

As the old judge-made common law - for reasons already pointed out<sup>(91)</sup> - is mainly concerned with individuals' rights, their vindication and protection, and also as the development of the common law is dependent on the disputes brought to the court and therefore sometimes necessarily slow and piecemeal, it follows consequentially that judge-made common law could not cope with rapid social changes starting in the last century.

The industrial revolution caused rapid changes in many areas of social life : family, housing, labour and others. Legal structures that had - in family law- sprung from the Middle Ages proved unadaptable to modern needs, and the social controls that had worked so far became useless. Different kinds of social relationships developed; like trade unions and political parties,

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89). Atiyah, Law and Modern Society, p.90.

90). cf. Friedmann, op.cit., p.544, see also Lord Denning's pleading for a new equity; The Need for a New Equity (1952) 5 C.L.P. 1

91). See above, p. 11, 35f.

the individual lost his importance and attitudes of collectivism<sup>(92)</sup> sprang up.

To satisfy the new social needs and to implant collective goals into the law, Parliament stepped in with increasing legislation. Legal Change by Parliament had the advantage of being fast and comprehensive as opposed to the slow and piece-meal change by the judges. Also the legislature could implant collective goals into the law, which the individualistic common law judges would not develop by themselves. And there is a fixed point where parliamentary law differs from judge-made law in effect it sets out the law for the future and thus can regulate<sup>(92a)</sup> social conduct in general as outside the courts, whereas the courts only deal with a case after the event, settling the dispute, and judge the social conduct retrospectively. However the structures of individualism derived from the old common law proved strong and found their way into the statute law and influenced its interpretation.<sup>(93)</sup>

The civil law systems with their broadly termed codes and their inclination towards general principles and ideas and their emphasis on substantive justice rather than formal justice provided less of a barrier for the introduction of collective goals and were open to the

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92). see e.g. Dicey, Law and Public Opinion, pp.64ff

92a).cf Lücke, op.cit., who calls statute law 'regulative' for this very reason, pp.13,29, 168ff.

93). as shown above, pp. 25f

setting into practice of public policy considerations. They were thus more prepared for modern social developments. Considering that modern social development means sometimes radical inroads into the individuals' rights and liberty<sup>(94)</sup>, this is certainly at best a mixed blessing.

It explains, however, why - though both systems of law are held to move towards each other not only in respect of substance but also in respect of methods of law<sup>(95)</sup> - it is the common law, that in the face of further increase of collectivistic ideas, e.g. the whole notion of the modern welfare legislation, that moves more towards a civil law approach<sup>(96)</sup> than vice versa. It will be the object of this study to trace this move in the narrow branch of parental status law.

### C. Outline of the Thesis.

The thesis will start with a description of the social and historical background of the period concerned in view of parental status law, followed by a description of the development of the substantive law of parental status in statutes and cases.

There are two main aspects of parental status, both of which take part in the change. One is the relationship

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94). Atiyah, Law and Modern Society, p.89.

95). David, op.cit., p.24.

96). David, op.cit., pp.24,308; Scarman, The New Dimension, pp.25f; Friedmann, op.cit., p.550.

between mother and father, the other the relationship between parent and child. The aspects naturally cannot be completely separated from each other but an emphasis will be laid on the mother-father relationship. I have chosen this emphasis mainly for the reason that the development of the law of parental status as between mother and father has come to an end with the 1973 Guardianship Act which introduces perfect legal equality between the parents for all legal purposes, whereas the law of parental status as between parent and child is still changing with the tendency of ameliorating the position of the child and strengthening state powers to interfere with family life.

Therefore the description of the general social and legal background will centre around the position of man and woman in society and law, and in particular in the family and in family law. Thereby the mutual influences of law and society will be considered.

The second part of this study shall concentrate on the particular development of the law of parental status, treating the relevant Acts and cases in turn over the whole period concerned. Particular attention will thereby be paid to the interaction between legislature and judiciary.

The next part of the study is devoted to questions of method and legal structure. This part will look into the shape of statutes and their provisions and into judicial reasoning and attitudes of the judges, especially in their approach to legal sources. Where it is appropriate, however, I will take into account other aspects described in

this chapter when they can be used to illustrate a change in the English legal system.

To finish this chapter and to provide an outlook on what may be expected in the following chapters, I shall set out two quite different quotations:

In a case in 1861 a judge had to determine whether to grant or to refuse a mother access to her children on the basis of s.35 of the 1857 Matrimonial Causes Act which provided very generally for orders of such a kind. He narrowed down the scope of this section considerably by using an older statute, the 1839 Custody of Infants Act which had provided that an adulterous mother should not have access to her children. The judge considered the older statute as follows, "the enactment establishes a precedent I ought to follow" (97).

Two things can be seen from this quotation in its context. First, the statute on which the case is based is approached by limiting its scope which hints a certain hostility to it. Secondly, the other statute is used as a precedent, which either shows that in fact a statute then was like a precedent or that the judge considered it to be so, misreading the different nature of statutes compared to precedents. Whichever interpretation one chooses, it demonstrates that the English legal system at that time was thoroughly a common law system.

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(97). Clout v Clout & Hollebone (1861) 2 Sw. & Tr.391, 164 ER 1047.

115 years later a different attitude evolves.

Though not in the field of parental status law, but in the case on matrimonial property, Ormrod L.J. stated:

"...the rules are not very firm. This is inevitable when the courts are working out the exercise of the wide powers given by a statute..." and "...decisions of this court can never be better than guidelines. They are not precedents in the strict sense of the word." (98)

It becomes apparent that the Lord Justice relies on general principles introduced by legislation, and when he states that the decisions are not precedents, he really voices an attitude which one would expect in a civil law system which is based on a code.

Thus at least these two quotations point out a striking change. In the first, statute is seen like a precedent, in the second, not even a precedent is seen as a precedent but just as a guideline, and the authority is the statute.

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98). Martin v Martin [1976] 3 All ER 625

CHAPTER IIGENERAL SOCIAL AND LEGAL BACKGROUNDA Outline and Purpose

In this chapter I shall describe the general social and legal background against which the specific development of the law of parental status took place. This is to include mainly the changes in the law of divorce and of matrimonial property and some child law, which may be necessary to illustrate the general development set out in this survey, without pre-empting too much of the next chapter.

I shall also consider *the social climate in which these* changes took place, who influenced them, who opposed them, and what their further consequences were.

B Common Law

The common law as related to family relations at the outset of the 19th Century can be described by two main criteria: the indissolubility of the marriage and the absolute common law rights of the husband and father over his wife and children.

Until the middle of the last century divorce as we understand it today, giving the ability to re-marry, could only be obtained by Private Act of Parliament and was normally only granted to men<sup>(1)</sup>. What was then called

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1). Morris Finer and O.R. McGregor, The History of the Obligation to Maintain, Appendix 5 to the Report of the Committee on One-Parent Families, vol.II (chairman: Sir Morris Finer) Cmnd 5629 (1974), p.94.

divorce as obtained by a suit in the ecclesiastical courts was the equivalent of today's judicial separation.

On marriage the husband became the absolute owner of of his wife's personal property, "Marriage is a gift of the wife's chattels to her husband",<sup>(2)</sup> or even better "A sixth method of acquiring property in goods and chattels is by marriage; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers as the wife, when sole, had over them."<sup>(3)</sup> The wife's landed property would also be vested in her husband during the marriage, and when there was issue born to the marriage, capable of inheriting this property, the husband would acquire a life interest of the property after her death, even when the child had not survived.<sup>(4)</sup> In order to alienate such property, husband and wife together had to 'levy a fine', and in the process the wife had to be examined separately to make sure that she freely agreed to the transaction.<sup>(5)</sup> Because of her proprietary disabilities a married woman could also not enter into contracts, other than as an agent of her husband<sup>(6)</sup>. Any conveyance she made by herself would be void. She could also not sue by herself or be sued independently, and as her husband on marriage had "adopted her and her circumstances", he was

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- 2). W.S.Holdsworth, A History of English Law, Vol.III, p.531; see also Dicey, Law and Public Opinion, pp.371f.
  - 3). Blackstone, op.cit., Vol.II, p.433.
  - 4). R. Megarry and H.W.R. Wade, The Law of Real Property, p.21.
  - 5). Megarry and Wade, op.cit., pp.993f.
  - 6). Holdsworth, op.cit., Vo..III, p.528.



also liable for her debts and torts incurred before marriage.<sup>(7)</sup> As the husband was liable for his wife's wrongdoings, it was thought proper that he should have the power to restrain her personal liberty and also otherwise exercise "domestic chastisement, in the same moderation that a man is allowed to correct his servants or children".<sup>(8)</sup> It was not until R v Jackson in 1891<sup>(9)</sup> that it was finally settled that a wife could go where she pleased without being detained by her husband. The husband had legal power over the children of the marriage, the wife and mother had no right to their custody, as Blackstone put it, "for a mother-as such- is entitled to no power but only to reverence and respect".<sup>(9a)</sup> The wife was considered inferior to her husband to such an extent that she was deemed to be under his coercion when she committed a crime (other than murder or high treason) in the presence of her husband<sup>(10)</sup>. This was a protection which the common-law denied to other people labouring under legal incapacities, "for neither a son or a servant are excused for the commission of any crime, whether capital or otherwise...".<sup>(11)</sup> In short, a married woman laboured under a number of legal incapacities and had thus a special status, as had the infant or the lunatic.<sup>(12)</sup>

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7). Blackstone, op.cit., Vol.I. p.430.

8). Blackstone, op.cit., Vol.I, p.432.

9 ). 1. Q.B. 671. Blackstone, (9a) Blackstone, op.cit., Vol.I.p.441

10). Holdsworth, op.cit., Vol.III p.443.

11). Blackstone, op.cit., Vol. IV, p.28.

12). Holdsworth, op.cit., Vol. III p.457; cf. also Dorothy M.Stetson, A Woman's Issue, p.5; and Lee Holcombe, Wives and Property, pp. 21-26, 35.

This legal position derived from the notion of a complete merger of the two personalities within marriage, the resulting united personality being represented by the husband alone, as Blackstone put it:

"By marriage, the husband and wife ~~are~~ one person in law; the legal existence of the woman is incorporated and consolidated into that of the husband; under whose protection and cover, she performs everything; and is therefore called in our law - French a feme-covert... ; and her condition during marriage is called coverture." (13)

There may be several reasons found for this phenomenon one of which could, for instance, be seen in the woman's inability to comply with the numerous duties imposed on a person by the feudal system, and which made it desirable to give the rights and duties concerning her property to her husband, which had in itself further consequences for her legal liability and her capacity to enter into contracts. Alongside such practical reasons went the influence of ecclesiastical law with its literal understanding of Genesis 2.24 that on marriage man and woman become one flesh, alongside with Genesis 3.16 that the husband shall rule over the wife. The situation may also be suitably described with a quote from de Montmorency (1897):

"The Creator took from Adam a rib and made it Eve, the common law of England endeavoured to reverse the process; to replace the rib and remerge the personalities". (14)

Although the same author maintained that the theoretical model

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13). Blackstone, op.cit., Vol. I. p.430.

14). J.E.G. de Montmorency, The Changing Status of a Married Woman, (1897) 13 L.Q.R., pp.187-199, at 192.

was never enforced to its logical extent by the judges<sup>(15)</sup>, it has, however, to be said that the state of law as described was not fundamentally questioned, as can be seen from the following two cases on custody law:

In De Manneville v De Manneville<sup>(16)</sup> a father had abducted his child then at the mother's breast. His wife had separated herself from him and had laid charges of ill-treatment and heresy against him. After unsuccessful habeas corpus proceedings<sup>(17)</sup>, the wife instituted Chancery proceedings to get her child back. Her petition was dismissed. Although the court paid lip-service to the benefit of the infant, it refused to interfere with the father's right, "the law imposed a duty upon parents, and in general gives them credit for ability and inclination to execute it,"<sup>(18)</sup> and it also felt that it would unduly encourage the wife to live in a "state of actual unauthorised separation"<sup>(19)</sup> if it granted custody to her. In R v Greenhill<sup>(20)</sup> the father of three small girls had formed an adulterous connection upon which the wife had separated herself from him, taking her daughters with her. He instituted habeas corpus proceedings and the children were ordered to be handed to him. He was held to have an absolute right to his children, which could only be interfered with when the children were in acute danger of health, of life and

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15). *ibid.*

16). (1804) 10 Ves. Jun. 52, 32 ER 762.

17). R v De Manneville (1804) 5 East.221, 102 ER 1054.

18). at p.767.

19). at p.766.

20). (1836) 4 Ad. & E. 624, 111 ER 922.

limb or when their moral well-being was jeopardized by the father's gross profligacy. It remains to be asked why and how such traditional structures could survive as they did. The answer lies in the fact that this rigid law did not effect the whole population equally. Among the lower classes for examples the property laws hardly applied, because these people had no property to speak of and also, as the husband and father had no possibility of looking after small children himself and no money to have them looked after by somebody else, it was more often than not the case that the mother retained the custody of young children even after a separation. (21).

#### C Equity and Parliamentary Divorce.

The upper classes evaded the rigid common law rules with the help of the Court of Chancery. Proceedings in the Court of Chancery were expensive and thus not open to the man in the street. This court though had jurisdiction to make settlements of property and administered the law governing trusts. By the means of trust and marriage settlement the rich could secure separate property for their daughters, protected from the grasp of the husbands<sup>(22)</sup>. Also by settling money on an infant somebody could make this infant a ward of court and the court when enforcing a scheme of education for such a ward would not only regard

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21). Susan Maidment, Child Custody and Divorce, p.116.

22). cf. Holcombe, op.cit., pp.38-43.

the father's rights but also the welfare of the child.<sup>(23)</sup>

Although it has to be admitted that often equity followed  
<sup>(24)</sup>  
 the law and the welfare of the child was seen to be pro-

vided for best by leaving the father's right undisturbed -  
 an attitude which can be found as late as 1883 in Re Agar-  
<sup>(25)</sup>  
Ellis.

This was a case where the parents had separated  
 and there had been serious disagreement on the question of  
 religious education of the children. The father then  
 forbade his 17 year-old daughter unsupervised contact with  
 her mother. The mother applied for an alteration of this  
 mode of access. Her petition was dismissed, the court  
 stated that it was normally for the best of any infant when  
 the sacred rights of family life were not interfered with.

Thus the upper classes could at least in part escape the  
 rigidity of the common law in the areas of matrimonial  
 property law and custody law. They could also, provided  
 they were very wealthy,<sup>(26)</sup> and only when adultery had been  
 committed by one of the spouses, evade the indissolubility  
 of marriage. For that purpose they had to get a decree  
 of separation from bed and board in the Ecclesiastical  
 Courts and the innocent party had to be successful in a  
 suit of criminal conversation in the civil courts, getting  
 damages from the spouse's partner in adultery. After  
 this they could go and obtain a Private Act of Parliament

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23). Maidment, op.cit., p.95.

24). As can be seen from the case of De Manneville, cited at fnts 16  
 and 17, where in fact legal proceedings were instituted first,  
 and the chancery proceedings thereafter brought the same  
 result.

25). In Re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch. D. 317.

26). Finer Report, op.cit., Vol.I, para. 4,10, p.67 gives the mini-  
 mum cost for a Private Act of Parliament as £700, if undefended.

which would enable them to marry again. As a matter of fact, the Private Acts were mostly obtained by men, there are only four cases where women obtained parliamentary divorce and none of them was a case of simple adultery.<sup>(27)</sup>

As the upper classes could thus evade the rules of common law, they did not feel the necessity for reform.<sup>(28)</sup> It was a time when pressure and interest groups<sup>(29)</sup> or parties were not yet formed and politics were much more governed by personalities. The age of collectivism had not yet begun.<sup>(30)</sup> This proved a handicap for reform and there was little chance for new ideas to find their way into legislature and judiciary.<sup>(31)</sup>

D     The 1857 Divorce Act

However, by the middle of the 19th Century social structures which had so far safeguarded family life were breaking up more and more rapidly. With increasing industrialization a considerable part of the rural population moved into the towns and cities and thereby out of the reach of local structures of social control. The larger family units which had existed in the countryside broke up into smaller nuclear families. It was no longer vital for the survival of the family that they all stayed together for support, but every member of the family had to go out and earn and fend for him or herself. This was at least true for the newly arising working class town population. Besides that, the social middle class grew in

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27). Finer Report, op.cit., Vol.II, p.94.

28). cf. Maidment, op.cit., at p.94 for custody law reform.

29). Stetson, op.cit., the organized Women's Rights Movement began in the 1850's.

30). cf. Dicey, Law and Public Opinion, pp.64f .

31). Matrimonial Causes Act 1857, 20 & 21, Vict., c.85.

numbers. Middle class women started to receive some education and increasingly found their way into gainful occupation<sup>(31a)</sup>. Thus they gained some independence which would not fit in with the traditional view of marriage as provided by the common-law. When they felt aggrieved in their family life, (and they did feel aggrieved by the fetters the old common law rules imposed on them in spite of their developing economic independence), they were often not rich enough to ensure for themselves the benefits of equality and Parliamentary divorce, but they were educated enough to voice their distress. As the indissolubility of marriage was now no longer an economic necessity and there were also (via an educated middle class) ways to voice dissatisfaction with the state of the law, the way became open for reform.<sup>(32)</sup>

#### 1. Preparation of the Act

To investigate these matters the first Royal (Campbell) Commission on divorce was appointed in 1850 under Lord Campbell as chairman. In his report published in 1853 it recommended conferring jurisdiction in matrimonial proceedings both for divorce and separation on a secular court and it suggested adultery as the only ground for divorce. Even this was only meant to benefit a husband, since according to the recommendations of the Commission a wife could only obtain a divorce if her husband had committed incestuous adultery.<sup>(33)</sup>

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31a). cf. Dicey, Law & Public Opinion, p.385.

32). cf. Stetson, op.cit., p.24.

33). Stetson, op.cit., p.29.

These recommendations were well in line with professional opinion which had attacked the cumbersome procedure that had existed before.<sup>(34)</sup> i.e. that it had been necessary to undergo three different legal proceedings to achieve one step, namely a divorce. They were also acceptable for the church as divorce for adultery was at least not contrary to the Bible.<sup>(35)</sup> Moreover they were in accordance with the views held in the community, insofar as they discriminated between husbands and wives.<sup>(36)</sup> With increasing industrialization a growing middle-class arose with economic and moral standards different from those of an earlier period. Their wealth did not come from landed property but from other sources<sup>(37)</sup> and therefore could not be protected sufficiently by the laws of inheritance and entails which enabled the landed nobility to keep their wealth within the narrow boundaries of the lawful family.

For the urban middle class family where (personal) property was passed on to all children it was much more important that there were no bastards among these children and therefore adultery of the wife which would impose 'spurious offspring' on her husband and family was a much greater crime than adultery of a man.<sup>(38)</sup>

Accordingly, when the Matrimonial Causes Bill was introduced into Parliament in 1856,<sup>(39)</sup> the grounds for divorce was one of the main issues in the debates. There

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34). cf. Stetson, op.cit., p.28.

35). cr. Holcombe, op.cit., p.97.

36). Stetson, op.cit., p.47.

37). Holcombe, op.cit., pp.34f.

38). cf. Holcombe, op.cit., p.103.

39). There had been earlier attempts in 1854 which proved unsuccessful, facing overwhelming opposition, cf. Stetson, op.cit., p.30.



was also still major opposition mainly by the Church to the admission of divorce at all, and long discussions on the matter of re-marriage, re-marriage in Church, and on criminal conversation. (40)

The opposition to admitting divorce at all was not so much that it was against divine law - as this argument was difficult to be upheld in the face of S. Matthew 19,9:

"And I say unto you, Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and whoso marrieth her which is put away doth commit adultery."

But there was a fear for the moral welfare of the population as the new law would allegedly open the floodgates to matrimonial litigation and deterioration of morality<sup>(41)</sup> (a recurrent argument in all debates on liberalizing the divorce law until the present day). The attempt to liberalize the law of divorce, apart from making it accessible for other than the very wealthy, by introducing equal grounds for both husband and wife proved to be unsuccessful. Victorian middle-class morals seeing the wife as the high priestess of the home, held the field:

"It was common feeling of mankind that, if a husband respected and treated his wife with kindness, the sin on the part of the husband was not necessarily an unpardonable offence. These were cases in which a wife might and ought to condone, but the common feeling of mankind told them that this must be on the part of the wife only". ( 42).

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40). As can be seen from the debates, Hansard, 3rd. series, Vols. 141-147.

41). R.H.Graveson, The Background of the Century, in: Graveson and Crane, op.cit., p.10f.

42). Debate on the 1854 Bill, Lord Chancellor Cranworth, Hansard 3rd Series, Vol.134, c.406.

or

"When adultery was committed by a woman all purposes of the marriage were forever annulled, there could be no condonation on the part of the husband" (43)

It was even maintained that unequal grounds were necessary to protect women as they might otherwise be forced into divorce by an adulterous husband :

"If adultery on the part of the husband is to entitle him to a divorce, in as much as the husband - which may be bad morality, but it is the fact - suffers little on that account in the opinion of the world at large - for it is notorious that, while the wife who committed adultery loses her station in society the same punishment is not awarded to the husband who is guilty of the same crime - he may, without any sacrifice, on his part, but by merely being a little profligate, and multiplying his acts of adultery, be able to effect his object" (44) (i.e. divorce).

There were however equally emotional comments from the other side (the following though more on the overall effect of the law on women):

"...but...unless something be done to change it - unless some redress be afforded - we must be content to continue to be held up to the rest of mankind as pretending to be a civilised country, while in reality living under a system more barbarous and more inconsistent with itself than existed in any other part of the world" (45).

As a consequence of the prevailing social climate the Act, when finally coming into force in 1858, only secularized the law of divorce and separation and made it also more accessible without changing its principles, i.e. divorce for a wife only on the grounds of adultery combined with

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43). Debate on the 1856 Bill, Lord Campbell, Chairman of the Royal Commission, Hansard 3rd. Series, Vol.142, c.1978.

44). Debate on the 1854 Bill, Lord Chancellor Cranworth, Hansard, 3rd. Series, Vol. 134, c. 7.

45). Debate on the 1856 Bill, Lord Brougham, Hansard 3rd. Series, Vol. 142, c.422.

specified aggravating circumstances.

The Act also had some ancillary provisions. S.35 empowered the Divorce Court to make provisions for the custody, maintenance and education of children and there were also several provisions to alleviate the situation of deserted, separated and divorced women respectively concerning maintenance, property, earnings and the legal capability to sue and to be sued. S21 gave a deserted wife leave to appeal to the court for an order of protection of the property she would acquire after the desertion, for example, her earnings and gifts and bequests by other people, s.25 put a separated wife into the position of a 'feme sole' in respect of property acquired after the separation, according to s.26 she could, after separation, sue and be sued like a 'feme sole' and her husband was no longer liable for her debts, and s.25 enabled the court to make orders for alimony in connection with any decree granted. Especially in these latter provisions the influence of an individual woman may be seen<sup>(46)</sup>, namely Caroline Norton, who had the misfortune of a degrading married life and the fortune of being a poet and writer, (though the financial fruits of her talent were enjoyed by her husband according to the existing law of matrimonial property). Her pamphlet "A Letter to the Queen on Lord Chancellor Cranworth's

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46). Margaret Forster, Significant Sisters, p.47. That it was possible for a single woman to influence the legislative machinery is some evidence that the tide of collectivism has not yet risen.

Marriage and Divorce Bill" published in 1855 was widely read and discussed at the time<sup>(47)</sup> and her influence was also openly acknowledged e.g. by Lord Brougham when commenting on the pamphlet "as clever a thing as ever was written...I feel certain that the law of divorce will be amended and she has greatly contributed to it".<sup>(48)</sup>

## 2 Effects and Consequences.

One of the immediate effects of the Matrimonial Causes Act 1857 lay precisely in the provisions just described : they catered for the worst abuses of the existing law in alleviating the fate of separated and divorced women - without substantially changing the law for married women - and by this they delayed immediate further reform, especially of matrimonial property law.<sup>(49)</sup>

Although the numbers of divorce petitions and decrees granted increased after the Act, the feared floodgate effect could not be seen. This was partly due to the high expenses of the proceedings and partly to the social stigma still connected with divorce.<sup>(50)</sup>

The public morals concerning adultery of the wife which underlay the Act can also be shown to have a lasting effect on the law of maintenance. Not only that the guilty wife was mostly not granted maintenance or alimony or only the damages the husband obtained from her partner in

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47). Stetson, op.cit., p.47.

48). Forster, op.cit., p.47.

49). Holcombe, op.cit., p.93 and perhaps intendedly so : cf Stetson, op.cit., p.47.

50). Holcombe, op.cit., p.105.

adultery<sup>(51)</sup>, even the innocent wife who had sued and obtained a decree of divorce was at one time deemed to be punishable because she had sued for divorce at all and not asked for a separation.<sup>(52)</sup>

This case law was developed even though the Private Acts of Parliament which had been granted before 1857 had always contained some financial provisions for the guilty wife<sup>(53)</sup>. It was not until 1883 in Robertson v Robertson and Favagrossa<sup>(54)</sup> that a gradual change in attitude became visible.

Though in the latter case the wife was not granted maintenance for procedural reasons and because she had refused to admit her adultery and receive maintenance in return, but had forced her husband to spend most of his moderate fortune in order to prove her adultery committed abroad, the Master of the Rolls carefully declared his own approach:

"I am sorry to hear it [i.e. the recent divorce court practice] I am not giving a final opinion, but it appears to me that s.32 of the 1857 Matrimonial Causes Act was intended to give the Court a discretion...and it was not intended that a guilty wife should be turned into the streets to starve" (55)

He also emphasized that, as divorce was not granted to members of lower social classes, the parliamentary practice was not to be copied to the letter, but it had to be

51). Holcombe, p.101; see Latham v Latham and Gethin (1861) 30 L.J. P.M. & A. 43.

52). Fisher v Fisher (1861) 2 Sw. & Tr. 410, 164 ER 1055, however, already in 1865 this rule is reversed in Sidney v Sidney, 4 Sw. & Tr. 178, 164 ER 1485, because a husband who had behaved himself grossly enough as to occasion divorce should not be given the additional advantage of paying less money.

53). Finer and McGregor, in Finer Report, op.cit., Vol.II. p.100.

54). 8 P.D. 94

55). ibid., at p.95.

taken into account that a working-class woman could more easily be expected to maintain herself after divorce. It should be noted that in spite of this judgment it had still to be stressed in 1966<sup>(56)</sup> than an adulterous wife did not automatically lose every claim to maintenance.

## E Property Legislation and Parliamentary Franchise.

### 1 The Social Setting

In the years after 1857 there was a growing public concern about the position of women, mainly centred on the questions of parliamentary franchise and matrimonial property rather than on the position of a woman as mother. This is probably due to the fact that questions of property and parliamentary representation show more directly the legal disabilities of women. As they were concerned with power given to women over themselves they were the main target for women's emancipation or liberation. Custody of children led one step further in aiming to give women power over others namely their children. Moreover in custody questions the position of the infant has to be considered independently in regarding its welfare. But as the child's welfare is in itself an indefinite term, it can easily be employed to veil the striving for other social aims. It can be used for justifying the father's common law right as well as the mother's emancipation.<sup>(57)</sup>

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56). Iverson v Iverson [1966] 1 All ER 258

57). As will be seen in the analysis of cases, Chapter IV. C.

Thus the field of custody of children is on its own not an apt one for women's emancipation.

Hence the emancipation movement concentrated as pointed out - on property and the franchise. These two are closely linked to each other for two reasons. First because in the last century the right to vote was dependent on property<sup>(58)</sup>, and secondly because it could always be stressed by the Feminists that only male representation of women did not lead to sufficient protection of their interests as could be seen in the property laws<sup>(59)</sup> and that therefore, it was vital to give women the vote in order to put pressure on Parliament that these interests might be guarded better.<sup>(60)</sup>

In 1823 James Mill could still safely maintain that women needed no vote because they had their husbands and fathers to act for them.<sup>(61)</sup> This argument held good for a long time thereafter, it lost force under overwhelming evidence to the contrary, namely that husbands and fathers did not look 'after their wives and daughters' properly, when acting for them. So the argument could then be made that if men did not look after the women of their families, the women had to get the vote to make their own needs known to Parliament. The public concern showed itself

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58). Holcombe, op.cot., p.210

59). Holcombe, op.cit., p.209

60). Holcombe, op.cit., p.214.

61). James Mill, Article on Government, in: Encyclopaedia Britannica 1923, cited in Stetson, op.cit., p.25.

mostly in the activities and writings of educated women themselves<sup>(62)</sup>, and unlike the first half of the century, when the influence of individuals was most important, women's interest groups were formed and bore a strong influence on the development<sup>(63)</sup>. There were also men of importance whose support could be enlisted for the women's quest. Mostly they were enlightened members of Parliament and the most prominent is probably John Stuart Mill.

In his widely read 'Subjection of Women' he illustrated the existing legal and social situation : "there remain no legal slaves except the mistress of every house".<sup>(64)</sup>

The 'Subjection of Women' was published in 1869 to help the Married Women's Property Bill which was accordingly followed by the Act in 1870. There had been striving for reform of property law since the 1850's. John Stuart Mill had in fact held back publication of his treatise for eight years until the Bill came in sight, then he published it in order to influence the public in favour of reform, and thus increase the social pressure on Parliament to pass the Bill.<sup>(65)</sup>

## 2 Legislation

In 1870 a first attempt to amend the property law was made with the Married Women's Property Act of that year,<sup>(66)</sup> and twelve years later after prolonged struggle,

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62). cf. Holcombe, op.cit., pp.113-115, 118-123.

63). Norman St.John-Stevenson, Women in Public Law , in: Graveson and Crane, op.cit., pp.261f.

64). John Stuart Mill, The Subjection of Women, p.160.

65). cf. Holcombe, op.cit., p.113

66). 33 & 34 Vict., c.93.



the Married Women's Property Act 1882<sup>(67)</sup> which provided a broad approach to the issue was passed. Neither Act achieved what had been asked for, but the overall result provided a substantial improvement and a certain degree of equality. In 1870 it became law that a married woman could keep and administer her earnings, certain investments and to some degree inherited property, as her separate property. In 1882 this limited rule was extended as a general principle to all property which a married woman acquired after the passing of the Act.

There was a strong professional opposition, especially to the 1870 Act<sup>(68)</sup>, which can be contrasted with the prevailing approach of the legal profession in 1857. In 1857, reform in their eyes had only meant straightening out an extremely cumbersome procedure and making a legal remedy which had existed only for the rich accessible to a larger part of the population. Now they felt the danger of upsetting age-old and well tried-out principles by introducing new concepts into English property law. The unwillingness of the lawyers to accept a revolutionary development led to a peculiar feature in both Acts. Both of them really only extended the principles of equity so far applied in the Chancery Court in connection with the settlements of the rich to all matrimonial property. As Dicey pointed out, equity governed the time, the method and the nature of parliamentary reform.<sup>(69)</sup>

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67). 45 & 46 Vict., c.75.

68). In the House of Lords, cf. Holcombe, *op.cit.*, pp.174-176.

69). Dicey, Law and Public Opinion, p.384.

After the property law had been substantially amended, introduction of equal franchise for men and women was consequently delayed, as some of the ground had been cut from under the feet of the women's movement<sup>(70)</sup>. In 1918 women were given the vote as a consequence of the First World War, but it was not until 1928 that it was given to them on equal terms with men<sup>(71)</sup>.

### 3 Consequences

The Married Women's Property Act 1882 provided "~~in effect~~ every woman on her marriage with a settlement".<sup>(72)</sup> This introduction of equitable rules rather than perfect equality in matrimonial property law led to injustice in several aspects<sup>(73)</sup> which were only removed by procedural amendments in the course of subsequent years : it had not been set out clearly in how far husband and wife could now give evidence against each other, ~~so this~~ had to be changed by the Married Women's Property Act 1884.<sup>(73a)</sup> As all her property was 'separate property' in the sense of the old equitable rules, a married woman would not be liable personally but only to the extent of her separate property. When she entered a contract only that separate property which she held at that point of time would be liable to her duties under the contract. (This was changed by the

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70). Holcombe, op.cit., p.215

71). By the Representation of People (Equal Franchise) Act, 18 & 19 Geo. V. c.36.

72). Dicey, Law and Public Opinion, p.391.

73). Holdsworth, op.cit., Vol.III, p.533 "When the legislature adopted equitable rules and applied them with some modifications to married women, many curious legal rules, many doubtful problems, and sometimes injustice resulted from the imperfect fusion of these two antagonistic sets of legal principles".

73a). 47 Vict., c 14

Married Women's Property Act 1893).<sup>(74)</sup> A married woman also would have only limited testamentary capacity, e.g. if she made a will during marriage purporting to include all her property, this will would not extend to property which would come to her on her husband's death.<sup>(75)</sup>

It was not until 1949<sup>(76)</sup> that complete legal equality was achieved and this ironically at a point of time when it dawned upon the judiciary that complete legal equality on the background of social inequality could lead to injustice and iniquity within marriage. As a consequence they started to introduce into the law certain principles vaguely resembling the notion of community of property at least as far as the matrimonial home was concerned, for example, if a wife was deserted by her husband, she was deemed to have a right (or rather : an equity) to remain in the matrimonial home.<sup>(77)</sup>

The effects of the matrimonial property legislation in its final result of 1882 has to be seen from two angles, the practical and the psychological point of view. The immediate practical effect was in fact smaller than might be expected from the words of the Act. For the rich it meant no decisive change as they had had the benefits of the rules of equity before the Acts. For the

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74). 56 & 57 Vict.c.50, The heaviest blunder, however, had perhaps been made with the 1870 Act which provided that though only some of the wife's property became her own and her husband would still take the rest, he was no longer liable for her antenuptual debts. This was changed quickly by the 1874 Married Women's Property Act 37 & 38 Vict.c.50 where it was provided that husband and wife should be sued jointly for her antenuptual debts and he should be liable to the extent to which he had acquired property from her on marriage.

75). cf Dicey, Law and Public Opinion, pp.392 ff.

76). Married Women (Restraint upon Anticipation) Act 1949, 12, 13 & 14, Geo.VI, c.78.

77). cf Lord Denning, The Due Process of Law pp.211-219 see also pp.217-233; finally, the Matrimonial Homes Act 1967 acknowledged the social needs and tidied up the judicial development.

working classes its effect was limited insofar as the earnings were often only sufficient to keep the family alive and the necessity of protecting accumulated property often could not arise. Though it should not be forgotten that the extreme cases which had been adduced as evidence for the necessity of reform<sup>(78)</sup> could no longer occur under the new law. In order to consider the effect the 1882 Act had on the middle class it is important to distinguish between holding and acquiring property. Concerning the holding of property the Act was a decisive achievement as women did not lose their property on marriage any longer. However, the effect of the Act on property acquired during marriage can be viewed as minimal for middle class women, as they could not stay in or enter socially respectable employment (i.e. nursing) once they were married. Some help, however, was provided for married women by the judiciary by means of the presumption of advancement. This equitable presumption first occurred in 1688<sup>(79)</sup> but did not come into frequent use before the second half of the 19th century<sup>(80)</sup>. The principle established that in contrast to the general presumption that, as nothing would normally be given without consideration, and accordingly, if some property was given by one person to the other, the latter was deemed to

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78). Holcombe, op.cit., pp.161f.

79). Kingdon v Bridges (1688) 2 Vern. 67

80). In Re Eykyn's Trust (1877) c Ch. D.115 widened the presumption in scope; Thornley v Thornley [1893] 2 Ch. 229; until into the 20th century Dunbar v Dunbar (1909) 54 Sol.J. 32 McNaught v McNaught (1909) 54 Sol. J. 135, Gascoigne v Gascoigne [1918] 1 K.B.223

hold the property in trust for the former, if a husband gave property to his wife without consideration, he was presumed to make a gift to her.<sup>(81)</sup> This presumption then fell into disuse until it was again found useful after the second World War<sup>(82)</sup> to meet new social needs. As will be seen later<sup>(83)</sup>, however, it finally lost its importance in 1969.<sup>(84)</sup>

As the judicial reaction in supporting married women's property rights can only be seen as having a long-term effect, it cannot be surprising that the immediate reaction of contemporary observers, who mostly belonged to the middle class themselves, was to emphasize the psychological<sup>(85)</sup> rather than the practical effect of the Act as it comprised the real importance of the reform at least for their own social class. To be entitled to their own property meant independence for women and it meant especially that they could insist on their rights as they need not refrain from insisting for fear of consequences.

#### F. Custody

In the shadow of these more spectacular developments the law of custody of children had also changed. The common law right of the father though in theory (and sometimes with

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81). E.H.T. Snell, Principles of Equity, pp.176-178.

82). Starting with Lord Denning in H v H (1947) 63 T.L.R. 645.

83). See below II. J.2

84). Pettitt v Pettitt [1969] 2 All ER 385

85). cf. Holcombe, *op.cit.*, p.218.

practical consequences) not abolished before the Guardianship Act 1973,<sup>(86)</sup> had gradually been eroded. After 1839 custody of children under 7 and access to older children could be given to an impeccable mother and in 1873 the age limit for custody was raised to 16 and in 1866 to 21. The 1873 and 1886 Acts also contained provisions for separation deeds and appointment of guardians, giving further, limited, rights to the mother.

Joint guardianship was already discussed as a feminist aim in connection with the 1886 Act,<sup>(87)</sup> but although the feminist movement can be seen as having had some influence on the 1886 and later on the 1925 Act, the central question which gains increasing importance is the welfare of the child. The welfare of the child is finally enacted as the paramount consideration in proceedings dealing with children by the Guardianship of Infants Act 1925, which also provided for equality of mother and father in the face of the court.

## G Divorce Reform 1909 - 1937

### 1 The Preparation

As could be seen already by the parliamentary proceedings around the 1857 Matrimonial Causes Act with the demand for equal grounds for divorce there was already a

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86). s.1.(1)

87). Maidment, Child Custody and Divorce, pp.127f.

certain social basis for further reform going beyond the 1857 Act. Also as divorces could only be granted by one court based in London and as the proceedings were still very costly, a dissolution of marriage was still only obtainable by a fraction of the population.<sup>(88)</sup>

In 1909 the Second Royal (Gorell) Commission on Divorce was formed under the chairmanship of Lord Gorell. Their report was issued in 1912 and proposed inter alia to expand the grounds for divorce and to grant divorces to men and women on equal grounds. They had received overwhelming evidence that such propositions would be in accordance with public opinion.<sup>(89)</sup> There was, however, also sufficient proof of strong church opposition, especially against the widening of grounds<sup>(90)</sup>. In the eyes of the church the marriage was sacred and indissoluble except for adultery committed by one of the spouses - the only ground allowed by the Bible.<sup>(91)</sup> The protagonists of reform on the other hand showed a new view of marriage as they paid regard to the personal misery of the individual<sup>(92)</sup> rather than upholding the Victorian ideal of general morality which, besides other insufficiencies, by having two moral standards for men and women demanded an attitude from women which came close to self-sacrifice. Morality in itself though was still a strong argument on both sides throughout

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88). Finer and McGregor in the Finer Report , op.cit., Vol.II, p.104

89). Stetson, op.cit., p.102

90). Stetson, op.cit., p.102

91). See S.Matthew 19,9 cited above, at p.56.

92). "The present law both encourages immorality and leads to much individual hardship"..., National Union of Societies for Equal Citizenship, Annual Report (1931), quoted from Stetson, op.cit., p.113.

the prolonged struggle for reform. It was maintained that equal grounds would enhance rather than erode general morals<sup>(93)</sup>, but equally that as the present law led to perjury and collusion<sup>(94)</sup>, widened grounds would buttress rather than weaken the institution of marriage and thus also uphold morality<sup>(95)</sup>.

## 2     The Acts of 1923 and 1937<sup>(96)</sup> and Their Implications

Though there was a widespread support for reform, at least for the introduction of equal grounds, nothing could be achieved until 1923. This was due to the strong opposition against widened grounds for divorce so that only after the two issues were separated, the less objectionable of them could be introduced into the law.<sup>(97)</sup> In 1923 a Matrimonial Causes Act was passed without major difficulties introducing equal grounds for divorce. It was not until 14 years later that widened grounds could be achieved. In 1936 an independent Member of Parliament, A.P. Herbert, took it upon himself to finally bring about reform. Besides being a member of Parliament, he was also a writer and he had already pointed out the absurdities of the existing law in his novel "Holy Deadlock" (1934). The success of his Bill was probably partly due to his determination and his varied and prudent tactics<sup>(98)</sup>.

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93). Stetson, op.cit., p.102

94). Stetson, op.cit., p.100

95). Stetson, op.cit., p.114

96). Matrimonial Causes Act 1923; 13 & 14 Geo.V, c 19; Matrimonial Causes Act 1937, 1 Edw.VIII 2 & 1 Geo VI, c 57.

97). cf. Stetson, op.cit., p.103.

98). cf. Stetson, op.cit., p.125



But also the social climate had changed and the Church had indicated some slackening of its stern opposition. The new Matrimonial Causes Act 1937 amongst other provisions introduced cruelty, three years' desertion, and incurable insanity, as additional grounds for divorce.

Although the Act treated men and women indiscriminately, it is to a certain extent, a women's Act as especially cruelty and even to a certain degree desertion<sup>(99)</sup> seem to be predominantly male offences.

After the Act, the judiciary carefully developed definitions within the framework of the Act which made possible a broad understanding especially of cruelty and desertion<sup>(100)</sup> and thus provided a certain degree of adaptation to social needs<sup>(101)</sup> and kept the Act abreast with social development at least for some time.

## H Divorce Reform 1950 - 1969

### 1 Preparation

However, gradual judicial adaption proved insufficient in the aftermath of the Second World War with its effect on society in general and on individual marriages. In 1951 the Third Royal (Morton) Commission on Divorce was appointed to find out whether it might be time for a further change of the divorce law. The Commission issued

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99). This is true today, cf. statistics in Stetson, p.234, which show a highly over-proportional percentage of cruelty petitions by women, and a slightly over-proportional percentage of desertion petitions by women; however, the statistics in Finer Report Vol.I, p.73, suggests an increase of men's petitions after the Act, the explanation for this lies in war-time divorces by husbands for adultery.

100). cf. C.E.P. Davies, Matrimonial Relief in English Law, in : Graveson and Crane, pp.322, 324-332.

101). P.M. Bromley, Family Law, p.189.

its report in 1956 and did not recommend a change. There is, however, some doubt whether their report was a true mirror of the social attitude of their time. Already the courts had started preparing for reform by forming rules which strongly favoured the 'breakdown' principle<sup>(102)</sup> when they had to decide whether to grant a divorce to somebody who had him or herself committed a matrimonial offence. Also the big number of undefended petitions and of cross-petitions blurred the distinction between 'guilty' and 'not guilty'.<sup>(103)</sup> However, it was again the Church, and the conservative establishment, who opposed reform, as they did not approve of the shift seen in public opinion from marriage being something close to a sacrament (as in 1857) or a moral institution, which should not lead to personal misery (as in 1937), to marriage being a union which was to create and further personal happiness (deemed to be everybody's right), and therefore dissolvable when personal happiness could no longer be attained within its bond.<sup>(104)</sup>

## 2 The Act and its Impact

It was not before the Church had relaxed its opposition by 1966<sup>(105)</sup> and before the Law Commission was instituted in 1965 that reform could be achieved. In 1971 at least

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102). Esp. after the 1963 Matrimonial Causes Act which made adultery of the petitioner a discretionary bar.

103). Cretney, op.cit., pp.102f.

104). cf also, Cretney, op.cit., p.105.

105). The Church set up a Committee, which published a report in 1966 called 'Putting Asunder' where the doctrine of irretrievable breakdown was favoured as the lesser of two evils - cf Cretney, op.cit., p.104.

the Divorce Reform Act<sup>(106)</sup> became law. It substituted the principle of the irretrievable breakdown of the marriage for the matrimonial offence though the matrimonial offence was not completely eliminated as it could still be a proof for the breakdown of the marriage.

The Divorce Reform Act had important consequences for the proceeding ancillary to a divorce. Before the Act there was still at least on the surface the guilty spouse and the following proceedings could rely on that in re-distributing matrimonial property and awarding maintenance. After the Act new guidelines had to be found to contrive a just solution in every case.

Also another development had by then come to an end. In 1969<sup>(107)</sup> the revival of the presumption of advancement was brought to an end. This doctrine, revived by Lord Denning in 1947<sup>(108)</sup> had often been used also in connection with s17 of the Married Women's Property Act 1882 to help the non-earning wife to obtain a share in the matrimonial property, usually the home.<sup>(109)</sup> Putting the last nail into the coffin of the presumption, Lord Reid declared :

"These considerations have legally lost their force, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished."<sup>(110)</sup>

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106). 1969, 17 & 18 Eliz. II, c 55

107). Pettitt v Pettitt [1969] 2 All ER 385

108). H v H (1947) 63 T.L.R. 645.

109). cf Lord Denning, op.cit., pp.228-233.

110). Pettitt v Pettitt [1969] 2 All ER 385 at 389.

Thus the courts were deprived of an instrument which had so far been helpful to reach socially just solutions in conflicts on matrimonial property, and so also from this quarter a need for reform arose.

This need gave rise to the 1970 Matrimonial Proceedings and Property Act<sup>(111)</sup> which gave a wide ranging discretion to the courts to redistribute the assets of the marriage. They could now take into account income of the parties as well as their financial needs, their standard of living, their contributions towards the family income including contributions made by looking after the house and children, effects of loss of pension benefits, age of the parties and duration of the marriage. As these criteria enable a multitude of different orders to be made, the courts in the years after the Act strove to fill this discretion with further rules which were not always consistent with each other. There was, for example, the<sup>(111a)</sup> one-third rule, meaning that a non-earning wife would get a third of her husband's income, which proved inapplicable in cases where the husband was a low wage-earner, or the different types of orders made in connection with the matrimonial home.<sup>(111b)</sup> These attempts did not find universal approval, and it has been maintained that the doctrine of precedent no longer applied in this area of law.<sup>(112)</sup>.

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111). 18 & 19 Eliz. II, c 45.

111a).cf Wachtel v Wachtel [1937] Fam. 72.

111b).eg. Mesher v Mesher [1980] 1 All ER 126, Harvey v Harvey [1982] 2 W.L.R. 283, cf. for evaluation of these strands of cases: Ruth Deech, Financial Relief, the Retreat from Precedent and Principle, 98 LQR. pp.621-655.

112). Deech, op.cit., p.639.

## I Conclusion

The beginning of the period here described saw a status of the married women and mother which only endowed her with a number of legal incapacities, the unimportance of the child and the indissolubility of the 'sacred' marriage tie.

There was some mitigation provided for the upper classes via Chancery proceedings and Parliamentary divorce, but this only helped to delay necessary reform. With increasing industrialization and the consequential growth of an educated middle class the social pressure for reform grew. It was first of all directed towards the legal equality of women and as the most striking examples of inequality were found in the fate of married women a considerable part of the impetus was directed towards this particular point.

By the first quarter of this century legal equality had been achieved in all major points and after some further time had elapsed, it became apparent that legal equality could still mean actual injustice. As already mentioned, the courts started to develop the law especially covering matrimonial property, showing a growing concern for the position of the married women. As divorce became easier to obtain and marriage was considered a joint venture with shared responsibilities, also matrimonial property had to be viewed differently and it became important to re-distribute it, if the necessity arose, according to the contribution towards it and according to the needs of the partners and the children, rather than according to personal conduct within marriage. It is in

this light that the provisions of the above mentioned 1970 Matrimonial Property and Proceedings Act have to be seen with their guidelines for the courts as to what they should take into account in their reasoning and in parts these guidelines take only up what the courts had already favoured before the Act.

The law concerning children developed in a less spectacular way, partly because it was easier to agree on the question of welfare as soon as the father's common law right had been eroded, whereas concerning the women's movement a lot of antagonistic feeling was involved on both sides and also many men felt much more immediately attacked and endangered by this direct struggle for power in domestic and public life.

After equal guardianship has been achieved in 1973 the strand of development in child law which is directly linked with the relationship between father and mother at least came to an end. So the end of the period described sees marriage as a joint venture which can be terminated on failure, with equal rights for both partners in every respect, including property and guardianship, and it also sees the overall importance of the welfare of the child as no longer subject to the rights of its parents. The impetus for change during this period has not always come from the same corner of the triangle : Parliament, judiciary, society. The standard procedure, however, would mostly be that a social need arose, was brought to Parliament, enacted and then tackled by the judiciary. But there are two main periods where the judges were well ahead of Parliament and maybe even ahead

of or at least abreast with the social development. One of them is the line of cases on matrimonial property after the Second World War, and the other which will be treated later in more detail, is the evolution of the welfare principle as 'paramount' consideration in children's proceedings.

Finally, at the beginning of the 19th Century legal reform was often influenced by individuals, whereas after the middle of the century interest groups (women's interest groups in the area here concerned) and parties found their way of influencing the legislative process.

CHAPTER IIITHE LAW OF PARENTAL STATUS IN STATUTE  
AND IN JUDICIAL LAWA Outline and Purpose

After having described in some detail the social and legal development concerning family life in England during roughly the last 180 years I shall in this chapter consider the law of parental status as it evolves against and from this general background. I shall pay special attention to the influence of legislation on the courts and vice versa. In viewing and tracing such an influence I shall consider the concrete legal provisions rather than aspects of method which are dealt with in a later chapter.

B Cases and Statutes - The Sample

I shall work from the statutes concerned with parental status directly which includes all Guardianship or Custody Acts from 1839 until 1973, with the exception of the Guardianship of Minors Act 1971 as this Act only consolidates the law concerning guardianship and is not likely to have an independent impact on the court decisions. It provides, however, an interesting phenomenon by its mere occurrence and will in this respect be dealt with later. There are also statutes which do not directly treat an issue but have a decisive impact on the law concerning it and sometimes a statute is enacted for a different purpose but proves to provide the courts with a tool which enables them to develop the law in the relevant area. In order to include such legislative provisions I have



also chosen the 1873 Judicature Act, the 1958 Adoption Act and the 1959 Legitimacy Act for my sample. Other enactments may be mentioned to make the survey comprehensive but they are not landmarks as far as the joint development by parliament and judiciary in the area of parental status law is concerned.

The sample of cases consists of more than 100 decisions based mainly on the Acts mentioned above or on principles of common law and equity which deal with the law of parental status. Besides that I have included certain side-cases beyond this scope which are particularly interesting from a social or methodological point of view and there<sup>fore</sup> shed additional light on the narrow thread of the main-body of cases.

#### C The 1839 Custody of Infants (Talfourd's) Act<sup>(1)</sup>

##### 1 Preparation in Society, the Courts and Parliament.

Before Talfourd's Act the mother, a common-law non-entity, had no claim in law to her children, as could be seen in De Manneville<sup>(2)</sup>, and there was also no possibility open to the courts to do anything about it. It can, however, be assumed that the social reality did not always conform to the rigidity of law. Especially in the poorer classes of society small children were taken care of by

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1). 2 & 3 Vict., c 54.

2). cited and summarized above, Chapter II, fnts 16 & 17, see also Blackstone, op.cit., Vol.I, p.441

the mother and often accordingly taken into a new union rather than left with the father who could not and did not want to be encumbered by the care of small children.<sup>(3)</sup>

Even after the father's death, a guardian appointed by him in his will would take priority over the mother. Only if no testamentary guardian was appointed, would the mother be considered guardian by nature until the child was fourteen.<sup>(4)</sup>

There were, moreover, wardship proceedings in Chancery, and in equity the mother's position would always be considered. However, in those days equity followed the law<sup>(5)</sup> and accordingly the Chancery judges would be loath to interfere with the father's common law right. There was also still the difficulty which a married woman experienced in going to court, as she could not sue without next friend and wardship proceedings could only be invoked if property was settled on the ward.<sup>(6)</sup>

However, finally demand for reform arose. By 1837 several cases had occurred where the courts had felt obliged, though unwillingly to enforce the common law right of the father despite humanitarian considerations<sup>(7)</sup>. Against this background a member of the legal profession, Sergeant-at-Law Talfourd, took it upon himself to change the law of custody. He had himself acted as barrister

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3). Maidment, op.cit., p.116.

4). P.H.Pettit, Parental Control and Guardianship, in Graveson and Crane, op.cit., p.60.

5). Pettit, in Graveson and Crane, op.cit., p.56.

6). However, the amount required lessened considerably and reached little more than a nominal amount by the middle of the 19th Century, Lee Holcombe, op.cit., p.44.

7). The unwillingness is openly avowed in Ball v Ball (1827) 2.Sim. 33, 57 ER 703, for this case see also below, Chapter IV. c.3.a)

for the mother in several custody cases, and especially the last case before the Act, R v Greenhill,<sup>(8)</sup>, had made it clear to him how necessary reform had become. In this case a mother of three small girls had separated herself from a husband who lived in adultery with a woman who was even occasionally known as 'Mrs. Greenhill'. The Court however, obliged the mother to give up the children to the father, stating, "there is in the first place, no doubt that when a father has the custody of his children, he is not to be deprived of it except under particular circumstances".<sup>(9)</sup> Mrs. Greenhill evaded this judgment by fleeing abroad with her daughters. On Talfourd's side in the quest for reform was Mrs. Caroline Norton who had herself experienced the effect of the existing law and who had by her talents as a writer and by her personal connections the opportunity of making herself listened to and influencing the course of reform<sup>(10)</sup>. This setting is a good example for showing that in those days the political development was very much influenced by individual personalities and also that reforms in law can be more easily achieved when members of the profession dedicate themselves to the cause.

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8). (1836) 4 Ad. & E. 624, 111 ER 922.

9). Lord Denman C.J. at p.927.

10). cf. Forster, *op.cit.*, pp.34f; p.39f<sup>cf.</sup> the direct influence of Mrs. Norton's private affairs on the progress of the Bill.

As a member of Parliament Talfourd launched a first attempt to change the custody law by bringing in a Bill in 1837. The debates centred around the plight of an innocent mother aggrieved by her husband's conduct and even deprived of her children.<sup>(11)</sup> It should be noted, however, that the so-called adultery bar, namely a provision that a mother against whom adultery had been judicially established could not be awarded custody or access was only inserted after considerable debate.<sup>(12)</sup> It becomes obvious from the debates that the adultery bar was not deemed necessary because the courts in their discretion would normally only award custody to an innocent mother<sup>(13)</sup>. But in the face of the great concern on this issue the clause asked for was inserted.

The cases that led up to the Act are discussed and evaluated in great detail during the debates in order to prove the necessity for reform<sup>(14)</sup>. After the adultery bar had been inserted, the main argument against the Act was that it might encourage separation. This in connection with the adultery bar shows the already great concern for the sanctity of marriage and the position of the wife as the submissive<sup>(15)</sup> partner which becomes even more pronounced during the debates on the 1857 Matrimonial

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11). Hansard, 3rd series, Vol. 39, cc 1088f

12). cf Hansard, 3rd series, Vol. 42, c 1055; this was a first version of it, the clause in its final shape was only inserted into the second Bill, cf. Vol 47, c 551.

13). cf. Talfourd himself, Hansard, 3rd series, Vol.42, c.1054.

14). Often in connection with cases not long before the Act, members of Parliament who had then been involved in the cases as lawyers, added their comments and voiced the regret they had felt about the outcome of the cases concerned: Hansard, 3rd series, Vol.39, c 1086, as to Ball v Ball (1827) 2 Sim.33, 57 ER 703; Vol.49, c 492 as to R v Greenhill (1836) 4 Ad.& E.624, 111 ER 922.

15). Hansard, 3rd series, Vol. 43, c 144, Sir E.Sugden, "A Woman's strength lies in her submissiveness".

Causes Act<sup>(16)</sup>. As Sir E. Sugden stated "A wife was, in general, glad to have that excuse that she has to stay with the children for submitting to the temper of a capricious husband".<sup>(17)</sup> Though the first attempt to reform the custody law ended with the Bill being thrown out in the second reading of the Lords, the second Bill - which was right from the start endowed with the adultery clause - proceeded through both Houses quickly and not much contested. In the second reading in the Lords, Lord Denman gives voice to the regret felt by the bench in the Greenhill case<sup>(18)</sup>, a regret which cannot be necessarily inferred by reading the report of the case, but which clearly indicates that the professional support for the Bill went beyond the person of Sergeant Talfourd.

Finally in 1839 the Custody of Children Act based on the second Bill came into force. It gave the Lord Chancellor and the Master of the Rolls the discretionary power to award custody of children under 7 and access of children up to 21 who were in the custody of the father to an impeccable mother.

## 2 Judicial Reaction.

The Act gave rise to a varied response in the judiciary from being narrowed down in Ex parte Young 1855<sup>(19)</sup>, via treating it approvingly even if not applying it in Re

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16). cf above II D.I.

17). Hansard, 3rd series, Vol.40, c 1115

18). Hansard, 3rd series, Vol.49, c 492.

19). (1855) 19 J.P. 777

Fynn 1848<sup>(20)</sup> and widening its scope by using its 'equity' in Re Tomlinson 1849<sup>(21)</sup>. Ex parte Young was a case of habeas corpus proceedings instituted by a father of two children under seven who were living with the mother, who had separated herself from her husband. The court held that notwithstanding the 1839 Act a father was legally entitled to the custody of his children under seven years of age. As these were habeas corpus proceedings, the court was not obliged to apply the Act but the court did not take into account, as it could have done, that the mother, after she had handed the children to their father, could apply to the Lord Chancellor to grant her custody under the Act, and would thus possibly get the children back. In Re Fynn the mother had custody of two small boys and the father wanted them back. The court held that it could not interfere with the father's right on common law grounds, even if it took the effects of the 1839 Act into account, and it did not apply the Act as the children were not with the father as prescribed by the Act. However, in Re Tomlinson the same court held that it was within the equity of the Act to grant custody to a mother who did already have custody of the child. Even as late as 1861<sup>(22)</sup>, long after the enactment, the adultery bar was still considered as good law, the 1839 Act was quoted as a precedent for not giving access to an

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20). (1848) 2 Dē G. & Sm. 457, 64 ER 205

21). (1849) 3 Dē G. & Sm. 371, 64 ER 520

22). Clout v Clout & Hollebone (1861) 2 Sw. & Tr. 391, 164 ER 1047.

adulterous mother, although in the meantime there had been the 1857 Matrimonial Causes Act which within its own sections did not provide an adultery bar. However, from the debates on the 1857 Act and from its later treatment by the courts as to the guilty wife's maintenance it is clear that adultery was considered such criminal conduct in a wife that it was simply not deemed necessary to affirm that she had not got any rights. The 1857 Act itself, though it contained a section which enabled the court to make orders as to the custody, maintenance and education of children whose parents were involved in proceedings under the Act, mainly dealt with divorce and had no impact on the law of parental status.<sup>(23)</sup>

#### D Legislation in 1873

##### 1 Custody of Infants Act 1873<sup>(24)</sup>

##### a). Separation Deeds Before and After

The next Act of importance is the 1873 Custody of Infants Act. It provides inter alia that articles of separation dealing with the custody of the children of the marriage should not be held void for the sole reason that thereby the father would divest himself of his right. It also provided that the deed of separation should not be enforced when the court was convinced that it would not be

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23). cf Maidment, op.cit., p.96.

24). 36 Vict., c 12

for the benefit of the infant. Thus, through the back-door of a proviso, the child's welfare entered the custody legislation.

The need for the implantation of this section had become clear by preceding cases. There is for example Vansittart v Vansittart (1858)<sup>(25)</sup> where the parents had agreed that the mother should have custody of two of four children, a girl of nine and a boy of five. The court held that this separation deed was against public policy, as the father thereby divested himself of the rights and duties which he had in respect of his children. As a consequence the court would not enforce the deed. Another important case is Hamilton v Hector (1873)<sup>(26)</sup>, where the parents had agreed that the wife should have custody of the younger and access to the elder children. The parties did not contest the custody provision, but the mother applied for enforcement of the access provision. The court gave a very careful judgment doubting the validity of the custody provision of the deed, but it enforced the access provision as by such a provision the father had not waived his rights so that it was not considered to be against public policy. This latter case is considered to have influenced directly the introduction of the relevant section into the Act.<sup>(27)</sup>

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25). 2 De G. & J. 251, 44 ER 984

26). 13 I.R. Eq. 511.

27). Maidment, op.cit., p.98.



Afterwards there seemed to have been some doubts as to how far the rights of the mother reached, even if the children were given to her upon such an agreement, especially as to how far she was free to direct her children's religious upbringing. In Re Besant<sup>(28)</sup> in 1878 the child, a daughter, was taken from an otherwise impeccable mother who had embraced atheist convictions and had published writings to that purpose and also a book on birth control. In Condon v Vollum<sup>(29)</sup> in 1887 the mother was to retain custody and it was left to her discretion in which religion she wanted to educate the child. In the latter case the court states explicitly that articles of separation confer all parental rights which were normally vested in the father onto the mother, including the right to direct the religious upbringing of the child. This sounds broad-minded, especially if compared with cases on religious upbringing yet to be dealt with.

As Re Besant was a special case with unusual facts and as the concern of the court for the welfare of the child which might be endangered by an atheist and radical mother can be considered genuine on the background of the morals of the time and perhaps even justified to a certain extent, Condon v Vollum can be seen as the usual

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28). 11 Ch. D. 508

29). 57 L.T.R. 154.

judicial approach to the provision of the Act. Thus the conclusion can be drawn that this part of the 1873 Custody Act was all in all well received by the judiciary and not much contested.

b) The Adultery Bar

A different fate was waiting for the abolition of the adultery bar, which was also brought about by the Act in not re-enacting it and repealing the 1839, Custody of Infants Act which had contained it.

It was not until 1897 in Re A & B<sup>(30)</sup> that a guilty mother was awarded custody of her children for six months of the year. In Re A & B both parents had been guilty of marital misconduct though the mother was all in all more to blame. There were three children, the youngest was with the mother anyway, the other two 6 and 10 years old. Upon application of the mother for custody of these two children the court split the custody as described. It might be worth noting that though the mother would not be granted custody<sup>of</sup> or access to children if she had committed adultery, the courts showed also increasing reluctance to give custody to an adulterous father even though there was never a question of not giving him access (cf. Hyde v Hyde 1859<sup>(31)</sup> and Re Taylor 1876<sup>(32)</sup>). The adultery bar persisted until B v B in 1924<sup>(33)</sup> when the abolition or

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30). [1897] 1 Ch. D. 786

31). 23 J.P. 471.

32). 4 Ch. D. 157.

33). P.176

invalidity of any adultery bar was finally confirmed. There was, however, a predecessor to this case B v B (Stark v Stark & Hitchin 1910<sup>(34)</sup>), where the court already showed a lenient attitude towards an adulterous mother. In conclusion, it may be said that the abolition of the adultery bar was not fully accepted into the case-law before it was in accordance with general judicial - and probably also public - moral opinion. The same development took place in the law of maintenance concerning the guilty wife's maintenance<sup>(35)</sup>.

c) Age-Limit

The 1873 Act also raised the upper age-limit from 7 to 16, under which custody of a child could be given to a mother, but there are no cases on this issue. This may demonstrate that the provision was socially uncontroversial and could thus slip into the law without litigation.

2 The 1873 Judicature Act

There was a second important Act in 1873, namely the Judicature Act, which merged the two separate court systems in England, the common-law and the equity courts. It also expressly enacted that from then on in cases regarding custody and education of infants the rules of equity should prevail.

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34). P.190

35). see above, II D.2.

The impact of this Act on the law of parental status might even be greater than the impact of the Custody Act of the same year, because it enabled the judges to spread the moderately progressive principles of equity into all branches of the law. They were, however, reluctant to accept the change immediately. The first two cases out of the sample after the Act - both in 1883<sup>(36)</sup> - state completely opposite views on the effects of the Act. The court in Re Agar-Ellis<sup>(37)</sup> still speaks of two separate, independent sets of law. As a consequence the court refused to interfere with the decision of a father who had declined to allow his 17-year old daughter unsupervised contact with her mother. However, the parties in this case had been involved in a long and bitter contest on the religious upbringing of their children. During the second half of the last century, religious feelings were of particular importance and the right to decide the children's religious education was constantly emphasized by the courts. During that time it was considered an important part of the father's common law right and seldom interfered with.<sup>(38)</sup> It is likely that the question of religious education in the background of the case influenced the court's decision and possibly even the view on the relationship between rules of law and rules of equity.<sup>(39)</sup>

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36). Re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch.D. 317; R v Nash (an infant) (1883) 10 Q.B.D. 454.

37). at p.330

38). cf. below, pp 96 f.

39). For further analysis of this case see Chapter IV C.3.(b.)

In R v Nash the court stated explicitly that the court of law was now governed by equitable rules and accordingly, orderd on illegitimate child to be handed to his mother who had instituted habeas corpus proceedings against the foster parents with whom she had placed the child before. At common law the mother was not considered to be related with her illegitimate child<sup>(40)</sup> though in equity she was entitled to guardianship.<sup>(40a)</sup> Thus in applying the rules of equity the court found that the mother in this case had a claim to the custody of her child. This latter view eventually prevailed in subsequent years and was finally confirmed to apply in general in Thomasset v Thomasset in 1894<sup>(41)</sup>

E The Guardianship of Infants<sup>(41a)</sup> Act 1886

#### 1 The Act and Its Preparation

In 1886 the Guardianship of Infants Act was enacted. It raised the age-limit for children who could now be given to their mother <sup>when under</sup> the age of 21. It also settled the criteria which should guide the courts in custody cases, namely the welfare of the child and both conduct and wishes of both parents. Another section provided that the mother was to be statutory guardian after the death of the father, if he had not appointed anybody, and she could also to a limited extent appoint a guardian herself.

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40). Blackstone, op.cit., Vol.I. p.447.

40a). As Jessel M.R. stated in R v Nash at p.456.

41). P.295, at p.300.

41a). 49 & 50 Vict., c 27.

These provisions did not abrogate the father's absolute common law right, but as soon as court proceedings, for custody or access were invoked they made equal treatment of mother and father possible. The strong common law position of the father persevered especially after his death, as long as he had appointed a guardian. From this it can be seen again that reform catered for the most obvious evils of the existing law rather than bring about a comprehensive change, although the latter had been demanded by the women's movement by pleading for joint equal guardianship.

There were cases before the Act which in effect led to two of its major provisions.

In Re Kaye (1866)<sup>(42)</sup> a court took into account, and complied with, the mother's wishes as to the guardianship for her children. The father had died first and appointed no guardian but the mother kept the children. She herself then appointed two guardians. After her death the court followed her wishes, appointing the guardians she had named herself, without denying, however, that she had no legal right to appoint a guardian.

There are also two cases<sup>(43)</sup> where rules for awarding custody were laid down by the courts in terms similar to those in s.5. of the Act which provided that in custody cases the child's welfare and conduct and

42). (1866) 1 Ch. App 387.

43). Re Halliday's Estate, Ex parte Woodward (1852) 2 L.T.O.S. 17,  
In Re Elderton (infants) (1883) 25 Ch. D. 220.

wishes of both parents are to be taken into account :

The first case, Re Halliday is a case on the 1839 Talfourd's Act, and though neither parent's conduct was blameless, the court granted access to the mother and threatened the father with granting custody to her, if he did not comply with the court order. The court stated that since the 1839 Act the paternal right was qualified by his duty towards his wife and by the welfare of the child. The child's welfare as a criterion for determining custody or access was inferred from the age-limit in the Act, as small children in particular, were known to need their mother's care, for if the Act had only been intended to console a mother who had to live separate from a tyrannous husband, it should have given discretion to award custody of children of every age to the mother. Though this case still regarded, according to its time, the paternal right highly, it shows a very 'modern' social attitude and a particularly enlightened and non-common-law way of reasoning.

In line with this, three criteria are expressly stated in the second example, Re Elderton, as to be considered in custody questions : the paternal right, the marital duty and the interest of the infants. Though this selection still gives priority to the paternal right, the welfare of the children is already an independent criterion. The Court already mentioned the mother's right to the custody of her children, and it provided an interesting definition of marital duty : marital duty involves that the partners behave towards each other in a way that they can provide a home together where the children

have the love and care of both. And if by the sole fault of one parent the other cannot be expected to live with him or her and the children are thus deprived of the joint parental affection, that parent is at first sight not entitled to the custody of the children. - This was said against the background of the facts of the case, where the wife had failed to obtain a divorce, but was living apart from the husband due to his intemperance.

## 2 Consequences

After the Act the courts adapted quickly to the new provisions. Already in 1889 ( Re Steel)<sup>(44)</sup> it was stated that although the Act did not abrogate the father's common-law right the court had now the power to modify it. This statement was further strengthened and widened in 1897 (Re A & B)<sup>(45)</sup> and not contested thereafter. Both these cases involved misconduct of both parents. In Re Steel this still led to awarding custody of a very young girl to the father for the reason that the mother was more blameworthy. The court also emphasized that it had only the discretion to modify the paternal right, implying that it need not do so. In contrast to this the court in Re A & B greatly stressed the welfare of the children (it is here for the first time called paramount) and as both

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44). Re Grace Steel (an infant), Steel v Steel (1889) 33 Sol.J. 659

45). [1897] 1 Ch.D. 786.



parents could provide equally well for it, the court awarded custody to each parent for half a year. It also stated that the Act gave discretion to set aside (rather than just modify) common law.

As to the provision which makes the mother statutory guardian after the father's death, this had a peculiar consequence for the development of law by subsequent court decisions : even if the mother was guardian, she had, as any testamentary guardian, to comply with the wishes of the deceased father in respect of the religious upbringing of the children - even if the wishes of the father were not expressly uttered. This looks peculiar, if one remembers Condon v Vollum<sup>(46)</sup> where it was expressively stated that by the means of articles of separation the mother would gain the right to direct her children's religious education - why should she not acquire it as a statutory guardian? But this must be understood against the background of the function of a guardian. A guardian would figure in the place ( like an agent) of the deceased parent and in general had to stick faithfully to the wishes of that deceased parent whereas by articles of separation the father would confer all his rights voluntarily upon the mother.

As the 1886 Act did not abrogate the father's common-law right it is thus not particularly surprising that there were still some cases after 1886 which referred to it in connection with the Act. It can be noticed, however,

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46). (1887) 57 L.T.R. 154

that the welfare of the child gains increasing importance and also that there is an increasing reluctance of the courts to interfere with the mother's position and both these developments find their epitome in the case of Ward v Laverly in 1924<sup>(47)</sup> where both parents were dead and the court refused to enforce paternal directions for the religious education and left the children with the maternal relatives because that would be for their benefit.

F     The Custody of Children Act 1891<sup>(47a)</sup>

1.     The Act and Its Cause.

In accordance with a general feeling for the importance of religious upbringing and the parental right to direct it, several cases arose by the end of last century where children had been left with charitable institutions of one Christian denomination, only to be reclaimed by habeas corpus more or less arbitrarily in order to be placed with an institution of another Christian denomination.

Several of these cases occurred in connection with Dr. Barnardo's Homes and are therefore commonly known as Barnardo's cases<sup>(48)</sup>. In order to prevent parents<sup>(49)</sup> from abandoning their children or having them otherwise

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47). [1925] A.C. 101.

47a). 54 Vict., c 3

48). e.g. R v Barnardo (No.2) (1889) 58 L.J.Q.B.D. 522, R v Barnardo, Jones' Case [1891] 1 Q.B.D. 194.

49). As to cases being the immediate cause for the Act, Cretney, op.cit., p.301.

brought up at other people's expense and then arbitrarily reclaiming them the 1891 Custody of Children Act was passed. It provided that parents who had abandoned their children within the definition of the Act could not reclaim them when it would not be for the child's welfare. The Act, although it might be considered as weakening parental status in general, preserved one then important parental right. Even when by virtue of the Act a parent could not reclaim his or her child, he or she could still determine its religious education. It should also not be forgotten that there are examples of long standing where the court had refused to deliver up children to their parents when they had originally consented to somebody else paying for them (Ex parte Hopkins 1732)<sup>(50)</sup>. Thus overall it may even be said that the Act clarified the law<sup>(51)</sup> rather than enforced a completely new principle.

## 2 Consequences

As it can be shown by the subsequent development the courts tended to narrow down the scope of the Act rather than widen it so that its impact on the overall legal development is not very important, as can be seen in Re O'Hara<sup>(52)</sup>, even more strikingly in R v New<sup>(53)</sup>.

Whereas in Re O'Hara the widowed mother had not seen

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50). 3 P Wms 152, 24 ER 1009

51). cf. also to this effect the court in Re O'Hara [1900] I.R. 233 at 251

52). [1900] 2 I.R. 233.

53). (1904) 20 T.L.R. 583.

any other way to provide for her child than agreeing to a de facto adoption, there were also in fact doubts as how the child had been treated by the foster-parents (more like a servant) and the mother now had re-married and wanted to have the child with her, in R v New the illegitimate-mother just wanted her child to leave foster-parents who had cared for her 10 years and with whom she was settled, and enter an institution where the children were for the first two years not allowed to have anybody visiting them, just to ensure a certain kind of religious upbringing.

So, ~~while~~ both cases have the same result, i.e. that the child is to be handed to the mother, they are in fact quite different, and whereas the reasoning is in parts already quite enlightened in Re O'Hara, there is obviously a relapse in that the court relied on the common law right rather than the welfare in R v New. However, it should be noted that the child in the latter case is illegitimate which may have had some bearing on the outcome.

## G The Guardianship of Infants Act 1925 <sup>(54)</sup>

### 1 The Law Before and After the Act

The next Act of importance, the Guardianship of Infants Act 1925, provides a peculiar feature in the development of the law of parental status. It is a major comprehensive enactment : first it provides that in any proceedings

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54). 15 & 16 Geo. V, c 45

in any court the mother shall be in a position equal to that of the father, and it secondly describes the child's welfare as paramount consideration for the court. This gives the impression of providing a major change on the background of previous statutes and it seems surprising that there are in this branch of law only 7 reported cases within the 20 years both before and after the Act.

## 2     Implications

This picture is, however deceptive.

First, the new statute partly only enacts principles of equity and thus only completes the work of the 1873 Judicature Act<sup>(55)</sup>. There are unreported cases in Chancery, enforcing and pre-empting the principles of this statute<sup>(56)</sup>. One reported example is Re A & B (1897)<sup>(57)</sup> which already terms the child's welfare as 'paramount' and another is Ward v Laverty<sup>(58)</sup> which gives a judgment shortly before the enactment and already relies in full on the principles which are thereafter provisions of the written law; it does, however, only give judgment between relatives on both sides with the parents being dead and thus does not yet as fully implement the principles mentioned as the Act itself does hereafter. Hence the Act does in fact go beyond the case law.

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55). 36 & 37 Vict., c 12; Thus it is also seen by the judges of the time, cf. In re Thain, Thain v Taylor [1926] 1 Ch.D. 676 at 691.

56). Maidment,             op.cit., p.105.

57). 1 Ch. D. 786

58). 1925 A.C. (H.L.) 101

Secondly, the Act embodies general principles of women's emancipation into family law, which are by 1925 comparatively well recognised in society and introduced into the law by the election laws and by the Sex ~~Disqualification~~ (Removal) Act 1919. The issues which are finally settled in this Act had been looked after and fought for elsewhere and before its coming into force. Its enforcement had a symbolic importance as can also be inferred from the preamble and it in fact achieves less than the women's movement asked for.<sup>(59)</sup> It has in this connection even been maintained that the welfare principle was used in order to get the Act out of the feminist fighting line, and also to defeat directly the feminists' claims<sup>(60)</sup>.

This explains the unspectacular appearance of a seemingly spectacular enactment. The 1925 Act may be considered as a kind of codifying Act<sup>(61)</sup> which, as can be inferred from the further development of the law, in itself provided one step within a constant development of the law.

## H The Adoption Act 1958

### 1 Legal Adoption and Social Situation

Legal adoption was first introduced into English Law by the 1926 Adoption Act,<sup>(62)</sup> and with increasing

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59). Maidment, op.cit., p.105.

60). ibid.

61). Maidment, loc. cit, also cf below, Chapter IV, B and C 3d).

62). 16 & 17 Geo. V, c 29



social demand further developed by the Adoption Acts 1950<sup>(63)</sup> and 1958.<sup>(64)</sup> Adoption makes possible a more or less complete severance of child and natural parent<sup>(65)</sup> and thus weakens the status of the latter, especially when it becomes possible to dispense with the consent of a parent. Adoption, however, does itself rely on the concept of parental status in general as it puts the adoptive parents in the position of the natural parents. The 1958 Act even retains one feature of enhancing the status of the natural parent: s.4(2) provides that conditions as to religious upbringing of the adopted child may be inserted into the adoption order.<sup>(66)</sup>

As the 1926 Act already puts mother and (legitimate) father of the child in equal position as to their consent, the English adoption laws do not deal with the parental status as between mother and father - the branch with which this study is mostly concerned. However, subsequently to the 1958 Adoption Act a line of cases evolved which may be considered as linked with this particular aspect of parental status. Though not originally designed for it, the Act has been used as a legal basis for the so-called step-parent adoption<sup>(67)</sup>, where after divorce the partner with custody tries to adopt the children jointly with his or her new spouse.

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63). 14 & 15 Geo. VI, c 26.

64). 7 Eliz. II, c 5

65). T.E. James, The Illegitimate and the Deprived Child, in : Graveson and Crane, op.cit., p.46f.

66). s.13 Children Act, 1975 (23 & 24 Eliz. II, c 30 now only allows for the parents' wishes to be regarded if appropriate, and according to s8(7) conditions may be inserted into an order at the court's discretion.

67). 1961:9,7% 1971: 25.5%, 1976: 44.5% of all adoption orders were made in favour of a parent and step-parent of legitimate children Alastair Bissett-Johnson, Children in Subsequent Marriages, in J.N.Eekelaar and S.N.Katz, Marriage and Cohabitation, (1980), p.429.

As far as can be seen from the reported cases it is invariably the mother who seeks this kind of adoption order. The reason for this lies partly in the fact that fathers are less often awarded custody than mothers,<sup>(68)</sup> but this can hardly account for the current degree of prevalence of step-father adoptions. There is in particular even one case where the new husband also has children of his own, but step-parent adoption is only sought for the children of the wife<sup>(69)</sup>. In this connection it might be interesting to consider what the motives behind these adoptions are and infer from them why they are mostly sought by the step-father rather than the step-mother. The most obvious argument brought forward in favour of these adoptions is the merging of a new and secure family unit<sup>(70)</sup>. This argument, though it gives a valid reason for step-parent adoptions in general, does not explain why these adoptions happen mostly one way and not the other. The other argument is that the children should be integrated into the new family and given more security<sup>(71)</sup>. This argument poses a similar problem.

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68). John M. Eekelaar and Eric Clive, Custody after Divorce (1977), speak of 10.3% of the cases where the husband gets sole custody. If one takes into account the cases of splitted siblings and only considers cases where one parent has sole custody of children, the percentage of fathers with custody of children amounts to 13.1%

69). Re D. (Minors), The Times, 16th June(1981). 2 FLR. 102

70). cf. Jacqueline Priest, Step-Parent Adoptions: What is the Law? (1982) p.289.

71). Re S (infants) [1977] 3 All ER 671, Re B (a minor) [1975] 2 All ER 449, the court, however, maintains in this case that security for the child has already been achieved by a change of name into that of the step-father, and accordingly refuses to make an adoption order.



First it may be asked, why only children with step-fathers have to be integrated and need security and secondly why children have to be merged into a family when they in fact have one of their parents with them and the other partner is the 'newcomer'.

This question leads to the last main argument in adoption cases, namely, that the father has to be integrated and needs security as much in relation to the children by having a certain authority<sup>(72)</sup>, as in relation to the natural father who always provides a disturbance factor for him. This argument seems to me the most logical against the background of the fact that there are so far no reported step-mother adoption cases in England. It may, however, be left open whether this argument shows a real need for the integration of the father or whether it is just generally felt necessary to buttress links between step-fathers and children rather than between step-mothers and children. Whichever is the more realistic interpretation, one may perhaps assume from this that the head and most important element of the family is still the father<sup>(73)</sup> and that the mother's children are outsiders and have to be formally linked with him whereas his children if he takes them with him are automatically part of every family unit he enters. This gives overall

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72). Re S (infants) [1977]3 All ER 671

73). It seems at least important that he is not inferior to the mother, cf. Priest, *op.cit.*, p.293.

the impression that the status of the father is still of special social (if not legal) importance<sup>(74)</sup>

## 2 Consequences

The number of step-parent adoptions has increased considerably<sup>(75)</sup> since in the wake of increasing divorce figures there is an increasing social demand for forming new families. Nevertheless, as can be seen from the reported cases, the courts are very careful and restrictive in developing the law of adoption. They mostly prefer not to dispense with parental consent<sup>(76)</sup> and they do not encourage step-parent adoption. As Cumming-Bruce J. put it rather strongly :

"The court should not encourage the idea that after divorce the children of the family can be re-shuffled and dealt out like a pack of cards in a second rubber of bridge,"

he also spoke of "the use of the statutory guillotine".<sup>(77)</sup> This attitude might be considered as upholding parental status, but this is not the only possible conclusion. With increasing divorce figures and high figures for step-parent adoption the likelihood of children being 're-shuffled' into new families several times in their life increases as well. Such a development would undermine the argument that adoption would give the children more security.<sup>(78)</sup> On the background of serial unions it may

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74). cf. Also Brenda M. Hoggett and David S. Pearl, The Family, Law and Society, where a case is cited, where the psychological need of the father to have the child as 'his' is brought forward.

75). cf. fnt. 67.

76). e.g. Re D(minors) [1973] 3 All ER 1001, In Re H (minors), The Times 26th November 1974, Re B (a minor) [1975] 2 All ER 449

77). Re B (a minor) [1975] 2 ALL ER 449 at 462

78). Priest, op.cit., at p.287 speaks of a possible devaluation of the concept of adoption.

provide more security for the child and thus be for its benefit, when it knows and keeps contact with both its parents. It is in this vein that most of the arguments in judicial reasoning run, and also the Houghton (Stockdale) Committee on Adoption emphasized in their report (1972) that it was important for a child to know its true parentage and accordingly they recommended that step-parent adoptions should be discouraged.<sup>(79)</sup>

Thus the refusal to grant step-parent adoption does not necessarily mean strengthening of parental status but consideration for the child, and as the cases on step-parent adoption are mostly where the mother wants to adopt the children together with the step-father the courts' attitude also means that they do not encourage the possibly still lingering social view about the importance of the father's status within the family.<sup>(80)</sup>

The reluctance of the courts to dispense with parental consent has to be seen from a different angle. S.5 of the 1958 Adoption Act specifies certain grounds on which the parental consent might be dispensed with, the widest of which is unreasonable withholding of the consent. This latter provision has been employed in connection with the welfare-principle to dispense with consent to a certain extent with the argument that a reasonable

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79). Report of the Departmental Committee on the Adoption of Children 1972 (Houghton/Stockdale Committee) Cmnd.5107, para. 105.

80). cf. above, text at fnt. 74.

parent would pay great regard to the welfare of the child<sup>(81)</sup>. But it has been emphasized in Re H<sup>(82)</sup> that consent is not necessarily dispensed with because adoption would be the best for the child's welfare, the latter can only be done if the welfare of the child in a particular case would overrule all other considerations in such a way that a reasonable parent could do nothing but consent to adoption<sup>(83)</sup>. It has also been acknowledged<sup>(84)</sup> regretfully<sup>(85)</sup> that in adoption cases the welfare of the child is not the paramount consideration. From this it may be inferred that a considerable part of the judiciary feel inclined to go further in dismantling parental status than the statute but do not see a way to follow this inclination against the word of the statute, whereas there are also judges who are otherwise inclined.

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81). in Re D [1977] 1 All ER 145

82). (Minors) The Times, 26th November 1974. This was a case of two children of 11 and 14 whose mother wanted to adopt them jointly with her new husband. The father was an artist of unstable character and irregular lifestyle, he had also not always contributed to the children's maintenance. His consent was not dispensed with, as it was not held to be sufficient that the adoption would be better for the children.

83). Re B (a minor) [1975] 2 All ER 449, also a case of step-parent adoption, the father had not seen the child for several years because he had not wanted to disturb the child. The court laid down the test for unreasonably withheld consent; it has to be determined how honest and reasonable the father's desire is to remain the father. The court found in this case that the father's desire to remain the father was honest and reasonable and, accordingly, did not dispense with his consent.

84). In re H. cf fnt. 82.

85). Re W (an infant) The Times 28th January, 1972, cf. also below Chapter IV C 3d).

In conclusion it may be said that there are two areas in adoption law concerned with parental status. One is the question of parental consent where the statute upholds the principle of a parental status. The other is the question of status as between the parents where the social reality still seems to cling to a certain pattern of sex-dependent parental status, whereas the judiciary sticks to principles independent of this particular social pattern.

There were until 1975 no statutory provisions to cope with the particular problem of step-parent adoption. The Children Act of that year, however, a comprehensive enactment on child law - took up the recommendation of the Houghton (Stockdale) Committee to discourage step-parent adoption and to suggest joint custody for step-parent and natural parent if that seems the more appropriate solution (s 10(3)). When the section came into force it had an immediate effect on the statistics. Step-parent adoptions dropped from 44.5% of all adoptions in 1976 to 35.6% in 1977<sup>(86)</sup>. It is yet early to decide on the effect of this provision on the law but it may be stated that the courts have certainly not grown more disposed towards granting step-parent adoption.<sup>(87)</sup>

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86). cf. Cretney, op.cit., p.433.

87). Re S (infants) [1977] 3 All ER 671, Re LA (minors) The Times 27th April, 1978, however, to the opposite effect Re D (minors) (1981) 2 F.L.R. 102

# I     The 1959 Legitimacy Act<sup>(87a)</sup>

## 1     Before the Act

Alongside the inroad into the strong common-law position of the legitimate father which directly ameliorated the position of the legitimate mother and that of the child, the position of the illegitimate mother and more recently that of the natural father has gained importance.

The position of the illegitimate mother already started to improve in the last century as can be seen in R v Nash, Re Carey in 1883<sup>(88)</sup> as against Re Ann Lloyd in 1841<sup>(89)</sup>. In Re Lloyd it is stated that where the mother instituted habeas corpus proceedings to regain custody of her illegitimate daughter the mother is at law not considered to be related to her illegitimate child,<sup>(90)</sup> accordingly the girl is left to go where she pleases and not handed over to the mother. In contrast in R v Nash an illegitimate child is delivered up to the mother in habeas corpus proceedings,<sup>(91)</sup> as under the influence of the 1873 Judicature Act equitable rules now apply in these proceedings. In equity the courts had always regarded the claim of the mother to her illegitimate child. But it was not before the 1926 Legitimacy Act<sup>(91a)</sup> that her position was to a certain extent recognised at law. By

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87a). 7 & 8 Eliz.II, c 72

88). 10 Q.B.D. 454

89). 2 Man.& G.546, 133 ER 1259

90). Maule J. "how does the mother of an illegitimate child differ from a stranger?" *ibid.*, 1260

91). cf. also fnt 36 and text at fnt. 40

91a). 16 & 17 Geo.V, c.60

1931 in Re Carroll<sup>(92)</sup> her position was at least equal to that of the legitimate father in relationship to strangers. In this case a Catholic mother had placed her child with a Protestant adoption society. Later she claimed it back to have it brought up in a Catholic children's home. The court granted her petition for custody.<sup>(93)</sup> It even appears not unlikely that her position was less fettered by the welfare principle than that of the legitimate father as legislation had at first mainly striven to qualify this right by the welfare of the child and the law as to the position of the illegitimate mother could for some time develop in the shadow of and thus slightly differently from that concerning the position of the legitimate father.

After the Second World War the position of the putative father gains strength. In 1955 (Re Aster)<sup>(94)</sup> the mother wanted to have the child adopted, she was therefore deemed to have given up her rights. Thus the father's suggestions were considered independently and accordingly given legal effect. Though the judges profess the decision to be according to the welfare of the child, they only pay lip-service to it by saying that the 'tie of blood' should be given legal effect to.

There was also a practice in the magistrates' courts

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92). [1931] 1 K.B. 317

93). for further analysis of this case, cf. Chapter IV. C 3.d).

94). [1955] 2 All ER 202

to give custody to the putative father when he applied for it under the Guardianship of Infants Acts 1886 and 1925. This development found its end in 1956 when Roxburgh J. stated that it could not be inferred from the letter of the statutes that they meant to include the putative father when they spoke of 'father' and that he thus had to bar such a development as had so far taken place in the magistrates' courts (Re C.T., re J.T. (infants))<sup>(95)</sup> As a consequence of this decision the 1959 Legitimacy Act was passed<sup>(96)</sup> which enabled the putative father to apply for custody or access under the Guardianship Acts.

## 2 Consequences

After the Act the courts have developed the law and the pendulum has swung back slightly in order not to give the putative father undue weight, e.g. it is stated in Re Adoption Application 41/61<sup>(97)</sup> that the single judge had paid too much attention to the position of the natural father and thus been in danger of establishing a new 'common-law' right. Also, in that case, §.3 of the 1959 Act is seen as a procedural position to hear the putative father in order to see what he can contribute to the child's welfare<sup>(98)</sup>. Thus, eventually, the 'tie of blood' argument loses its independent position and is integrated into

95). [1956] 3 All ER 500

96). cf Re Adoption Application No. 41/61 [1962] 3 All ER 553, at 563

97). cf fnt. 96.

98). This is developed later further in S v O (1978) 8 Fam. Law, 11  
M v J (1978) 8 Fam. Law, 12.



the welfare principle.

There are two cases which give very strong weight to the natural father inasmuch as they order conditions for access to be put into an adoption order for which the mother had applied. It is not quite clear what the main concern of the court was in those two cases (Re J 1973<sup>(99)</sup> and Re S 1976<sup>(100)</sup>). In both cases the father could offer special guidance to the child as member of a different culture or race, in Re J the father was Jewish in Re S the father was Singaporean. This was considered to be important for the child's welfare. In both cases the court may also have been influenced by the fact that the natural father in each case had known the child for some time (the children were 6 and 7 years respectively), and was very attached to the child. But it could have been maintained with equal ease that an undisturbed family life would be better than openness about parenthood. In a way those two cases are most closely in line with the step-parent adoption cases in that the parents had a close contact with each other, the father had established a close relationship to the child and the mother wanted to adopt the child together with her new husband. The only difference between natural and legitimate father as viewed by the courts here is probably that had the fathers in Re S

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99). (a minor) [1973] 2 All ER 410

100). (a minor) [1976] Fam.1.

and Re J been legitimate, adoption orders would probably not have been granted at all. But whether an adoption order with inserted conditions can in such a case fulfil the purpose of a full adoption order remains an open question. Concluding, it can be noted that with the weakening of the status of the legitimate father the status of not only the mother (whether married to the father or unmarried) but also of the natural father has been strengthened. But in general the mother's as well as the father's status has been dwindling gradually at least since the beginning of this century, while the welfare of the child has gained an overall priority.

As to the status of the parents of an illegitimate child a recent development should be mentioned briefly.

In the belief that they would meet current social demands the Law Commission in their Working Paper on Illegitimacy suggested that the concept of illegitimacy should be abolished entirely<sup>(101)</sup>. This meant besides other points that a parental position should be automatically conferred upon the natural father, thus giving him full parental status<sup>(102)</sup>. However, the public response to this suggestion was overwhelmingly negative. Although the majority agreed that discrimination against

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101). Working Paper No. 74, Illegitimacy, (1979), paras. 3.14 - 3.22

102). Paras. 3.15, 3.16.

illegitimate persons of any kind should be abolished, they were strongly opposed to the idea that the illegitimate father should have full parental status<sup>(103)</sup>. The reasons given were inter alia that mothers might refuse to identify the father for fear of interference and thus the child could draw no benefit from its father at all, and that such a step would encourage step-parent adoption of illegitimate children (also in order to avoid interference) and thus deprive the child of its natural father<sup>(104)</sup> altogether.

As a consequence the Law Commission finally suggested in their Report that every other distinction between illegitimate and legitimate children should be abolished but they refrained from suggesting automatic parental rights for the natural father.<sup>(105)</sup>

#### J The Guardianship Act 1973<sup>(106)</sup>

##### 1 Remnants of Inequality: The Father's Name

Another interesting strand of cases starts after the Second World War, ie., the name-cases. These are cases where the mother who has the custody of the children tries to or actually does change the children's names after her re-marriage to a new partner. These cases are related to the cases of step-parent adoption<sup>(107)</sup> which have, as stated

103). Law Commission Report, No. 118, (1982), para. 4.15.

104). Para. 4.26 (a), (b)

105 ). para. 4.50.

106). 21 & 22 Eliz. II, c 29.

107). Bissett-Johnson, op.cit., p.389.

above, so far only arisen when the mother wanted to adopt her own children together with her new partner. There is, however, one interesting difference between the two groups of cases. Whereas the adoption cases can be decided with the help of the Adoption Act 1958 there is no authority for the name-cases before the first of them in 1962 (Re T. orse H).<sup>(108)</sup>.

The fact that the name cases occur at all seems to me particularly interesting, first because in English Law the name in itself has no significance, since it can be altered easily by deed-poll, and secondly, because the name of a child and what it says about the relationship to the adults with whom it lives, is closely related to the question of its status as a legitimate child of one or the other party to the marriage, or as an illegitimate child. So it appears as somewhat surprising that the name gains such an importance when parental status in general is being constantly weakened. In Re T (orse H) the courts states that the right to determine a child's name rests with the father as guardian of the child and can therefore not be changed by the custodian mother, and accordingly orders the name of the child to be rechanged. In Y v Y (1969)<sup>(109)</sup> although the right is still said to rest in the father it is stated obiter that as the mother was custodian he could not unilaterally alter the child's name. Moreover based on the welfare of the children concerned,

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108). [1962] 3 All ER 970

109). [1973] 2 All ER 574

the court refuses here to order a rechange of name. This points to a concept of joint equal guardianship which is favoured by the court in a way that comes close to assuming legislative power.

## 2 The Act and Its General Impact

The 1973 Guardianship Act, however, did not take up this thread but introduced equal but separate guardianship for both parents probably for practical reasons. It was also avowedly for practical reasons<sup>(110)</sup> that several Bills<sup>(111)</sup> before the Act, which suggested joint guardianship, were rejected by Parliament. But by 1973 it was considered a matter of a prevailing principle which should be introduced into English Law - separate rather than joint guardianship then being the more practical solution<sup>(112)</sup> against this background.

The impact of the Act has to be seen in three different ways : practical, psychological and legal. In practical respects the Act is important for the cases where the mother is left with the children without any court order and the father does not take an active part in the children's life. e.g. because he has deserted his family. Before the Act the mother in such a situation could not act freely in some respects e.g. she could not get a passport issued for her children, which is now possible for her. The Act is of less importance when

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110). cf Maidment, op.cit., p.141.

111). in 1962, 1963, 1964, cf. Maidment loc. cit.

112). Maidment, op.cit., p.142.

the parents live in harmony, because they would now, as before the Act, solve any conflicts peacefully. This way of regulating social conduct is a new feature in this branch of law, its particular significance will be considered in the next chapter.

### 3 The Effect of the Act on the Law

The effect of the Act on the development of the law is not easy to judge, partly because insufficient time has elapsed and<sup>(113)</sup> partly because the law is not very clear either before or after the Act.

As to the name-cases it can be said that the judges are not too ready to consent to a name change, not, after the Act, because the mother as opposed to the father does not have any guardianship rights, but because it is often deemed necessary for the welfare of the child to maintain a link with the father by keeping his name<sup>(114)</sup>. In fact, regulations have been issued which make a formal name-change without the consent of the parent who has not got the custody of the child or leave of the court impossible<sup>(115)</sup>. This is reminiscent of the case Y v Y<sup>(116)</sup> with its favouring of something close to joint rather than separate equal guardianship. This may hint that the effects of separate equal guardianship are not really always desirable, but it provides a practical compromise.

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113). Also there is so far no record of any cases have been brought under s 1 (3) of the Act.

114). e.g. L v F, The Times, 1st. August, 1978.

115). Matrimonial Causes Rules 1977, r. 92 (8)

116). [1973] 2 All ER 574

However in some cases name changes have been granted generously and the latest tendency seems to be to allow an informal change of name rather than a formal one<sup>(117)</sup>. It remains to be seen which attitude will prevail in the long run. But after what has been said in connection with step-parent adoption on the background of changing family units it may also be suggested here that the stability of a child would be better preserved by leaving its name unchanged and that it would be less unsettling to have a different name from the rest of the family than having to change its name and thus part of its identity possibly several times. Especially from this point of view the case of W v A<sup>(118)</sup> seems to peculiarly preserve a feature of status law, as for the child the practical consequences are not much different whether its change of name is authorized by deed-poll or not, but for the father it might be of symbolic importance for his position as a father that the legal name of his child is still identical with his own. Overall it cannot be clearly determined whether the latest development in the name-cases favours parental - and, because they are name-cases, mostly paternal-status, as similarly to step-parent adoption, a refusal by the courts to consent to a name-change does not necessarily mean strengthening of the father's position but possibly granting stability to the child.

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117). W v A [1981] Fam,14, Crich v Crich (1977) 7 Fam. Law 239

118). [1981]Fam,14.

The other branch where the legal effect of the Act might be seen is the law of custody. However, before the Act there were no clear and overall consistent rules and cases for the settling of custody disputes. There were and still are a number of possible court orders, which often overlap in their concepts<sup>(119)</sup>. The 1975 Children Act was an attempt to clarify the concept of parental rights and custody and was as such partly successful. But as it is not applicable to all proceedings concerning child custody, there is still a considerable amount of confusion. Thus also the effect of the 1973 Guardianship Act is not easily to be discerned. Perhaps most clearly it can be traced in connection with split custody orders. These orders were judicially invented in 1954<sup>(120)</sup> and further affirmed in 1963<sup>(121)</sup> where it was maintained that authority for this kind of order was in fact provided by the 1886 Guardianship of Infants Act. Split custody order means that one parent gets care and control, the other custody. As the latter was mostly the father and the former the mother, who was not guardian of her legitimate children, the same effect could probably be achieved by just awarding care and control to the mother and leaving the father to exercise his guardianship. After the Act a split custody order means that the mother has not only care and control but

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119). cf. Mrs. Justice Booth, Child Legislation, Custody: Its Judicial Interpretation and Statutory Definition (1982), Statute Law Review pp 71-77; and Maidment, The Fragmentation of Parental Rights, 1981, C.L.J. pp.135ff.

120). Wakeham v Wakeham [1954] 1 W.L.R. 366

121). Re W (J.C.) (an infant) [1963] 3 All ER 459



also the rights of a guardian, and as she has, according to the concept of the 1973 Act, separate guardianship, she can in theory exercise her rights and duties independently of the father. The father can also exercise his guardianship independently of the mother, as far as he finds opportunity to do so, e.g. he can have a passport issued for his children and take them abroad, while they stay with him for a holiday. However, if conflicts arise, the parents have to invoke the jurisdiction of the courts.

As separate guardianship, as opposed to joint guardianship, enables each parent to exercise his or her parental rights and duties independently of the other, there is no legal necessity for the parents to consult each other in respect of their children's education. In case of divorce, and if the mother has care and control, it is only by awarding custody to the father that he gains (among other, not clearly definable rights<sup>(122)</sup>) the right to be consulted regularly in respect of his children's education. Thereby it does not make much of a difference whether he is given sole custody or custody jointly with the mother. Giving him custody jointly with the mother only means that he has to consult her, when exercising his parental rights and duties. But if the mother has the daily care of the children, he will have few opportunities to actually try to exercise his rights: If he tries to do so while the children are with the mother, she can contradict as an equal guardian. Accordingly, the parents have to find a solution or ask for a court order. Only if the children are staying with the father, e.g. for a holiday, a joint custody order could differ significantly from a sole custody order.

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<sup>122</sup>). cf. Maidment, Child Custody and Divorce, p. 27.

It follows that before the 1973 Act a split custody order was similar to having no custody order with care and control to the mother, whereas after the Act a split custody order is similar to a joint custody order with care and control to the mother. After the Act, a custody order - whether "split" or jointly with the mother - in fact grants more to a father than it would have done before the Act when the father used to be the sole guardian of his children.

So much on the legal effect of the Act, as might have been inferred from its words and concepts. However, in 1980 Dipper v Dipper<sup>(123)</sup> was decided, and split custody orders were treated disapprovingly. Ormrod L. J. stated that "the basis of the judge's order ... was ... unsound", and goes on that split orders are "not really desirable"<sup>(124)</sup>. Cumming-Bruce L. J. chooses even stronger language, referring to:

"a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent" (125)

It is also emphasized that by these orders the parent who has not the burden of the day to day care is given too much importance, and that this would be an affront to the parent with care and control. Apart from the fact that this is a sound psychological argument, it is not a very convincing one, if one considers that now by the new Act the mother with care and control is in any case guardian of her children. Whatever her custodial status, she cannot be superseded by the father in her decisions. As said above, giving the father (even: sole) custody only means that he

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123). [1980] All ER 722.

124). At 731.

125). At 733.

has a right to be consulted regularly in respect of his children's education. Thus, in a way, disapproving of split custody orders, like the court in Dipper v Dipper, would have made more sense before the 1973 Act, when the affront and the practical problems for a mother with care and control were in fact grave. Then the father could simply decide in matters of education without asking the mother who, in her turn had to cope with the practical consequences of the father's decisions. Thus the reasoning of Dipper v Dipper is not easy to understand.<sup>(126)</sup>

Some light, however, will be cast on the matter, if one looks at the following aspect: The judges state that now both parents have equal rights, quite in accordance with the Act. But they do not fully consider its legal effect on split custody orders which has just been set out.<sup>(126a)</sup>

Their true object can be seen from their further reasoning. Cumming-Bruce L. J. states, "The parent is always entitled, whatever his custodial status, to know and to be consulted about the future education of the children and any other major matters ..."<sup>(126b)</sup> Strictly speaking, this statement is only true in relation to parent and stranger and not between both parents as equal but separate guardians. As stated above, when the parents live separate, a right to be constantly consulted and informed, actually arises from custodianship and not from guardianship<sup>(126c)</sup>. Thus in fact the reasoning of the judges, though practical and reasonable, is not quite in accordance with the legal concept of the Act but rather favours the concept of joint guardianship

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126). cf. also, Maidment, Child Custody and Divorce, p. 27.

126a). pp. 120 f.

126b). at p. 733.

126c). cf. above pp. 120 f.

which the judiciary had already favoured before 1973.<sup>(126d)</sup>. However, the judges act in accordance with their ideas by using conventional means, by awarding joint custody to the parents, not noticing that compared to the single judges order their order has a different psychological rather than a different legal effect.

## K Conclusion

The development of the law of parental status shows a change from the strong common-law position of the father via quasi-equality of the mother (since 1925) to equal but generally weakened status of both parents, facing an increasing importance of the consideration for the child's welfare<sup>(127)</sup>. With the weakening of the status of the

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126d). Y v Y [1973] 2 All ER 574, cf. above p. 116.

127). cf. J. C. Hall, The Waning of Parental Rights (1972) 31 (1) C.L.J., pp. 248-265.

legitimate father not only the legitimate mother but also the illegitimate parents first the mother and more recently the father gained a stronger position.

Throughout the whole development a strong mutual dependence of judicial and legislative law can be seen. Within this the impact of judicial law on statutory reform takes different shapes.

First one can distinguish the immediate and quick influence of single cases as can be seen in connection with the separation deed provision of the 1873 Guardianship of Infants Act, and the provision to give custody to the natural father in the 1959 Legitimacy Act. This latter example already leads to the next category as in fact there had already been a long standing practise in the lower courts pre-empting and thus preparing this provision.

There are then secondly Acts prepared by longer development in the Courts, either in that the Courts created a socially unbearable situation which made parliamentary intervention necessary, as before the 1839 Talfourd's Act, or in that they evolved principles that were just transposed into the statute, as before the 1925 Guardianship of Infants Act, or in that they favoured certain trends which were also enforced by the statute but not taken directly from the case law, as the favouring of joint equal guardianship before the 1973 Guardianship Act. Judicial response to the statutes proved to be often more advanced than it is given credit for.

The third and last category is characterized by a hostile attitude of the judiciary to legislative law.

There is one Act - the 1891 Custody of Children Act - which had virtually no influence on the development of law because of the narrow interpretation it suffered from the courts.

Particular judicial hostility was shown towards the abolition of the adultery bar by the 1873 Act, but it may well be that the judges were in fact more in accordance with the public opinion based on 'Victorian' morals and convictions than the enactment.

Otherwise the judicial reaction is often careful and just slightly conservative and thus perhaps provides a certain smoothness and continuity of legal development.

CHAPTER IVSTATUTORY DRAFTING AND JUDICIAL  
REASONING IN THE LAW OF PARENTAL STATUSA. Purpose

This chapter will seek to demonstrate how the method and structure of statutory drafting and judicial reasoning developed over the relevant period and how the English common law system thereby acquires some new characteristics and changes into something which, in parts, resembles a civil law system.

As pointed out in Chapter I, the main difference between a traditional common law system and a traditional civil law system lies in the form and function of legal sources and the approach which the judges take to them.

A civil law system is mainly based on broadly termed and well organized codes which each cover a large area of the law comprehensively. The codes contain general principles which are guidelines for the judges. Academic writers as well as judges provide a gloss on the code provisions. The judges reason freely from the principles of the code, they are open to philosophical ideas and public policy notions. They are not bound by a doctrine of precedent, but in their turn they reason by analogy from the code provisions, thus making law under the cover of the code which may be (but seldom is) overruled by subsequent judges.

In contrast to this the traditional common law consists of detailed legal rules derived from the holdings of cases, and more recently, from statutory provisions. Statutes are traditionally casuistic and brief amendments of the common Law. They are construed literally by

the judges. Common law judges are bound by a doctrine of precedent which is mostly extended to cases that deal solely with statutory interpretation<sup>(1a)</sup>. They are sceptical of philosophical ideas and notions of public policy and in this adhere to an empirical tradition and an individualistic outlook on law as well as on society.<sup>(1b)</sup> They may make law when a new situation, for which there is no precedent, is brought before them in an area of law which is still only covered by cases, but they will not make law when they are concerned with the interpretation of statutes.

It is the object of this chapter to show how far the English legal system has in fact moved away from this common law approach; how statutes have lost their singular character and have taken a shape which in some parts resembles continental codes; how the judges to some extent relax in this liberal construction of statutory provision and become open to general principles and notions of public policy.

## B. Statutory Drafting

### 1. Sample

In order to look into the methods of statutory drafting I have chosen the seven Acts between 1839 and 1973 solely concerned with parental guardianship or

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1a) . cf. Cross, Statutory Interpretation, pp.30,42, however, a precedent on the interpretation of one statute can normally not form a precedent for the interpretation of another.

1b) . cf. Chapter I above, pp.11,25f



custody<sup>(1)</sup>. This choice was influenced by the fact that in order to evaluate statutory drafting it is essential to look at a statute as a whole, so I had to choose Acts which deal with subject matters that are entirely covered by my topic of parental status, a conditions which is fulfilled by the Acts in question.

I have included the 1971 Guardianship of Minors Act although it is only a consolidating Act, rather clarifying than developing the law. This is, because a consolidating Act though not changing the law can nevertheless show a change in drafting method. Also the fact that there is a consolidating Act at all is a phenomenon to be looked into.

It is to be expected that the character of the Acts changes as they serve different functions at different periods. At the outset of the examined period, a statute was an exception in the legal system and it was employed to amend a socially unbearable flaw in the common law. Today nearly every area of family law in general and law of parental status in particular is governed by statutes which no longer refer to the common law but mainly to other statute law so that there is, at least in parts, a comprehensive coverage of the law by statutes.

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1). Custody of Infants Act 1839, 2 & 3 Vict., c.54. (Talfourd's Act).

Custody of Infants Act 1873, 36 Vict., c. 12

Guardianship of Infants Act 1886, 49 & 50 Vict., c.27.

Custody of Children Act 1891, 54 Vict., c. 3.

Guardianship of Infants Act 1925, 15 & 16 Geo.V., c.45.

Guardianship of Minors Act 1971, 19 & 20 Eliz.II., c. 3.

Guardianship Act 1973, 21 & 22 Eliz. II, c. 29.

## 2. Method

In order to determine how the statutes change their shape and character over the relevant period, I shall look into the following aspects:

### (1) Compass and length of statutes

The compass and length of a statute will show how large an area of the law it covers. The traditional common law statute normally governs a few situations, whereas a civil law code, and even a civil law statute, covers a whole area or branch of the law comprehensively. Thus, with the increase in length and compass of statutes the common law system loses one of its common law characteristics.

### (2) Lay-out and structure of the statutes, use of general provisions, degree of speciality in other provisions.

Under this heading I will show how far the statutes cover an area of law systematically rather than casuistically. As described above<sup>(2)</sup> civil law codes are divided into books, titles and sub-titles, each headed by some provisions which will lay down the general principles which govern the area of law to follow. In a code, sections of one type will be put together, and if there are procedural provisions, they will be separated from the provisions of substantive law<sup>(2a)</sup>. A traditional common law statute sets

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2) .p.29{

2a) . A civil law code, however, will normally only contain either procedural law or substantive law, it is only in a civil law statute where there may be procedural as well as substantive provisions, and they will be set out separately.

out the cases it is meant to govern one after the other usually in great detail, without paying heed to systematic organization.

- (3) How far the provisions are court-centred or on the other hand how far they state the law in general.

This will demonstrate how far the English legal system remains a court-centred system. The traditional function of the law in a common law system is to settle disputes in court according to the rules developed by the same court when settling earlier disputes. Thus, also the traditional common law statute will only provide some other rules for the courts to settle disputes. Civilian legislation is often meant to implant certain social goals into the law to provide rules for conduct so that disputes will not even arise. Such rules will not refer to the courts. Looking at it the other way round, the more English statutes contain provisions which do not refer to the courts, the more the English law loses its common law characteristics and moves towards a civil law system. Under this heading I will also consider whether the reference to the court is direct or indirect, eg. "no order shall be made," or "the order may contain". A direct reference puts emphasis on the court, the provision is, in the true sense of the word 'court-centred'. An indirect reference emphasizes the law which the court is to administer, it is therefore not 'court-centred' in a narrow sense but 'court-based'. Though the court is still there, it is no longer so important. In this context attention will be paid as to how, and how much, discretion the statutes give to the courts.

- (4) What guidance the statutes provide for construction of statutory provisions.

The guidance for construction as provided within the statutes themselves as well as by the Interpretation Acts will be considered at the end of this sub-chapter in order to find out whether changes have also taken place in this area and what conclusions can be drawn from such changes.

### 3. Analysis

#### a) Custody of Infants Act 1839 (Talfourd's Act)

This Act covers less than a page in the statute book and consists of five sections, it is solely concerned with the case of a mother whose children are in the sole custody of their father and provides for the Lord Chancellor to grant her access to them and custody when they are under 2 years old<sup>(2b)</sup>.

The new substantive law can be found in sections 1 and 4, the former is printed as one with the preamble and contains the main provision, the latter contains the adultery bar. Sections 2 and 3 are procedural provisions and section 5 caters for repeals and amendment during the session of Parliament in which the enactment was passed. The Act contains no general provisions. It shows no systematic organization, thus retaining common law features. All Sections with the exception of section 5 deal with the 'courts',<sup>(2c)</sup> that are to administer the new law, they

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2b). cf. Chapter III, pp. 80 ff.

2c). 'Court' is taken to mean every judge or judicial body vested with the power to deal with the law covered by the statute.

describe the new law solely in relation to the court. Thereby sections 1, 2 and 3 expressly name the court concerned whereas only the proviso, is worded in the passive voice, "that no order shall be made...". Thus, this section is not court-centred in the narrow sense of the word, but as it is the only section so worded, no further inference can be drawn from this. (2d)

As sections 2 & 3 are procedural provisions, which normally do not give discretion to the courts concerned, and section 4 contains an absolute proviso, consequently section 1 is the only provision to grant discretion to the court. Three terms of discretion appear in this section, twice "as we shall deem convenient and just", and once "if he shall see fit.", they refer to the orders the court may make and to the conditions it may insert into the orders.

All in all this Act fits entirely into the picture of a traditional common law statute : it is brief, and court-centred. It does not show any signs of organization as there would be in a code : the provisions follow one after the other as they might in a speech of a member of Parliament, rather than presenting a systematic description of the law. The lack of systematic approach can also be seen from the wording of section 1 which contains three terms of discretion, where one at the beginning or at the end might have been sufficient.

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2d). cf. above, p.128, this phenomenon of indirect reference to the courts gains importance in later Acts.

b) Custody of Infants Act 1873.

This Act is as short as its predecessor and it only consists of three sections. However, it has a larger compass : it deals with the material of the 1839 Act - extending it - as well as with the case of a separation deed between mother and father which provides for the custody of their children.

The preamble is printed separately here. The new substantive law is contained in sections 1 and 2, section three being a legislative provision, repealing the 1839 Act.

This Act, like its predecessor, contains a proviso. However this time the proviso immediately follows the statement of law, to which it is applicable, not in a section of its own, apart from the other substantive law in the Act. This has become necessary, because the Act treats two 'cases' <sup>(3)</sup> and the proviso only applies to one of them.

Also, there are no procedural provisions in this Act which could have tempted the draftsman to put them so as to separate the proviso as he did in the 1839 Act. Accordingly the structure of this very short Act is not sufficient evidence for it being systematically organized.

The proviso is also interesting for another reason :

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3). In fact it covers more than two cases, as section 1 now - as opposed to the 1839 Act - includes the case where the mother has already custody of the children.

"Provided always, that no court shall enforce any such agreement if the Court shall be of the opinion that it will not be for the benefit of the infant or infants to give effect thereto." Here, for the first time, the legislator introduces a general principle into the law of parental status, even though it is only by a proviso. Nevertheless, as in the 1839 Act all but the legislative provision are court-centred. This can in particular be seen by the wording of the proviso. The 'benefit of the infant' is in itself a broad term which gives a certain discretion to the court, so it would have been sufficient to say "no agreement shall be enforced that will not be for the benefit of the infant"; instead it says, "no Court shall enforce...if the Court shall be of the opinion...". By this wording the court is very much put into the foreground<sup>(3a)</sup>, it is also given express discretion 'shall be of the opinion' in spite of the fact that the welfare-principle already itself embodies discretion given to the court indirectly. In section 1 there are two identical terms of discretion "as the Court shall deem proper" where there had been three terms in the 1839 Act.<sup>(4)</sup>

Seen as a whole, the 1873 Act is still very much a common-law amendment Act. However, it has increased in compass and it contains a general principle. The lay-out

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3a). cf. above, p. 128

4). cf. above, p. 130

12 which applies to tutors according to Scots law and is worded in a most complicated way. It moreover contains elements of definition rather than just substantive law, :

"In Scotland tutors being administrators-in-law...who shall, by virtue of this office...shall be deemed to be tutors within the meaning of an Act...and shall be subject to the provisions thereof..."

It can be easily perceived that the section was placed towards the end of the statute as it did not properly fit anywhere else. Sections for construction (sections 8 and 9) as well as procedural provisions (sections 10 and 11) are kept together within the Act and follow the substantive law. This shows an organized structure, not traditionally found in a common law statute.

There are three sections which contain broad, general terms, s 3(3) "welfare of an infant", s 5 "welfare of the infant", "conduct of the parents", "wishes as well of the mother as of the father" and s 6 "welfare of the infant" (twice) <sup>(4a)</sup>. Thereby "welfare of the infant" and "conduct of the parents" <sup>introduce</sup> a general principle into the Act. They give discretion to the court indirectly, as a general principle never tells the court exactly what to do, but provides it with a guideline only, and the court can decide for itself how to put this guideline into practice. (The only "wishes of the parents" though listed with the other two terms and apparently as indeterminable do not quite

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4a). These terms are to apply to orders of custody or access, the removal and appointment of guardians, and to general orders by the court on matters upon which the guardians disagree.



seems more organized, as the preamble is printed separately, but this on its own is not very strong evidence of a different approach of legislator or draftsman to statutes and it is difficult to draw any inference from the structure of the statute as it only contains 3 sections, which did not give the draftsman much choice as to their order.

c) Guardianship of Infants Act 1886

This Act shows a picture quite different to that of its predecessors.

It consists of 13 sections and covers three pages in the statute book. It also covers an increased area of the law : the guardianship of children in all possible cases when one or both parents are dead, including the removal of guardians, the custody of children in general, and the more particular case of declaration in a decree of divorce or separation to the extent that one parent is unfit to have the custody of the children of the marriage.

The lay-out of the Act does not differ from that of the 1873 Act with one exception, normally that one of the sections, S.3, is divided into sub-sections and s.11 contains sub-divisions 'a', 'b', 'c'. Both these sections are evidence of an attempt to systematize the law covered by them. Only 7 of the 13 sections of the Act contain substantive law; the rest are procedural provisions or provisions for construction (s.8 and 9) and other general provisions like s.1, setting out the short title of the statute. The Act shows a high degree of systematic organization in that, with one exception, all the provisions of substantive law are set out in successive sections, from section 2 to section 7. The exception to this is section

fit into the notion of a general principle. Once the parents have voiced them they are clear as they are and not open to a judgment of the court, the court can only decide to regard them or to disregard them).

For the first time with this Act a statute contains provisions of substantive law that state the law as it is or should be outside the courts : "On the death of the father of an infant,...the mother, if surviving shall be the guardian of such infant...".<sup>(5)</sup> The same applies to s3(1), s4 and the first part of s12. Section 3(1) confers certain powers on the mother to appoint a guardian, Section 4 states the powers of the guardian in general and Section 12 applies to Tutors in Scotland.

Even among the provisions which do not contain substantive law there are three, namely sections 1, 8 and 9, which do not refer to the court as being vested with power to administer the law of the Act, though sections 8 and 9 deal with construction which is normally done by the courts. However, for instance, counsel could construe a word of the statute in argument, whereas he could not entertain an application. Thus these sections cannot be considered as being court-centered. In this context s13 proves interesting. It is a provision saving the jurisdiction of certain courts to appoint and remove guardians. It shows the increasing impact of statute law in general : in 1839 Parliament did not think it necessary to state that the jurisdiction of the Lord Chancellor on children was not impaired by the new Act.

Wherever the court appears in this Act in provisions of substantive law<sup>(6)</sup> it is vested with discretion. There

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5). First part of section 2.

6). With the exception of the second part of s12, which is, as pointed out, an unusual provision.

is also one procedural provision - s.10 - with a term of discretion. It may be interesting to note that there are 11 different terms of discretion in the statute and only one of them appears twice.

In summary, it may be stated that the 1886 Act has moved away to some extent from the common-law amendment statute. It has a comparatively wide compass, it states - in some parts - the law as it is or should be, outside the courts, it contains other provisions which are not court-centred<sup>(6a)</sup> and it assumes an organized structure in so far as sections of the same category (substantive law, procedure, construction) are put together.

d) Custody of Children Act 1891

This Act is just over a page long and consists of 6 sections. It is concerned with cases where parents have abandoned their children or have left them to other people to be brought up at the latter's expense and it deals with custody, religious education and cost of upbringing of such children. In compass it is therefore comparable with the 1873 Act with the only difference that the law covered by the latter Act is more diverse<sup>(6b)</sup> than the law covered by the 1891 Act.

The lay-out of this Act is basically the same as the one seen in the 1886 Act, except that this time one of the

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6a). cf above, p.118, this new phenomenon shows perhaps most significantly a shift towards a civil law system.

6b). The 1873 Act dealt with custody and access on one side and separation deeds on the other side.

sections is divided into sub-sections, s.3 has sub-divisions of 'a' and 'b'.

The Act contains 4 provisions of substantive law, sections 1 to 4, s.5 is a provision for construction and s.6 sets out the short title of the Act. Thus again, like in the Act before, provisions of substantive law and other provisions are kept separately, and especially here the short title is placed towards the end of the Act with the other general provisions and not, like in the 1886 Act, at the beginning. Thus the Act shows an organized structure not typical of a common law statute.

There are two general broad terms in the statute, "all circumstances of the case" in s.2 and "welfare of the child" in s.3 both embodying general principles, which are more typical of a code than of a statute. All the sections on substantive law refer to the court and all of them give discretion to the court - with five different terms of discretion, two of which are used twice. The former shows that the law is still seen as centered around the courts. The latter, the variety of forms of discretion, shows a low degree of systematic organization in statutory drafting. Both are typical common law features.

This Act taken as a whole resembles the 1839 and 1873 Acts more than its immediate predecessor especially in compass and length, and insofar as all its sections on substantive law are court centered. It is, however, drafted in a slightly more systematic manner, if one considers the sub-divisions of s.3 and the fact that the general provisions and the provisions of substantive law are not mingled. Also, this Act contains more general

principles than even the 1873 Act by using two different broad general terms.

e) Guardianship of Infants Act 1925

This Act only consists of 11 sections, but it spreads over as much as 8 pages in the statute book, one schedule included. The Act covers most of the law of custody and guardianship of legitimate children.

Most of the sections of the Act are divided into sub-sections<sup>(7)</sup> and s.7(1) and s.9(1) and (4) have further sub-divisions into 'a' 'b' and 'c'. There is also something completely new in the lay-out of the Act; it has a schedule, setting out the persons whose consent is required to an infant's marriage.

Several of the sub-sections are longer than most of the sections in the Acts before and their wording is very intricate and shows a high degree of specialization, thus retaining the casuistic, detailed piecemeal interference with common law.<sup>(7a)</sup> :

"If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant,

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7). Not: sections 1,2,6 and 10.

7a). This very detailed way of drafting has also been encouraged by the literal construction of the statutes by the courts, cf. Cross, Statutory Interpretation, pp.11ff.

the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable." (8)

This detailed form of drafting stands for the traditional common law approach and would not be found in a civilian code. However, there is something to balance such particularity. The Act is headed - also a new phenomenon - by two sections which contain general principles applicable to the entire law of custody : s.1. orders that any court dealing with any proceedings concerning custody and administration or property of an infant shall regard the welfare of the child<sup>(9)</sup> as first and paramount, and s.2 put mother and father on an equal footing in respect of their right to apply to court. S.1 is a provision with a general principle for two reasons, because first it introduces the welfare as being a paramount consideration and then it extends these principles to any proceedings before any court dealing with the matters of law here concerned. This general provision signifies a further move away from a traditional common law approach. If it were not for its references to the courts, which show that the law is basically seen as centred round the court and not as setting out general rules for social conduct, this provision might easily be found in a code.

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8). s.5(4); S.7(1) and (5), s.8(2) and s.9(1) are of a comparable quality.

9). Apart from s.1, the welfare of the child occurs in s.5(4) and s.6

Apart from these new features, the schedule at the end and the two general principle provisions at the beginning of the Act, the structure of the Act is not very clear. Procedural provisions are only found in s.7, but legislative provisions<sup>(10)</sup> as well as provisions which deal with the meaning of certain terms<sup>(11)</sup> are strewn all over the statute. Accordingly, pure substantive law is laid down in sections 1 to 3, s.4 except (3), s.5 except (7), s.6, s.8 except (3), and s.9 (1) to (3).

Among the provisions on substantive law the following do not refer to the courts at all : first sentence of 4(1) first sentence of 4(2), 5(1) to (3) and (5), (6), 8(1), first sentence of 9(1), 9(2) and (3). Compared with the 1886 Act, the 1925 Act states more of the law as it should be outside the court than the older statute.<sup>(12)</sup>

The sections containing substantive law which refer to the court, however, with the exception of s.1 (which however gives indirect discretion), s.2 and s.3(3) and (4), also grant discretion to the court. The variety of different terms of discretion has declined in comparison with the 1886 Act : there are only 6 different terms and one of them, the simple 'may' occurs as often as five times.

Concluding, it is noticeable that in this Act,

10). Sections 4(3), 5(7), 9(5) and 11(3).

11). Sections 7(1), 8(3), 9(4) and 11(2), I hesitate to call all of them provisions or construction. S7(1) says "'the court' shall include a court of summary jurisdiction : Provided that ... (n) ... shall not be competent-...." So this section although it takes the shape of a provision or construction is really a provision to extend the jurisdiction of certain courts. Similarly s.9(4) mainly deals with questions of court rules and procedure, though it starts with "For the purpose of this section 'the court' has the same meaning as.....".

12). There were four provisions in the 1886 Act which stated the law outside the courts, cf. above, p.135

compared with all its predecessors the proportion of provisions on substantive law which vest the courts with a discretionary power has declined. All in all the 1925 Act has moved still further away from the traditional common law amendment Act. The new occurrence of general principles is something which gives this Act a remote resemblance to a code. However, otherwise the structure of the statute appears not to be very systematic, <sup>(13)</sup> and some of its provisions are somehow ungainly. <sup>(14)</sup>

There is something I would like to add, which cannot be seen from the Act itself. In embodying the welfare as the paramount consideration to guide the court, this statute is in fact codifying <sup>(15)</sup> the preceding case law <sup>(16)</sup>. In this respect it is probably the most "progressive" Act within the sample here considered. <sup>(17)</sup>

f) Guardianship of Minors Act 1971 <sup>(17a)</sup>

This Act consists of 20 sections and including its two schedules and a title page it covers 15 pages in the statute book. Its compass is that of the 1925 Act extended by provisions on the application of the Act to illegitimate children. The layout of the Act is quite different from that of its predecessors. First the reader is pleasantly surprised by two pages preceeding the Act, headed 'Arrangement of Sections'. According to

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13). cf. above,

14). cf. above.

15). Codifying is understood as settling the judge-made common law, whereas consolidating is settling statute law by moulding several old statutes into one new statute, cf. Bennion, op.cit., p.75, Allen, op.cit. pp.476. However, codification would normally imply that future courts are not allowed to take precedents before the Act into account. As will be seen below sub-chapter C, this is not what the courts do, pp.

16). Stouton v Stouton (1857) 8 De G.M.&G. 260, 44 ER 583; Re A & B [1897] 1 Ch.D.786; see also Ward v Laverly [1925] A.C.101, which was decided shortly before the Act came into force.

(Footnotes contd.next page..)



this, the sections of the Act are sorted into 6 blocks with each a headline of its own - and these headlines appear in the statute itself. They read as follows:

- General Principles (sections 1 and 2)
- Appointment, removal and powers of guardians (sections 3 to 8)
- Orders for custody and maintenance (sections 9 to 13).
- Illegitimate Children (s.14)
- Jurisdiction and Procedure (sections 15 to 17)
- Supplementary (sections 18 to 20).

The 'Arrangement of Sections' also gives a short description of the contents of every section, however, these descriptions do not reappear in the enactment itself. This structure shows that this statute is organized much like a code : the general provisions come first, procedural provisions last, and the provisions on substantive law are arranged according to their contents in between. The 'Arrangement of Sections' reminds of a table of contents which usually precedes a code, and the different headings show subdivisions like the different titles of a code. All in all this statute is as the structure and lay-out of a code.

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17). More recently, there has been some doubt as to whether this Act not only codified but also changed the law i.e. by extending the principle to all proceedings before all courts, cf. J v C[1970] A.C.668, at pp.697, 709, 724f, 727. However, even if it also did change the law, it nevertheless also put something into the statute-book which was already treated by some courts as the law of the land.

17a) The gap of 46 years between this Act and its predecessor may be seen as evidence for a satisfactory development of the law by the courts, cf. sub-chapter on judicial reasoning.

As in the 1925 Act, most of the sections are divided into sub-sections<sup>(18)</sup> and (a new phenomenon) all of the long and complicated sections or sub-sections are further split into sub-divisions, headed by letters.<sup>(19)</sup> Thereby the very detailed provisions are made palatable to the reader - and to the lawyer who has to apply the statute.

The Act has two schedules, one on consequential amendments, the other on consequential repeals. Especially the latter is a change from the 1925 Act where the consequential repeals were strewn over the whole statute.<sup>(20)</sup>

As can be inferred from the list of headlines taken from the 'Arrangement of Sections', sections 1 to 14 contain the substantive law<sup>(21)</sup>, and sections 1 and 2 contain the general principles which are to govern the law of custody and guardianship, namely the welfare of the child and the equality of mother and father in all court proceedings.

As the 1971 Act is a consolidating Act the latter provisions are nearly<sup>(22)</sup> identical with the equivalent

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18). except sections, 1,2,6,7,11 and 19.

19). s1, s3(1) and (2), s.4(4), s9(1) and (3), S.10(1), s.11, s.12(2), s.15(1) to (3) and (5), s.19 and s.20(4).

20). cf. above, p.

21). I would, however, include s.13(1) and (3) under the head of procedural provisions. S.13(1) provides for a copy of a court order to be served on certain persons and s.13(3) orders a certain payment order to be enforced like affiliation orders.

22). The difference lies in the arrangement, not in the words.

provisions of the 1925 Act. In addition to this, the "welfare of the child" occurs in s.6, s.7, s.9(1), s.10(1) and s.11. S.9(1) also contains the "conduct and wishes of the mother and father" as a further principle to guide the court, it thereby more or less repeats s.5 of the 1886 Act.

As in the 1925 Act, there is a number of provisions that do not refer to the court but state the law as it should be outside the courts : the first parts each of s.3(1) and (2), s.4(1) - (3) and (5), (6), s.8, s.13(2), s.14(1) and (3). There is no increase in provisions on substantive law which do not refer to the courts, but this is no surprising feature, in a consolidating Act. Out of the provisions of substantive law which do refer to the court, the following do not vest discretionary power in it: sections 1,2,12(3), 14(2) and (3). There are, however, several provisions which, though they give discretion to the court, do not mention the court itself but use words like "the order..may contain, " these are sections 9(3) and (4), 10(2)<sup>(23)</sup>, 12(1) and (4)<sup>(24)</sup>. Though this phenomenon does not change the fact that most of the statutory provisions are still court-based, it is evidence for a shift in approach : the court is still the 'basis' but perhaps no longer so much of a 'centre' of the law.

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23). "the powers...may be exercised..."

24). The 1925 Act only contained one section on substantive law with such a wording, s 3(4).

In addition to this there<sup>are</sup> a few different terms of discretion in the Act : six different terms are used in 17 places, whereby the weak "may" is used as often as six times.

Taking the Act as a whole, there is only one feature left which is distinctly a feature of a common law statute system, namely the high degree of speciality of most of its sections. The other points, its clear structure, systematic arrangement and the general principles of its beginning show a shift from the traditional common law statute. Only a very slight shift in this direction can be seen by the fact that several of the provisions of substantive law are only court-based and no more court-centred.

g) Guardianship Act 1973

This last Act of the sample consists of 15 sections, and including the title page and the five schedules, it spreads over 22 pages of the statute book. Its compass differs from that of the 1971 Act though it partly refers to it, the 1973 Act governs the law concerning parental rights and powers of guardians and parts of the law concerning local authorities.

As the 1971 Act, this statute has a title-page headed "Arrangement of Sections" and the headlines given here, also appear in the Act itself. However, the structure of the Act is different, It is divided into three "parts" headed "England and Wales", "Scotland"<sup>(24a)</sup> and "General" respectively. And though all the miscellaneous provisions

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24a). In accordance to the different legal systems in which the statute applies.

are bound into part III, the other two parts contain a mixture of legislative<sup>(25)</sup> procedural<sup>(26)</sup> and substantive legal provisions<sup>(27)</sup> and provisions on construction<sup>(28)</sup>. However, most of the legislative provisions are set out in the different schedules (repeals, amendments).

Because of this mixture of different types of sections, the structure of this Act, apart from the frame is not organized as well as the structure of its predecessor, it retains some common law features.

However, though most of the provisions of this Act are very detailed and complicated<sup>(29)</sup>, there are also some provisions on substantive law which embody general principles.

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- 25). Sections : 2(1) and (7), 8,9,10(8),11(6) and 14; s.1(8) is a curious type of amending provision, substituting certain words in two other Acts not otherwise concerned with the area of law covered here.
  - 26). Sections: 1(6), 2(5), 4(2), 5(1) and (3), 6,11(4) and 12(2)(b).
  - 27). Sections 1 except (6) and (8), 2(2) to (4) 3, except (5), 4 except (2), 7, 10 except (8), 11 except (4) and (6) and 12 except (2)(b).
  - 28). Sections : 2(6) and (8) and 13.
  - 29). e.g.s 4(3) "In relation to an order under section 2(2)(b) above committing the care of a minor to a local authority or to an order under section 2(3) requiring payments to be made to an authority to whom the care of a minor is so committed, the following provisions of the ...(1971 Act) ., that is to say... (8 provisions) shall apply as if the order under section 2(2)(b) above were an order under section 9 of that Act giving custody of the minor to a person other than one of the parents (and the local authority were lawfully given that custody by the order), and any order for payment to the local authority were an order under section 9(2) requiring payment to be made to them as a person so given that custody"; this sub-section is made particularly complicated by numerous references to other Acts and sections, a phenomenon widely spread in this Act, as can be seen from the following list (which does not contain legislative provisions!) : s.1(6), s 2(2), (4) to (6) and (8), 3(3) to (5), 4(1) (6), 5, 6(1) and (3) 10(5), 7, 10(2) to (5), 11(1) and (4), 12(1) (2) (a) and (3).

Besides the provisions which embody the "welfare of the child"<sup>(30)</sup> and the broad guideline of "exceptional"<sup>(31)</sup> or "special"<sup>(32)</sup> circumstances, there are two provisions which introduce a new general principle into the law of guardianship, the principle of legal equality between father and mother for all purposes.

This new principle is set out twice in this statute, each at the beginning of one of its "parts", namely in s.1(1) at the beginning of part I and in s.10(1) at the beginning of part II<sup>(33)</sup>.

There is an additional novelty in this principle, it is set out as applying generally, ie., independent of and outside the courts. In the 1925 and the 1971 Act the sections which set out general principles of law, still referred to the courts.

In addition to this, the following provisions on substantive law do not refer to the courts : s 1(7), s 4(6) s 7(1), s 10(6) and (7), s 12(3) this is a smaller number than in the 1971 Act.

Among the provisions on substantive law which refer to the courts, the following do not vest discretion in the courts : s 1(4), s 3(1), (2) first part, s 4(1)<sup>(34)</sup>, (3) to (5), s 7(2), s 10(4), s 11(2) and (5) (b).

30). s 1(3), s.10(3); 'benefit', s 1(2), s 10(2).

31). s.2(2)(a) and (b), s 11(1) (a) and (b).

32). s.2. 4) (b)

33). Each of them has to<sup>be</sup> read together with the provisions s 1(7) and s 10(6) respectively which each in their turn exclude the application of the general principle to illegitimate children.

34). Though this provision contains the words "in the opinion of the court", it does not give discretion to the court, the court has to decide where it thinks the minor lives and then act according to this knowledge

This shows a considerable increase compared to the 1971 Act where only 5 of the provisions of substantive law do not grant discretion to the courts.<sup>(35)</sup>

Among the provisions on substantive law which grant discretion to the courts, the following only refer to the courts indirectly, for example by referring to the order, : § 1(5), § 3(3) and (4), § 10(5) first part, and § 12(1). On the basis of this, there is a smaller proportion of provisions on substantive law which give discretion to the court than there is in the 1971 Act.<sup>(36)</sup> (If one considers that the 1973 Act partly treats a new area of the law, if seen in the line of Acts treated so far, and therefore has to determine afresh the jurisdiction of the courts, one could even have expected an increase of this particular type of section).

Discretion given to the court is in 20 places, with six different terms of discretion. This shows a further decline of variety of discretion terms, especially as the weak term "may" appears seven times. This is a sign for systematic drafting, avoiding any superfluous variety of expression. The use of the weak "may" indicates a very matter of fact approach to the court's discretion and also draws the attention further from the court to the substantive law. The court is no longer requested to have an "opinion" as to "deem proper", it "may" administer the law.

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35). cf. above, p.144, on the basis of one sub-section as one provision the 1971 Act contains 31 provisions on substantive law, the 1973 Act 33, cf. fn.27.

36). Taking again one sub-section as one provision, there are 11 provisions which fit into this category in either Act.

Viewing the 1973 Act as a whole it can be seen that in some respects it has moved further away from the traditional common law statute, namely insofar as it contains general principles of law which apply outside the courts. In respect of the outer frame, including the statements of principle at the head of two of the "parts", the Act can be compared with the 1971 Act. However, its overall structure is far less clear than in the 1971 Act and this shows some common law features. Apart from the set frame, provisions of different types mingle freely and the provisions also contain a high number of cross-references to other Acts and other sections which, though they may shorten the Act as a whole, obscure their meanings, insofar as they present an unsuccessful attempt to set out the law systematically.

#### h) Construction

Guides to the construction of certain words of statutes appear either in the statutes themselves or in the Interpretation Acts<sup>(37)</sup>. They take normally, either the shape of "X shall mean Y" or "X shall include Z".

In the sample here concerned the first provisions on construction appear in the first comparatively comprehensive Act, the 1886 Act. The provisions are sections 8 and 9 of this Act and they both belong to the category "X shall mean Y"<sup>(38)</sup>

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37). There have been three of them in the English Law: An Act for Shortening the Language Used in Acts of Parliament 1850, 13 & 14 Vict., c.21. Interpretation Act, 1889, 52 & 53 Vict., c.63. Interpretation Act 1978, 26 & 27 Eliz.II., c.30.

38). s.8 "In the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil". S.8 "In the construction of this Act the expression 'the Court' shall mean;...."



There is also a provision on construction in the 1891 Act, namely §5. This section is of the type "X shall include Z" and provides a definition for "parent" and "person" as used in this Act. The 1925 Act contains two provisions of the type "X shall mean Y", namely §8(3) and §9(4) insofar as it states "For the purposes of this section, 'the court' has the same meaning as in the Guardianship of Infants Act, 1886, as amended by this Act, and...", and a rather unusual one, §11(2), "This Act shall (except...) be construed as one with the Guardianship of Infants Act, 1886 and...". This provision shows an early attempt to cover an area of law as then comprehensively as possible by construing two Acts as one.

The 1971 Act contains two provisions on construction §15(1) "...The court' for the purpose of this Act means..." and §20(2) "In this Act 'maintenance' includes education.

In the 1973 Act there are two provisions of the type "X shall mean Y", namely §2(8) and §13, both of them defining local authority and §13 stating in addition what "child" shall mean when the Act is applied in Scotland. There are also two sections not easily recognised as provisions on construction. One of them, §2(6) appears particularly obscure, "Where an application under section 9 of the Guardianship of Minors Act 1971 relates to a minor who is illegitimate, references in sub-sections (2) and (4) above and in sections 3 and 4 below to the father or mother or parent of the minor shall be construed accordingly(...)"

The last provision which possibly refers to construction is §15(1)(a) and (b). It sets out with which Act the 1973 Act may be cited together and what a form this situation

should take. Comparing this provision with s11(2) of the 1925 Act which contains similar words, albeit in addition to "This Act shall be construed as one with...", it seems as if s15(1) of the 1973 Act relies on a construction of this Act as one with the 1971 Act in England or with the 1886 and 1925 Act in Scotland respectively as being possible if so required.

There is also a provision on construction for the area of law here concerned in Schedule 1 of The Interpretation Act, 1978, which provides that "parental rights and duties", "legal custody" and "any reference to the person with whom a child (as so defined) as his home" are to be construed in accordance with the Children Act 1975<sup>(39)</sup>.

Concluding, it can be stated that devices for construction only arise when statute law appears more frequently in the English legal system. And, though all provisions on construction can be seen as devices of the draftsman to shorten the language of the statute,<sup>(40)</sup> there seems to be a move from the simple "x shall mean Y" to more complicated provisions "...shall be construed...". Provisions which, if they had to be spelt out within the other parts of the respective statute would probably lengthen the whole statute considerably.

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39). 23 & 24, Eliz.II, c.72.

40). cf. Bennion op.cit., p.79.

#### 4. Conclusions

This sub-chapter has shown a gradual shift of the statutes in the sample away from the traditional common-law amendment statute, and in the process acquiring some features that would normally be found in codes of a civil law system. At the outset of the period concerned the statutes are short, casuistic and court-centred with a narrow scope and no recognisable structure. By the end they show a wide scope, a reasonably clear structure, they embody general principles of law and they also state the law as it should be outside the courts. However, one typical common-law feature often remains; the very detailed and specialized sections<sup>(41)</sup>.

It also became clear that there are different degrees of clarity in structure and that as in the 1973 Act it sometimes falls far short of that degree normally found in a code. There are also two features which the English statutes acquired on their development away from the traditional common law statute that are not normally found in codes, the schedules and the provision for construction.<sup>(42)</sup> The provisions of construction would not fit into a civil law system as it traditionally relies on liberal methods of interpretation<sup>(43)</sup>, they only fit into a legal system

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41). Though by now, of course, sections embodying general principles, are added to the statutes.

42). e.g. the German civil code has no schedule at all and the German code of civil procedure has only two schedules, one of them contains the limits of income for obtaining legal aid, the other the limits of what can be taken of somebody's income when enforcing a payment order.

43). cf above pp 31f.

where a liberal understanding of parliamentary law is prevalent.

Thus in respect of methods of statutory drafting, though the English system has moved towards somewhat closer to the civil law systems, it has at the same time uniquely developed along its own lines apart from the civil law systems.

### C. Judicial Reasoning

After having looked at the methods of statutory drafting and having seen a change from brief casuistic statutes which were meant to amend a flaw in the common law to comprehensive statutes with a well organized structure which contain general principles, I shall now turn to the methods of judicial reasoning to see whether a comparable change has taken place here.

#### 1. Sample

In order to work out the development of judicial reasoning it was necessary to choose a small sample of cases to allow for a detailed analysis of each of them.

To achieve this, I divided the relevant period into five sub-periods, each sub-period determined usually by two of the major enactments in the area of parental status law. These major enactments are the Custody of Infants Act 1839, the Guardianship of Infants Act 1886, the Guardianship of Infants Act 1925 and the Guardianship Act 1973<sup>(44)</sup>. Compared with the sub-chapter on analysis of statutory drafting I have left out the Custody of Infants Act 1873, the Custody of Children Act 1891 and the Guardianship of Minors Act 1971.<sup>(45)</sup> This was partly because these Acts

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44). 2 & 3 Cit., c .54 (Talfourd's Act); 49 & 50 Vict., c.27; 15 & 16 Geo.V., c.45; 21 & 22 Eliz. II. c.29.

45). 36 Vict., c.12; 54 Vict., c.3; 19 & 20 Eliz., II, c.27.

would have provided for two short sub-periods, but mainly because their importance in the overall legal development is not equal to that of the other four statutes. The 1971 Act is only a consolidating statute and its impact on judicial reasoning is likely to be small. The 1873 Act besides its provision on separation deeds, only extended the scope of the 1839 Act, and the 1891 Act mainly covers conflicts between parents and strangers rather than between mother and father and thus stands outside the main strand of legal development.

Out of each of the five<sup>(46)</sup> sub-periods thus found I took two cases providing landmarks in the legal development of the time. However, from the period 1925 - 1973 I choose three cases. The 1925 Act provides for the father and the mother of a legitimate child to be treated equally in every court proceedings and to consider the child's welfare paramount, but it did not make explicit how a mother or father of an illegitimate child were to be treated in court and how - outside the narrow compass of the 1891 Act ; the parents' position should be considered in disputes with strangers. It is for this reason that I selected a case each for the position of the mother of an illegitimate child, of the putative father and of parents as against strangers.

From the period after the 1973 Act I only selected one case, as this period is considerably shorter than the periods before and as far as I can see, the method of

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46). i.e. :before 1839,  
                   1839-1886  
                   1886-1925,  
                   1925-1973,  
                   after 1973

judicial reasoning has not changed perceptibly within this short period. So I had finally chosen ten cases<sup>(47)</sup> which I analysed in turn, but were necessary as appropriate to clarify and amplify certain sub-developments or tendencies, I gave a short analysis of other cases within each sub-period, thereby mainly concentrating on cases between father and mother.

## 2. Method

In order to analyse the judicial reasoning, as it develops within the chosen sample, I looked at the following aspects in every single case :

### (1) Social Concepts

Considering the social concepts, I looked at how the judges view the position of the members of the family, father, mother and children. I also considered whether there is an emphasis on individual rights on the one hand, or on collective goals on the other hand, and in this connection the attitude of the judges to public interference with (private) family life. Hereby emphasis on individual rights - which will in this context mostly mean : the father's right - stands for a traditional common law attitude; and emphasis on collective goals - like, in this context, the child's welfare - represents a

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47). Ex parte Warner (1792) 4 Bro. C.C. 101, 29ER 799; R v Greenhill (1836) 4 Ad. & E. 624, 111 ER 922; In re Fynn (1848) 2 De G. & Sm. 457, 64 ER 205; In re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch.D. 317; R v Gyngall [1893] 2 Q.B.D. 232; Ward v Lavery [1925] A.C. (H.L.JR) 101; Re Carroll [1931] 1 K.B. 317; Re C.T. (an Infant), re J.T. (an Infant) [1956] 3 All ER 500; J v C [1970] A.C. 668; Dipper v Dipper [1980] 2 All ER 722

more civilian approach.

(2) Approach to Legal Sources

The approach to legal sources includes the approach to precedent, to statutes and to living legal writers. The possible approaches to precedent reach from confirming the precedent to the facts of the case to a 'loose view of precedent', which means in its extreme form that the judge only applies the language of the precedent without referring to the facts.<sup>(48)</sup> A loose view of precedent, thus means a departure from the traditional common law doctrine. The approach to statutes includes the general attitude towards the construction of statutes, whether literal or according to the spirit, as well as the attitude towards judicial law-making in connection with statute law. Hereby a move towards a civil law system can be seen in construction in accordance with the spirit rather than the letter of the law and in a positive attitude towards judicial law making.

(3) Reasoning from Rules or Reasoning from Principles.

The question whether a judge is reasoning from rules or from principles is closely linked with his approach to legal sources but still worth independent consideration.

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48). For both views of precedent see Llewellyn, op.cit., pp.66f.

A legal rule can either be applied or not applied, but otherwise it leaves no freedom of decision to the judge. When two rules contradict each other the judge has to declare one of them inapplicable to be able to decide a case. A principle is more broadly termed and leaves it to the judge how to comply with it in his decision<sup>(48 a)</sup>. When principles seem to contradict each other the judge will be able to solve the conflict by giving different weight to each of them or by finding aspects in each of them which will contradict each other : eg when there is the principle that the welfare of the child is to be the paramount consideration in a custody question, and the principle that the state should interfere as little as possible with family life, the judge can solve their conflict by stating that the welfare of the child is normally ensured by leaving him or her with the family and that the court will only interfere when it becomes evident that in a particular case it is not for the welfare of the child to be with him or her family. The judge can also solve the problem by stating that the principle of non-interference with family life has to be given small weight whenever questions of the child's welfare arise. Reasoning from rules stands for a common law attitude, whereas reasoning from general principles

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48a). cf. the aspect of "indirect discretion" given to the judge by broad principles embodied in legislative provision, above, p.132



will denote a move towards continental reasoning .

The three categories of analysis of judicial method just explained can be applied to every case. The two categories now to follow will be of use only in some of the cases.

#### 4) Philosophical Concepts.

Under the heading 'philosophical concepts' I pay attention as to how far the judges are open to general ideas and possibly notions of public policy as a civilian judge would be, or in how far they strictly confine themselves to the legal issues at stake, and thereby show the legal positivism which is thought to be prevalent in English legal thinking<sup>(49)</sup>.

#### 5) Language and Consistency

In order to determine how stable a legal concept or a social attitude is, how deeply rooted it is in the mind of the judge who decides a case (and this mostly means also in the minds of his colleagues), it is useful to consider how internally consistent his judgment is. A judge who is certain about the law and its underlying social or philosophical concepts is likely to write a straightforward judgment which is consistent in itself. A judge who is uneasy about his decision, either because he feels it is socially undesirable, or even objectionable, or because he presumes his approach to the law is not in line with the legal thinking of his time, can be expected to show his uneasiness in his judgment. Either he voices it directly or betrays strong feelings otherwise and thereby possibly implies that he is uneasy. The latter happens,

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49). Atiyah, Law and Modern Society, pp.100 ff.

for example, when he emphasises that his decision is according to the law and at the same time describes the behaviour of the litigant, who is about to win his case, in an unfavourable way. The judge may also favour a certain social concept and still decide against it, according to the letter of the law, or he may set out a rule of law and may find a way around it by deviously inventing an exception, and thereby decide according to a social attitude he favours<sup>(50)</sup>. This category can not help to show whether judicial reasoning in the common law has changed over the last century, but it contributed to the understanding of judicial attitudes in general and thereby help with the evaluation of the cases under the other categories.

### 3. Analysis

#### a) Cases Before Talfourd's Act - Ex parte Warner <sup>(50a)</sup>

This is the case of four infants, wards of court. The parents lived apart from each other and the father a bankrupt with no fixed abode, had been in prison for cruel behaviour towards the mother. The children had been placed in different schools and were maintained there by the mother and her relations, with the exception of the youngest who was with the mother. The father had

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50). All these ways of case solution, Paterson, op.cit., calls "Court solution" of a conflict of principles. (For him this approach is 'adaptive' and he contrasts it with an 'innovative' approach on the one hand and 'judicial withdrawal' on the other hand). cf. at pp.

50a). (1792) 4 Bro.C.C. 101, 29 ER 799

attempted to take the children away from these schools. There was a petition to restrain the father from interfering with the children. The petition was granted.

The argument was that the court had the power to interfere in such cases and that the father was a "very unfit and improper person to have the care and management of his children".. Two precedents are cited in argument, giving the facts of one of them,<sup>(51)</sup>. The court gives no reasons for its decision.

In this case there seems to have been no doubt about the rights and authorities of the father of common law, but equally the judges do not seem to have felt qualms in interfering with it, without wasting any words on the matter. The main argument of the petition centres around the property settled on mother and children, and the inability of the father to provide for them. There seems to be a practical approach lurking in the background : when somebody pays for somebody else's children, and the father lets him do so, the person who pays shall have a say when matters of custody or upbringing are decided. This thought also appears in Ex parte Hopkins, a case where three girls were separated from both parents and brought up on money bequeathed to them by a rich uncle<sup>(52)</sup>,

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51). The case of Mr. Orby Hunter, Cruise v Hunter (1790), reported in the editor's note to Powel v Cleaver (1789) 2 Bro C.C. 500 at 519, 29 ER 274 at 283 "Who was restrained taking his son, a ward of this court out of the care of his mother, who had been at the expense of his education, the father being abroad, and in embarrassed circumstances"

52). (1732) 3 P Wms. 152, 24 ER 1009, it should be noted that in this case access is granted to both parents on equal terms.

and more than a hundred years later in Re Ann Lloyd where the judge was of the opinion that the proper person to have custody of an illegitimate daughter would be the mother's husband (who was not the child's father) for the very reason that he was obliged to provide for her according to the (then) new poor law<sup>(53)</sup>.

The welfare of the children is mentioned in the petition but not argued to any extent, it seems to be more important to decide whether the court has jurisdiction to interfere than to go into the merits of the case. The approach to precedent seems to be based on the holding of the previous case,<sup>(54)</sup> rather than on a principle derived from the previous case or on particular dicta. As there are no grounds for the decision given, there is also no reasoning given, but the court has obviously relied on a 'rule'<sup>(54a)</sup> and not on a principle.

All in all this case is a typical common-law case. It should be noted that the father's authority is taken for granted, but there does not seem to be any strict doctrine the law is not as fixed on this particular point<sup>(55)</sup> as it is in later cases.

- R v Greenhill <sup>(55a)</sup> -

This is a case of habeas corpus proceedings against a mother of three infant girls who had taken the children

53). (1841) 2 Man & G 546, 133 ER 1259, as these were, however, habeas corpus proceedings and the girl beyond the age of nurture, she was left to go where she chose.

54). cf. fnt. 51 above.

54a). cf. above, pp. 156f.

55). Like in Ex parte Hopkins cf. fnt. 52 above; also Eyre v Countess of Shaftesbury (1722) 2 P Wms 103, 24 ER 659, where though the rights of the father are not doubted, the position of the mother as a guardian of nature and nurture is discussed freely and fairly.

55a). (1836) 4 Ad. & E. 624, 111 ER 922.

away from the father and lived with them with her own family. The father had been committing adultery for years with another woman but he had never brought the children into contact with her. It was held then since this was a case of legitimate children under the age to exercise a discretion, the father had legal custody of them and they were to be delivered up to him.

In this case the father's right is greatly stressed, it can only be interfered with when the exercise of it would bring danger to the children, eg. if the father were cruel or grossly profligate . At one stage the argument takes a curious turn in respect of the well-being of the children, "But I think that the case ought to be decided on more general grounds; because any doubt left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age"<sup>(56)</sup>. This quotation is evidence for the weight which is given to considerations of certainty of the law.

Numerous cases are cited in argument, but only one appears in the judgment, but the court relies heavily on the father's right to his children and the rule that the court can only interfere with it on very narrow grounds. There is therefore no reasoning on principles.

At several points of the judgement the judges emphasize that they are bound by the law, "As unfortunately, the

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56). cf. p.927, Lord Denman, C.J.

attempts to reconcile...have failed, we are bound to pronounce our judgment upon the application before us".<sup>(57)</sup>

"It may be that a modified order, if we made it, would be obeyed by Mrs.Greenhill; but I do not feel that we should be justified in making such an order".<sup>(58)</sup> I think we have no right (and I do not say that we should have it in any case) to make an order about access to the children..."<sup>(59)</sup>

"In this case, as it came before my brother Patteson he was bound to decide, in point of law..."<sup>(60)</sup>

"and here the learned judge, having no doubt of the law (and I accede to his view of it), made the order in question ...".<sup>(60)</sup>

This appears somewhat repetitive and not quite consistent - if the question was really so simple to decide, why make so many words of it? Though the judges do not openly voice any regret as to their decision, it becomes clear that they are somehow uneasy about it, which may also be inferred from the quotation above, and from this it is easy to believe<sup>(61)</sup> that they were, in part, unhappy with the outcome<sup>(62)</sup>. This case was a cry for reform,<sup>(63)</sup> which duly ensued two years later.

As can be seen from its reasoning from rules and faithful adherence to precedent, this case is a traditional common law case, it shows in comparison to older cases,<sup>(64)</sup>

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57). Lord Denman C.J at p.927

58). Lord Denman C.J.at p.928.

59). Littledale J. at p.928.

60). Williams J, at p.928.

61). cf. above at fnt. 56.

62). cf. above Chapter III, p.

63). At stated in Re Taylor (1840) 11 Sim 178, 59 ER 842.

64). Ex parte Warner; Ex parte Hopkins, Eyre v Countess of Shaftesbury above fnts, 52, 55.

that unfortunately the common law by its rigid adherence to precedent had moved into a cul-de-sac and it is apparent that if reform proves necessary as it does here, it has to come from Parliament.

- Other cases before the 1839 Act -

If one compares Ex parte Warner with R v Greenhill, it becomes apparent that a change in social attitude must have taken place in the meantime or at least a shift of consciousness in such matters. The turn really comes with De Manneville v De Manneville<sup>(65)</sup>, where a child, less than a year old is left with the father, against whom the wife had laid charges of ill-treatment and heresy. The court sees itself paying regard to the benefit of the child "...the petition being presented upon the part of an infant, the Court will do what is for the benefit of the infant, without regard to the prayer,"<sup>(66)</sup> But the contents of the 'welfare' concept in those days is also made clear, "...that the law imposed a duty upon parents, and in general gives them a credit for ability and inclination to execute it".<sup>(67)</sup> There is also another point emphasized here. The mother had separated herself from her husband without obtaining a decree in an Ecclesiastical Court to justify her to do so thus "living under

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65). (1804) 10 Ves. Jun. 52, 32 ER 762

66). at p.765.

67). at p.767.

circumstances, under which the law will not permit her to live".<sup>(68)</sup> And it is avowedly one of the motives of the court not to encourage her to remain in this unlawful state by granting custody of the child, "This is an application by a married woman, living in a state of actual unauthorised separation, to continue, as far as the removal of the child will have an influence to continue, that separation, which I must say is not permitted by law"<sup>(69)</sup>. Here moral censorship creeps into the judgment and influences the outcome. The position of the husband and father is no longer self-evident,<sup>(70)</sup> it has to be emphasized.

There is also a different example<sup>(71)</sup>, where the father's legal position is not doubted, but there is honest regret on the side of the court that this has to be so, "I do not know that I have any authority to interfere. I do not know of any one case similiar to this, which would authorize my making the order sought (ie. access for the mother to her 14-year-old daughter), in either alternative. If any could be found, I would gladly adopt it, for in a moral point of view, I know of no act more harsh and cruel than depriving the mother of proper intercourse with her child". (emphasis supplied)

Besides the strict adherence to precedent this quotation demonstrates another common law feature : the

68). at. p.765.

69). at p.766.

70)cfAs it was in Ex parte Warner, cf above, the father's right, however, is interfered with in case of gross abuse cf. Wellesley v Wellesley (1828) 2 Bli. NS 124, 4 ER 1078, but even here the common law right of the father is greatly stressed.

71). Ball v Ball (1827) 2 Sim.33, 57 ER 703 at 704; The Vice-Chancellor then referred to two previous similar cases where he had been counsel for the mother and had not been able to achieve something for her in either case. This shows the beneficial effect of the work at the bar on the later work of the judge, cf. Atiyah for other aspects, Law and Modern Society, pp.18



stern refusal to take into account any extra-legal considerations, like philosophical, or as in this case moral, considerations. It becomes clear also from this case : the thorough victory of the father's common law right in the face of social conditions beginning to change<sup>(72)</sup> - is an uneasy one.

b) Cases between 1839 and 1886

- In re Fynn <sup>(73a)</sup> -

This is a case of three children, two boys aged four and three years old and a one-year-old girl, whose parents separated on account of the father's profligate living. The children were in the custody of their mother, helped by her mother with their maintenance and upbringing, and the grandmother petitioned that a guardian might be appointed for them and the father stopped from interfering. Besides several incidents of unkind or cruel conduct towards the mother, the father had also neglected his sons when in his custody as he was then in straitened financial circumstances. The father consented that the mother should have the custody of the girl and daily access to the boys. The grandmother had given a personal undertaking to provide means for maintenance and education for all three children. The court held that a personal undertaking which ended with the life of the grantor was not sufficient for the court to interfere on behalf of the children.<sup>(73)</sup> The petition was dismissed in respect of the

72). cf. above, p.53

73). This reminds of the "who pays influences custody" -- attitude of Ex parte Hopkins and Re Ann Loyd, cf. above, p. 161, and footnotes, as it becomes clear at p.215 that the court had the jurisdiction to interfere even if there was no money, but because there was no money here, the Court thought it improper to exercise this jurisdiction.

73a) (1848) 2 DeG. & Sm. 457, 64 ER 205

parts the father had not consented to the order made.

In this case the father's right, the mother's right and the child's welfare are each treated in turn and given their due position:

"Cases, indeed, in which a father is sought to be deprived of the custody of his infant children, or to be controlled or checked with respect to the guardianship of them, can seldom be otherwise than painful".

"Before this jurisdiction can be called into action... (ie. to interfere with the father's right)...it must be satisfied, not only that it has the means of acting safely and sufficiently, but also that the father has so conducted himself...as to render it not merely better for the children, but essential to their safety as to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended - should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong".

"What I have said may, however, where there is a mother (and especially as to infants under seven years of age), be subject to qualification with reference to her rights (if I may use the expression), created by the statute called Mr. Serjeant Talfourd's Act..."  
(74)

This clearly favours the father's right above all other consideration, but it should be noted that the Vice-Chancellors personal opinion is somewhat different :

"...were I at liberty, as I am not, to act on the view which out of Court I should, as a private person, take of course be likely to be most beneficial for the infant, I should have no doubt whatever upon the question of interfering with the father's power. Without any hesitation I should do so-"(75).

These quotations show the priority given to the father's right, the narrow approach to authority and the refusal to consider questions of morals in legal argument.

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74). All three quotes from p.212,

75). *ibid.*

It becomes clear that as a matter of law the judge is extremely reluctant to interfere with the private affairs of a citizen, he shows a very individualistic outlook on society here.

In this case, numerous cases are cited in argument. The Vice-Chancellor<sup>(75a)</sup>, in his judgment takes the law as a whole, only referring to three cases when he discusses the problem of property to ensure the children's upbringing.<sup>(76)</sup> The case does not call for mention of Talfourd's Act, the court in fact recurs to it :

"The present petition certainly is not a petition under that Act; but I ought not probably to deal with the proceedings without bearing in mind that, were the three children or the two boys placed in the father's sole custody today, the mother would be entitled to present a petition under the statute tomorrow, and probably with effect". (77)

Though the Vice-Chancellor thinks 'he ought to bear in mind', there is no sign throughout the judgment that he does so. It becomes very clear indeed that he does not want the father to have custody of the children,<sup>(78)</sup> but he feels legally incapable of doing anything about it. He certainly does not feel tempted to indulge in judicial law-making, by mending the gap in the Act which fails to cover the case when the mother does already have custody of the children. His reasoning, though it seems in part, to be open to broader considerations, is clearly based on

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75a). Sir J.L.Knight-Bruce

76). cf. p.214 it should be noted that for one of the cases he relies on a reference taken from a legal text-book, however, this cannot be considered as a reference to a legal writer, as it is the case which is referred to and not any ideas of the author of the text book.

77). p.212.

78). p.213, commenting unfavourably on the father having escaped from a debtor's prison in France, p.214 he finds the modes of life the boys are likely to be consigned to, if with this father "adverse in the highest degree to culture, to discipline..." and he deems the father clearly unfit to be a guardian of children.

rules, which can also be seen by his strict compliance with the separation of the different types of court jurisdiction.

This case represents the traditional type of common law reasoning, and it is a striking example for it. In spite of his sympathy for the new statute and for the social issues at stake, the Vice-Chancellor feels unable to solve the case to his personal satisfaction. However, within a year the Vice-Chancellor had found a way to avoid another decision which though complying with the law would displease him as a man.

In re Tomlinson<sup>(79)</sup>, a case of a sickly child of two, in the custody of the mother, the Vice-Chancellor, upon application by the mother, granted custody to her. He found that it was clearly for the welfare of the child, being very young and not very strong, to be with the mother. (This is, by the way, the first time when the well-being of a child is considered expressly from the individual child's side and not from the point of view that the father was unfit to look after any children). The starting point for the judge's reasoning is the child's welfare and not the father's right. He found also that he could entertain the application "although the child was at the time of the presentation of the petition and is still, in the custody of its mother, the court has within the equity of the Act jurisdiction to interfere".<sup>(80)</sup>

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79). (1849) 3 D & G. & Sm. 371 64 ER 520.

80). at p.521.

- In Re Agar-Ellis, Agar-Ellis v Lascelles<sup>(81)</sup> -

This is the case of a sixteen year-old girl, daughter of separated parents, under the father's custody with only supervised access for mother and supervised correspondence with her. The deeper reason for litigation in this case lies in a long struggle for the religious upbringing of this girl and her two sisters, the mother being Catholic, the father Church of England. The father had promised before the marriage that the daughter should be brought up as a Catholic and later he had changed his mind and ordered that all three daughters should be brought up as Anglicans. The second daughter on whose behalf the present petition had been filed, had, upon application to the court been allowed to convert to the Catholic faith. The father now feared that unsupervised contact with the mother would alienate his daughters' feelings from him. The application of mother and daughter for unsupervised contact and staying access was dismissed.

This judgment is full of the 'natural' or 'sacred' right of the father, and the sacred rights of the family life. The mother's right is not mentioned at all and the welfare of the child is stated as only to be adhered to in extreme cases "It is not in our power to go into the question as to what we think is for the benefit of this ward."<sup>(82)</sup> The Court can only interfere in cases of gross mis-conduct as abdication of paternal rights. This relapse to the view of

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81). (1883) 24 Ch.D. 317;

See also the case before in this matter, with a similar treatment of the law (1878) 10 Ch.D. 43.

82). at p.334.

the father's right according to the old common law - so convincingly declared to be all but abolished by Jessel M.R. only 7 years before - is even defended by some lip-service to the welfare of the child, "it is for the general interest of children, and really for the interest of the particular infant that the Court should not except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child".<sup>(83)</sup>

The reluctance to interfere is particularly remarkable when one considers that the court did not approve of the father's conduct, "this is a case in which, if we were not in a Court of Law, but in a court of critics capable of being moved by feelings of favour or disfavour, we might be tempted to comment with more or less severity, upon the way in which, so far as we heard the story, the father has exercised his parental right."<sup>(84)</sup>

Numerous precedents were cited in argument for both sides. The court only mentioned a few and more emphasized the rules of the common law in general, of none of the precedents mentioned, the court gave the facts, but only quoted from the words.<sup>(85)</sup> There is one mention of the 1873 Act which is singularly hostile, "...but it is admitted, and it is an undoubted fact, that the young

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83). Ibid., similar statements at pp.336, 337 as to the reluctance of the court to interfere with family life.

84). Bowen L.J. at pp.334 f.

85). Re Plomley (1882) 47 LTR 283, cited here at pp.328f. in fact a case where a father wanted to emigrate with his son and the uncle applied to the court to prevent him. another case at p.330, Cotton L.J. only quoted to show the difference between habeas corpus and custody proceedings, at p.333 he quoted the older Agar-Ellis case (cf above, fn 81) to enable himself to disregard another precedent which might have stood in the way of the judge, Stouton v Stouton (1857) 8 DeG M. & G. 760, 44 ER 583

(Footnote contd. overleaf...

lady is above the age of sixteen, and that Act, therefore, has no bearing at all upon the matter"<sup>(86)</sup> It should be kept in mind that this case is only concerned with a petition for unlimited access, and that the 1839 Act gave the court full discretion to grant access to children up to the age of 21. Though the 1873 Act in fact only enables the court to make custody orders of children under sixteen and repeals the Talfourd's Act, thus this limitation may in fact have been unintentional, if one considers the overall development.<sup>(87)</sup>

There is a peculiar feature to this case considering the concepts of thought embodied in it. The marked reluctance of the court to interfere with the father's right shows a streak of individualism, but the recurrent reference to the 'sacred' rights of family life comes close to something like natural law thinking as being above the letter of the law. The suspicion that the judges are in fact guided by some extra-legal thoughts is buttressed by the fact that they only paid lip-service to precedent and did not approach it in the proper common law way of using the holding of the case rather than some of the dicta. The structure of this case seems the more astonishing when one considers that the judges did not

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Footnote<sup>85</sup> Contd/... - similar comments can be made on the citation of Ex parte Hopkin§ (cf evaluation above, at fnt- 52) at p.336, and Re Curtis (1859) 28 L.J. Ch. 458 of p.337, the latter is the only case which might have supported the present decision on its facts.

86). cf. p.330

87). as described in Chapter III

approve of the actual outcome<sup>(88)</sup> and could have achieved what they wanted by the proper use of precedent. Because of this peculiar mixture this case can not be considered as purely rule-based, it has a leavening principle.

Though in respect of its outcome and its attitude to status this case fits into the traditional common law approach, the same cannot be stated as to its treatment of precedent and its reference to 'sacred rights'. The somewhat unusual features of this case can partly be explained by the fact that it is a case on religious education at a time when there was a high tide of religious feelings. The right to direct the child's religious upbringing was the most important aspect of the father's right.<sup>(88a)</sup>.

- Other Cases between 1839 and 1886 -

There are twelve cases on custody or access between mother and father in this period, where no special questions, like religious upbringing or the enforcement of separation deeds, are involved<sup>(89)</sup>. In six of these cases the custody is granted to the mother.<sup>(90)</sup>

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88). cf. above, p.171.

88a). cf. the remarks on cases of this type in Chapter III, above, pp. 88, 91, 96.

89). Ex parte Bartlett (1896) 2 Coll. 661, 63 ER 960, Langston v Cozens (1847) 10 LTO. S.50, Ex parte Pulbrook (1847) 11 JP.86, 102, Warde v Warde (849) 2 Ph 786, 41 ER 1147., Re Halliday's Estate, Ex parte Woodward (1852) L.T.O.S. 171. Hyde v Hyde (1859) 23 J.P. 471, Re Curtis (1859) 28 L.J. Ch. 458, Re Wiscom (1865) 2 H & M. 540, 71 ER 573.; Ex parte Young (1855) 19 J.P. 777, in Re Elderton (Infants) (1883) 25 Ch. D. 220, Constable v Constable (1886) 34 W.R. 649, Re Taylor (an infant) (1876) 4 Ch. D. 157.

90). Ex parte Bartlett, Hyde v Hyde, Re Halliday's Estate, Warde v Warde, Langston v Cozens, In re Elderton, Re Taylor.



In habeas corpus proceedings the courts, without much ado, grant custody to the father, not considering the 1839 Act as having an effect on these cases.<sup>(91)</sup> Ex parte Bartlett shows a change especially against the case of De Manneville<sup>(92)</sup> and also shows a broad and open-minded approach to the statute. In this case the wife had separated herself from her husband without having obtained a decree of separation from bed and board in the Ecclesiastical Court and it was not clear whether she was in fact to live separate from him. The court found that the new statute gave jurisdiction to interfere and interfered accordingly, if not fully granting the petition.<sup>(93)</sup> Forty years later, however, the courts seem to be more reluctant in this respect. In Constable v Constable, where the wife had separated herself from her husband, the court stated the prima-facie right of the father, and stated also that it was not for the wife to take the law into her own hands and separate herself from her husband taking the child with her. As the wife however, had also concealed the child's abode from her husband and only left because of petty quarrels, the courts disapproval for such behaviour may have been the true reason for the decision. Re Halliday's Estate was the

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91). Ex parte Pulbrook, Ex parte Young, the latter is very 'common law' relying heavily on De Manneville and Greenhill though these cases were the reason for the 1839 Act to liberalise the law of custody, however this Act was only applicable in Chancery proceedings.

92). cf. above at fnt. 65.

93). The mother had applied for custody of two children under seven (a boy and a girl) and access to the other four children of the marriage. She was granted all but custody of the small boy.

first case to lay down a broad rule-or even as much as a narrow principle - how the court has to exercise its discretion under the 1839 Act, namely that the father's right had since then been qualified by his marital duties and the child's welfare. It should be noted that the welfare principle as inherent in the 1839 Act is deduced from the age-limit of 7 years, stating that the only reason for inserting this age-limit was that generally children under 7 were better off in the custody of their mothers.

Re Taylor followed in this line, "But the Act took away that right of the father in the most express terms... which was formerly the absolute right of the father became, and is now, subject to the discretionary power of the judge,"<sup>(94)</sup> as did re Elderton. However, the latter case though very distinctly pointing out the mother's right, put greater emphasis on the father's right than the former, "I ought to give effect to the paternal right unless there has been so grave a breach of marital duty."<sup>(95)</sup>

Re Curtis is very much a 'common law' case probably with a leavening of Victorian morals. In this case the parents were separated on the grounds of the husband's cruelty. Though the Divorce Court had by an interim order, granted custody of three children to the mother who had been with her 7 years, it was now granted to the father,

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94). Jessel M.R. at p.159.

95). Pearson, J. at 222 Re Elderton (1885) 25 C.L.D. 220 "I ought to give effect to the paternal right unless there has been so grave a breach of marital duty..."

the court dwelling at length on the father's right and the wife's duty to obey and to submit to her husband. But Victorian morals had another side to them. In Hyde v Hyde where there was a judicial separation on the grounds of the father's adultery it was held to be unjust that the adulterous father should have custody of a 13 year old boy.<sup>(96)</sup> The case most sympathetic to the 1839 Act, and also interesting as to broad constriction of a statute, is probably Warde v Warde. In this case there were 4 children; 2 under 7, a girl of 11 and a boy of 9. The Lord Chancellor found that the daughter was in danger of being 'contaminated' by the profligate father. He also stated that he had 'absolute discretion' in respect of the youngest children. He then found that it would not be for the welfare of the 9 year old boy to be separated from his siblings.<sup>(97)</sup> He also hinted that even without the Act he might have been inclined to give the younger children to the mother, "I think that it is the true construction of the Act, but, whether it be so or not, the principle to which I have adverted with respect to the second child would apply equally to the other two, and, as I am obliged to remove one, I must remove all".<sup>(98)</sup> He discussed the 1839 Act at length and considered the motives of Parliament and stated "that was the object

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96). An order under the Divorce Act 1857, cf. above, Chapter II, p. 38, Hyde v Hyde and Re Curtis are particularly difficult to reconcile with each other, for custody for the adulterous wife, see above, Chapter III, pp. 85f.

97). This aspect of the welfare concept appears for the first time. It also shows more concern for the child itself and does not view the situation merely from the point of the father's conduct.

98). at p.1150

with which the Act was introduced, and that is the construction to be put upon it",<sup>(99)</sup> and he did not use the intention of Parliament to narrow down the statute's scope, "this is not...., a question merely as to the general jurisdiction of this Court to interfere with the legal rights of the father; but that I have now an absolute authority over the children under seven years of age, and a larger power than the Court then had with regard to children above that age".<sup>(100)</sup>

It can be stated that there was considerable enthusiasm among the judiciary immediately after the passing of the 1839 Act, not only in respect of a liberal interpretation of the statute but also in respect of readiness to interfere with the father's right, whereas towards the close of this sub-period the father's right was a fairly strong concept again. The impact of legislation was seen as being<sup>(101)</sup> small, if compared with the approach at the beginning of the period. All in all, when the 1886 Act was passed, the judicial reasoning was still based on rules, careful with statutes, and in favour of individual rights rather than policy considerations. In spite of a different approach forty years earlier this typical common law reasoning was prevalent at that time.

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99 ). at p.1148.

100). *ibid.*

101). *cf.* especially Re Agar-Ellis.

c) Cases between 1886 and 1925

(102a)

Reg v Gynghall -

This is the case of a 15-year old girl, daughter of a poor widow who is guardian under the 1886 Act. The mother, a Catholic, had placed the girl in the charge of different people. Eventually she came to stay in a Protestant convalescent home which was kept by the defendant. The girl had on her own account changed her denomination and she was learning to be a pupil teacher and would soon be able to earn her own living. The mother instituted habeas corpus proceedings, but the girl was left to go with the defendant; an appeal by the mother this decision was upheld.

In this case the parental right still holds a strong position though distinctly, if only carefully, qualified by considerations of the child's welfare", "the Court must exercise this jurisdiction (i.e. to interfere with a parent's custody) with great care, and can only act when it is shown that either the conduct of the parent, or the description of the person he is, or the position in which he is placed, is such as to render it not merely better, but...clearly right for the welfare of the child in some very serious and important respect that the parent's right should be suspended or superseded" (102)

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102). Lord Esher M.R. at p.242.

102a). [1893] 2 Q.B.D. 232.

The welfare of the child is understood in a broad sense, it is seen to include the child's happiness<sup>(103)</sup>, "Again, the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration".<sup>(104)</sup>

The approach to precedent in this case varies according to a certain pattern. The old equity cases are treated faithfully,<sup>(105)</sup> mostly stating the facts as well as quoting the language. Also Re McGrath<sup>(106)</sup>, though a case of orphans where there was a dispute between the paternal relatives and the guardian appointed by the mother, is quoted in accordance with its general tendency, namely with emphasis on the welfare of the child. However, Re Agar-Ellis is only quoted on aspects of jurisdiction in habeas corpus proceedings<sup>(107)</sup> and otherwise not discussed at all, though habeas corpus proceedings were of no significance in the second Agar-Ellis case. The 1886 Act is of no importance in this case, as the mother's position as statutory guardian is clear. The case contains, however, a careful and fair evaluation of the impact of s 25 ss.10 of the 1873 Judicature Act on habeas corpus proceedings, stating and applying the principle that since the passing of that statute in questions of custody and education the rules of equity are to prevail<sup>(108)</sup>.

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103). Lord Esher M.R. at p.242.

104). at p.249.

105). at pp.247, 249.

106). [1891] 1 Ch.D. 143.

107). at p.250.

108). at p.248.

In its approach to precedent the court is mainly still reasoning from rules. The interpretation of the statute is the only possible one, according to the words of the statute, so that it leaves no room to judge whether this stands for rule-based or principle-based reasoning. The court's attitude towards the parent's right and its reluctance to interfere<sup>(109)</sup> also shows an adherence to narrow legal rules, but the understanding of the child's welfare in "its largest possible sense" and dependant on "every circumstance" shows clearly a reasoning from principles.

In conclusion this case still shows most of the typical common-law characteristics, but there is a clear inroad into the traditional form of reasoning.

-Ward v Laverly <sup>(109a)</sup> -

This is the case of three orphan girls of Catholic parents. Before the marriage the mother had been Protestant. When the father had ceased to provide for his family, the mother had gone back to her parents. When the father had died he had left a will to the purpose that his daughters were to be brought up Catholic. After that the mother had become Protestant again and educated her children accordingly. When she had died the girls stayed with her parents. The eldest girl, then eleven years of age had formed distinctive Protestant convictions. The paternal aunt applied for custody with the expressed intention of ensuring a Catholic education for the girls. The petition was dismissed.

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109). cf. p.242

109a). [1925] A.C. (H.L.J.R.) 101.

The court still took the father's right into account, however, only to state that the father in this case had abandoned his right<sup>(110)</sup>. The father's wishes were mentioned, but they were only to prevail, "if there is no other matter to be taken into account".<sup>(111)</sup> There was no doubt for the case of the importance of the welfare, "it is the welfare of the children, which, according to rules which are now well accepted, form the paramount consideration in these cases".<sup>(112)</sup> The welfare is influenced by fixed religious views,<sup>(113)</sup> by affections formed<sup>(114)</sup>, by the notion that siblings should stay together<sup>(115)</sup>.

Precedent is treated sweepingly, the court only refers to two cases, though these are both cases which also from their general tendency not only from single quotations support the present case.<sup>(116)</sup> As to other precedents, the court only states that "the law in these

110). cf. p.110, 25 years later a final word is spoken in these matters. In re Collins (an infant) [1950] 1 Ch.D.498, that as the common law right had been abolished by the 1925 Act, it could not be revived after the father's death and prevail upon the religious upbringing.

111). at p.108.

112). *ibid.*

113). p.109.

114). *ibid.*

115). p.111.

116). Stourton v Stourton (1857) 8 DeG.M.&G.760, 44 ER 583, where a convert Protestant mother is appointed sole guardian of a 9 year old boy against the application of paternal relatives; and Re McGrath [1891] 1 Ch.D.143, a case where orphans were left to be educated by a guardian appointed by a convert Protestant mother, in both cases, the father had died before the mother's conversion and had left no distinct directions as to his children's religious education.



cases is well settled".<sup>(117)</sup> There is also a plea for an adaptive interpretation of precedent, "Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now..."<sup>(118)</sup> The 1886 Act is viewed sympathetically, "Since the passing of the Guardianship of Infants Act, 1886, s.5 of which Act shows the modern feeling in these matters, the greater stress is laid upon the welfare and happiness of the children".<sup>(119)</sup>

This latter quote refers to the 'modern feeling' apparently meaning the approach of society to the question of custody of children, and therefore lies stress on a collective rather than an individual viewpoint in this matter.

Considering the approach to precedent one can say that the reasoning in this case is mainly principle-based. There are, however, remnants of rule-based reasoning. For example the welfare is considered for every aspect in turn making several rules out of one principle and only once there is a statement as to the "whole facts of the case".<sup>(120)</sup> In this respect <sup>(120a)</sup>Gyngall showed more principle in its reasoning with its broadest possible understanding of the welfare concept.

In comparison with Gyngall, however, this case has moved

117). p.108.

118). *ibid.*

119). *ibid.*

120). *ibid.*

120a). [1893] 2 Q.B.D. 232.

further away from the traditional common law approach as can be seen in the 'modern feeling' shown in the Act, the welfare as a paramount consideration, the slight treatment of the father's right, the generous treatment of precedent in general, especially in connection with decisions on the new Act, which are not cited but broadly summarized.

- Other Cases Between 1886 and 1925 -

As for decisions settling disputes between parents, there are first of all four cases which deal with the still surviving "adultery bar"<sup>(121)</sup> illustrating a development which has already been treated elsewhere.

In Re S.Witten<sup>(122)</sup> the court is obviously guided by notions of material justice rather than by welfare considerations, when it gives the custody of a ten year old to the mother. The other cases dealing with disputes among parents seem to be somewhat more enlightened. Especially Smart v Smart,<sup>(123)</sup> though a Privy Council case on a Canadian appeal and therefore no binding authority for the English lawyer, provides some interesting notions on the legislative and on the adaption of old law to modern times. The court mentioned that it had been a "tendency of legislative action and of judicial decision, as well as of general opinion...to give to

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121). Manders v Manders (1911) 63 L.T.R 627, Handley v Handley [1891] P.124, Stark v Stark [1910] P.190, B v B [1924] P.176, otherwise see treatment of this phenomenon above, Chap.III at pp.89 f, Re Grace Steel (an Infant), Steel v Steel (1889) Sol.J. 659 also belongs into this category, here both parents are guilty, though the mother seems to be more to blame, the court emphasizes the father's right, admitting only a modifying jurisdiction to interfere with it.

122). (1887) 57 L.T.R..336

123). [1892] A.C. 425.

married women a higher status both as regards property and person" (124). The children's welfare was viewed broadly, dependent on circumstances and its standards "can hardly be fixed for one age by the standard of another" (125). There is also reference to the welfare of families. (126) It is worth noting that in this context the court refers to the "sense of the community" which was "so satisfied of the benefit of the change, and also of its insufficiency that in 1873 the limit of seven years was raised to sixteen". (127) This is the first time that society as a whole is so openly referred to, and it goes hand in hand with the reference to public opinion. (128) It represents the notion of public control over private affairs and thus furthering collective goals rather than individual rights.

Re A & B (129) puts considerable emphasis on the mother's right (130), stating that to enhance it had been the main object of the legislature (131). This strong feeling for the mother leads to custody being awarded to each parent for six months of the <sup>year</sup> thus considered to be "clearly for the benefit of the infants" (132). (This latter assertion - it is respectfully submitted here - is open to some doubt). There is also with regard to the mother's

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124). at p.432.

125). *ibid.*

126). pp.432,434,

127). p.435.

128). cf. above quotation at fnt. 124, and p.436.

129). ( infants ) [1897] 1 Ch. D. 786, a case with marital misconduct on both sides.

130). pp.790,792 f.

131). p.791

132). p.796.

right a very open-minded understanding of the 1886 Act, it was seen as having "materially altered the law".<sup>(133)</sup> However, approach to legal sources changes with the social issues at stake. As in questions of custody for an adulterous mother, also in questions of religion, the right of the father is seen to be less affected by legislation. In Re Scanlan<sup>(134)</sup> two Protestant guardians were appointed alongside a Catholic widow, of a Protestant husband, mother of three girls, to ensure the religious upbringing in accordance with the father's wishes. The 1886 Act was seen to have had no impact on this question, "...nor can I suppose that in a matter of so much difficulty and delicacy, the legislature intended to abolish a well-established rule by a side-wind."<sup>(135)</sup> In the case of an illegitimate girl the court solved a dispute over religious upbringing by taking the 12-year-old infant out of the care of foster parents who had looked after her for ten years, and delivering it to her mother who intended to place her into an institution.<sup>(136)</sup> Only in Re X, X v Y,<sup>(137)</sup> where the correct religious upbringing was not directly jeopardized, as the mother, a widow, had only married a man of a different denomination and not converted herself, could a court concede, "the Guardianship of Infants Act,

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133). p.791.

134). (infants) (1880) 40 Ch.D. 200.

135). at. p.214.

136). R v New (1904) 20 T.L.R. 583.

137). [1899] Ch.D. 526.

revolutionized the law and gave to a mother surviving her husband rights which were entirely new. Her legal position before the Act was...most unfortunate, cruel and unjust. This state of things was brought to the attention of legislature. They saw that it should be altered, and ...accordingly." (138). And the court does not revive old common law, because the statute is silent to the point of what happens when a widowed mother remarries, "...this is a statutory right which is not to be taken away from the mother without good cause". "That is the interpretation of the statute put shortly. It says nothing about the mother marrying again". (139) The court in this case also reasons from principles :

"I do not think it (i.e. application of the old rules) is in accordance with the true construction of the Act. I think that wherever the Court is called upon to exercise the judicial discretion which is given to it by this Act, it must go upon the special circumstances of the case and not upon the general rule formerly existing..." (140)

Concluding one can say that during this sub-period the welfare concept was being truly established in cases on disputes between mother and father, (except in cases of the mother's adultery where this is only achieved at the very end of the period). These same cases mostly show an open-minded approach to statute and reasoning from principle. When other issues are at stake like the mother's adultery as a breach of Victorian moral standards, the religious education and disputes after the father has died or when the mother of an illegitimate child is

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138). Lindley, MR., at p.530.

139). at pp.533 f.

140). p.534.

involved, the emphasis of the paternal, and in the latter case, the parental right is considerable, and this often goes hand in hand with reasoning from rules rather than from principles and a narrow approach to statutes. In all these areas traditional common law reasoning is still prevalent, whereas in the narrow area of disputes between two living parents a style of reasoning has developed which already resembles that of a civil law system.

d). Cases Between 1925 and 1973

(140a)  
- Re Carroll -

This is the case of a two year old girl, born to an unmarried woman. The mother was a Catholic, she arranged for adoption of the child via an institution which later turned out to be a Protestant organization only mediating adoptions by Protestant couples. The child was placed with prospective adopters. After the mother had learned that the institution was a Protestant institution, and under the influence of her spiritual adviser, the mother became anxious that her child should be brought up according to her own faith. She applied for the child being delivered up to her with a plan in view according to which the child would be placed with a Catholic home without being adopted.

The parental right in general, and the special right of a parent to have his or her child brought up in his or her own religion was greatly emphasized in this case, (141)

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(140a). [1931] 1 K.B. 317.

141). pp.333,335,353-355, 357.

the mother has a natural right to its religious education and custody which will be regarded by the Court. (142)

And as the mother in this case did not want custody herself, the court found another way to help her, :

"though custody in the strict sense is not claimed by the mother, accessibility - a kind of constructive custody - is claimed here. There is no reason to suppose that if the child remains with the adopters the mother will regain custody in this limited sense. Although the child may not find adopters through the Catholic society, the very fact that the Adoption Act will not be used will preserve the legal right of the mother over her child wherever that child may be, and the evidence is that the Catholic society will allow the mother reasonable access to her child". (143)

This concern for the mother's right led to a negligent treatment of the child's welfare, going as far as claiming that an institutional upbringing would enhance the independence of a child, "I may add that it is not universally accepted that a 'home' with no external education is the best thing for a child. Many home-brought-up children are spoilt and deprived of independent initiative..." (144) The old thought that it must be essential for the welfare of the child that the parental right should be interfered with in order to give the court jurisdiction to do so was also revived in this case. (145)

Accordingly the court emphasizes that interference is to be conducted with great care and reluctance, "and the court

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142). p.356.

143). at p.357.

144). at p.332.

145). at p.350.

will in my opinion be undertaking a dangerous and impossible task if it substitutes its own wishes and responsibility for the wishes and responsibility of the parent in the matter of religion".<sup>(146)</sup> The court, however, was not unanimous on this point. There is a strong and determined dissent by Greer L.J. who considered upbringing in a family the best for a child.<sup>(147)</sup> and commented on the right to determine the religious upbringing as follows, " But in my judgment it is not a separate and distinct right, but only one of the rights which are included in the parental rights of the parent who is the guardian, and has the custody of, his or her children."<sup>(148)</sup>

There is an interesting approach to sources in this case, The approach to precedent is different in each of the three judgments. Scrutton L.J. evaluated favourable precedent mostly on the facts and also quoted the language.<sup>(149)</sup> He only mentioned one unfavourable precedent, Gyngall, and there he confined himself meticulously to a few words quoted from the judgment.<sup>(150)</sup> One of the cases he used to help him determine how far the mother was sincere in her desire to have the child removed from her present situation<sup>(151)</sup> (this, to me is a question of fact, not of law).

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146). p.337.

147). p.346.

148). p.347.

149). R v New (1904) 20 T.L.R.583, cf. above at fnt.136, at p.332; Agar-Ellis at p.334.

150). p.336.

151). at p.331.



This approach can all in all considered to be according to the tradition of common law reasoning . This goes hand in hand with a narrow approach to statute. For the judge stated that the 1886 Act was passed to improve the position of the mother,<sup>(152)</sup> then he viewed the 1925 Act as extending this principle further, which led him in due course to confine the scope of the 1925 Act, to disputes between mother and father<sup>(153)</sup> - against the express words of s1 of this statute which orders the welfare of the child to prevail in all proceedings on custody.

Greer LJ in his turn treated Gyngall faithfully<sup>(154)</sup>. He carefully distinguished R v New and Re O'Hara<sup>(155)</sup>. Most boldly, in respect of Barnardo v McHugh<sup>(156)</sup> he regarded "detrimental to the interest of the child" to adhere to the mother's wishes, as being equal to "advantageous to the interest of the child" not to adhere to the mother's wishes. But the remarkable thing is that he actually quoted the precedent and then stated what he thought the words meant. Green LJ's approach to precedent also shows <sup>adherence</sup> <sub>A</sub> to common law reasoning. He is, however, much more open in his argument, tackling unfavourable precedent rather than evading it. However, he

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152). p.335

153). p.337.

154). pp.343f.

155). p.344, Re O'Hara [1900] 2 I.R. 233 is a case where a mother had placed her legitimate daughter with strangers when she could not maintain her, when she had a proper living again herself she desired the child back to bring her up herself.

156). [1891] A.C.388, cited at p.345.

shows a broad minded understanding of statute, "... that actually the attitude of public opinion and the Courts towards the powers of a parent over his children had become modified, and that nowadays less importance was attached to the right of, and the wishes of, the parent, and more importance was attached to the welfare of the child, and the Act of 1925 was pointed to an illustration of the modification....".<sup>(157)</sup>

Slessor LJ. was decidedly hostile to any broad understanding of the 1925 Act. He set out the "whole legal history of parental rights" as being "not only justified but necessary" to determine the matters at stake, especially "having regard to the view...that recent legislation has included the old principles of law which used to determine these matters".<sup>(158)</sup> In his eyes, "neither of the statutes cited by the learned judge has modified the considerations of immemorial right of parents by nature and nurture which we have here to regard".<sup>(159)</sup> He used the preamble of the 1925 Act, which referred to the object of the Act as establishing equality between mother and father, to confine the scope of the Act - against the words of s.1 - to disputes between parents<sup>(160)</sup>. Slessor LJ. cited abundant precedents<sup>(161)</sup>, but mostly he only

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157). at p.348.

158). p.349.

159). p.363

160). *ibid.*

161). especially pp.353-356.

just cited the cases and in other instances he quoted from the language, without referring to the facts (which might have defeated his object!), only in two places in his 16 pages long judgment did he set out the facts of the cases<sup>(162)</sup>. By this ~~mode of reasoning~~ the judge is not particularly faithful to precedent, but he shields his sweeping approach to case authorities under abundant citations. In order to further his view on the natural right of the parent he even invoked the help of the Canon Law and St. Thomas Aquinas and referred to the doctrine of natural justice.<sup>(163)</sup> He thereby reveals a reasoning which, though it derives social concepts from the old common law, is really based on extra-legal considerations and principles and therefore not a common law reasoning at all. In contrast to this, Greer L.J. had relied on modern social concepts embedded in common law reasoning. The immense effort employed by Slessor L.J. to achieve the result desired may be evidence that his social attitude was no longer in accordance with the spirit of the time and he had to employ a method of reasoning quite outside the common law and possibly ahead of his time to achieve this.

Concluding one can say that this is a case full of

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162). p.351, as to Reg v Nash (1883) 10 Q.B.D.454 where an illegitimate child, on application of the mother was delivered out of the custody of foster parents to the mother's sister; pp. 350, 352 Barnado v McHugh, a case very similar to the present case [1891] A.C.388.

163). p.354.

tensions between traditional and progressive attitudes to social issues and questions of method and it may be only by the coincidence of a particular combination of the contrasting elements that the case came to a result which was considered unfavourably and out of time forty years later, "But in 1931...the Court of Appeal, Scrutton and Slessor L.J. ...attempted to put back the clock forty years"<sup>(164)</sup> or to put it even more strongly : ironically it was the general change in the method of judicial reasoning which was well on the way at least since the beginning of the century<sup>(165)</sup> that enabled Slessor L.J. to adhere to an outmoded social concept.

(167a)  
- Re C.T., re J.T. -

This is the case of two illegitimate children whose putative father applied for custody under the Acts of 1886 and 1925. The application was dismissed on a point of law though the judge expressly stated he would also have dismissed it on the merits of the case. The judge found he had no jurisdiction under the Acts to award custody to a putative father.<sup>(166)</sup>

The judge takes pains to set out law. Though there was the case of Re M<sup>(167)</sup> where Denning L.J. had stated plainly, "In my opinion the word 'parent' in an Act of

164). Lord Upjohn in J v C at p.725, cf. below.

165). cf. above, p. 186

166). p.502.

167). (an infant) [1955] 2 All ER 911.

167a). [1956] 3 All ER 500.

Parliament does not include the father of an illegitimate child, unless the context otherwise requires, "(168) Roxburgh L.J. in the present case carefully reconsidered the whole law on this point. He set out numerous legislative provisions<sup>(169)</sup> and quoted several passages from Halsbury's Laws of England<sup>(170)</sup> and finally amplified what he had set out by references to cases. Thereby he mostly only quoted from the language of the cases without referring to the facts, however, where he did so, he openly acknowledged that he only took the words, possibly out of context to throw some light on the question at hand, "although I am conscious that I am quoting from a minority speech, I adopt this reasoning in a quite different context".<sup>(171)</sup> The judge was faithful in his approach to the statutory provisions when he concluded that the various provisions on the parents never meant to include the putative father when enacted. He obviously refused, however, to adopt the words of the statute to modern times by extending the scope of their words. Though viewing the statutes systematically and in their context, he confined himself to doing just this and not embarking on tasks that are for Parliament to fulfil," and it is, of course, trite knowledge that such alterations cannot be made by judicial decision, and that they are solely within the province of Parliament".<sup>(172)</sup>.

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168). at 912.

169). p.505 § 2 and § 3 of the 1886 Act, § 1 of the 1925 Act p.506, § 3(1) + (2) of the 1925 Act; p.508, § 4 and § 5 of the 1925 Act;

170). at pp.504, 506, 507.

171). p.508.

172). at p.512.

All in all this case though there is no residual hostility to statutes and an acknowledged 'loose view' of precedent, it is well within the common law tradition of a strict separation of powers. Therefore it contains both characteristics of civil law as well as common law judicial method.

- J v C <sup>(121a)</sup> -

This is the case of a nearly 11-year-old boy of Spanish parents, born in England. The parents had left him with an English family shortly after his birth as they were themselves incapable of looking after him.

When he was two years old he returned with his parents to Spain for 17 months, but they lived in such poor conditions that his health suffered and he was brought back to the foster parents. They undertook ( though Protestant themselves ) to educate him in the Catholic faith in knowledge and recognition of his parents and knowledge of the Spanish language. In 1967 the foster-parents applied for the boy to be brought up in the faith of the Church of England for educational reasons, and subsequently the parents applied for custody. The parents had in the meantime acquired a proper home and the father was in good employment. However, the boy had not seen much of his parents and was well integrated into the foster-family. There was also evidence that the chances of successful adjustment in Spain were slight, and were diminished by the impatient temperament of the boy's father who was not likely to understand the difficulties his son would have finding his way into completely new surroundings. There was, however, not the slightest reputation of misconduct

on the natural parents.

The judgment is long and very thorough. Most of it deals with the legal history since Re Fynn and there is also some evaluation of the 1925 Act. The court does not have the slightest doubt that the child's welfare is now the paramount consideration to guide the court and it strives to demonstrate that this consideration is now also applied to disputes between parents and strangers. The parental right is only treated in passing as a historical phenomenon, "it is argued that united parents are prima facie entitled to the custody of their infant children.,. and that in the case of what has been described as an unimpeachable parent the court must, unless in the very exceptional case, give the care and control to the parents. This argument for the appellants necessitates a review of the authorities since 1848 when in Re Fynn was decided". (173). The wishes of the parent can only be considered in so far as they can contribute to the child's well being.

The judgments of the court assess all the more important authorities on custody law, thereby demonstrating that the law and the general attitude to questions in this field has changed over the decades. The Law Lords in this case also do not refrain from severe or favourable critique where they find it appropriate, "at the turn of the century

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173). at p.694

a more enlightened view appears to have been taken," (174)

and, "Re Carroll...which I have found a difficult case..." (175)

"I consider the case was wrongly decided...the observations went far beyond what was necessary for the decision and they are, in my view not well founded". (176) "...in 1883 we find the case which I can only describe as dreadful, of In re Agar-Ellis...where the Court of Appeal permitted a monstrously unreasonable father to impose upon his daughter of 17 much unnecessary hardship in the name of his religious faith". (177) The approach to precedent can be summed up by a quote from Lord MacDermott :

"...the course of both authority and legislation during the 120 years which have elapsed since Fynn's case shows a change in the law, and the question is, how far that change has gone. The authorities are not consistent, and the way along which they have moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion(!) has many twists and turns. In these circumstances no useful purpose would be served by an exhaustive citation. A few examples will suffice to indicate the trend which, it may be observed, was probably fashioned to a considerable degree by unreported cases heard mostly in chambers." (178).

Though he speaks of authorities, the judge only views them as putting a gloss on the law of today. Obviously, when the authorities have twists and turns they are at least in respect of their twists and turns no authority.

The approach to statute is broad. Unanimously the

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174). p.695, referring to Re O'Hara cf. above fnt. 175.

175). p.698

176). p.699, cf. also p.725 quoted above at fnt.164.

177). at p.721.

178). p.703.



Law Lords in this case find that the 1925 Act applies to conflicts between mother and father as well as to conflicts between strangers and parent,<sup>(179)</sup> even between strangers and strangers.<sup>(180)</sup> Thereby the judges rely on the words of the Act itself, and although invited to do so by counsel for the parents they refuse to take the preamble into account to narrow down the scope of the Act to disputes between parents<sup>(181)</sup> which the court had done in Re Carroll. Considering that the Legislature in 1925 probably mainly intended to put mother and father on the same footing, as the Act had been canvassed for by the Women's movements<sup>(182)</sup>, this construction though relying on the words of the statute is also "adaptive" in that it transfers the Act into the present time. The judges consider the cases after the Act, but not wholly as authorities. Two of them rather state what the law is according to the statute and then view the authorities for confirmation of their views,<sup>(183)</sup> thereby getting rid of cumbersome cases like Re Carroll, "this view of the law is confirmed by the cases, apart from one exception, which followed the passing of the 1925 Act."<sup>(184)</sup> Their Lordships disagree partly on the extent to which the statute had changed the law. Especially Lord Guest shows a marked belief in the strength of common law development,

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179). pp.697, 710f, 727, 715.

180). p.715.

181). pp.698,710.

182). See above, Chapter III.

183). Lord Guest at p.698, Lord MacDermott at p.711, Lord Upjohn, pp.723-725 mainly considers the development before the Act. For the time thereafter he only mentions Re Thain, Thain v Taylor [1926] 1 Ch.D.676, a case where a widowed father successfully claimed back his child from his sister-in-law after he had remarried and could provide a home; and Re Carroll of which case he disaproves.

184). p.698.

"It is clear to me that even prior to the 1925 Act the paramount consideration in regard to the custody of infant was the infant's welfare, "(185) as opposed to Lord Donovan, "it is incredible to me that Parliament would pass such an enactment as section 1 of the 1925 Act if the position were that it made no difference at all to the law as already expounded by the judges". (186) If one views the cases before and after the Act, Lord Guest probably comes closer to the truth : Reg v Gyngall stands for a case where an infant was left with strangers for considerations of welfare before the enactment, as Re Carroll stands for a case where the right of an only parent was allowed to prevail against welfare consideration after the enactment. It seems more that the 1925 Act gathered up some loose ends of the law and tied them together and thereby made a step towards the law as it stands today.

There is one reference to academic writers but only on a point of conflict of laws, quoting Dicey, Conflict of Laws, 8th ed. (1967) and also citing Cheshire, Private International Law, 7th ed. (1965). (187)

The reasoning in this case is according to the spirit of the law and is mainly based on principles, as "while there is no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and

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185) . p.697.

186) . p.727.

187) . p.700.

society, can be capable of ministering to the total welfare of the child in a special way,..."(188)

All in all this case has moved further away from the traditional common law reasoning. The main basis of reasoning is the welfare of the child, a general principle. Their Lordships show a 'loose' but not unfaithful view of precedent, and in contrast to Slessor L.J. in Re Carroll, they admit it. They do not view previous decisions as strictly binding precedent, though they still speak of authorities. In this case there is no reference to general principles apart from the welfare principle and no reference to notions of public policy. This conforming to legal issues is well within the common law tradition.

- Other cases between 1925 and 1973 -

There are numerous cases between 1925 and 1973, or later between the end of the second world war and 1973, and they now mostly deal with side aspects of parental status : the position of the putative father, adoption proceedings, name cases. Here I should only like to point out certain tendencies which go along with the lines of cases. When a new type of case arises or a new idea gets hold of the judiciary, the first thing they do is to lay down a new rule. But almost immediately afterwards this rule is again abolished by reference to the welfare principle, it is turned into an aspect of the welfare principle.

There is first the example of a rule for awarding

custody among parents. W v W & C<sup>(189)</sup> stated that other things being equal, a boy of 8 should be with his father. This is a tentative enough statement of a rule and this issue had already been stated otherwise some six years before in Re B.<sup>(190)</sup> However, after W v W & C it was three times that a court hastened to state that there were no fixed rules "as to which (of the two parents) the children should go with."<sup>(191)</sup>

Another example is the blood tie argument which, when it first appears in Re Aster,<sup>(192)</sup> has a strong impact on the decision of the case, "there is the further consideration which, I think quite properly, entered into the judge's mind, the consideration expressed by the ancient proverb that 'blood is thicker than water'."<sup>(193)</sup> In a later decision Re O<sup>(194)</sup> the blood tie is considered in how far it can contribute to the child's welfare. There are other decisions where this is not so greatly stressed,<sup>(195)</sup> but the blood tie is not again considered nearly independently from the welfare of the child as it had been in Re Aster.

The last line of cases where a rule was substituted by the welfare principle is formed by the name-cases.<sup>(196)</sup> In Re T (otherwise H)<sup>(197)</sup> the court stated that if there was a

189). [1968] 1 W.L.R. 1310.

190). (an infant) [1962] 1 All ER 872, that there was no hard and fast rule.

191). H v H & C [1969] 1 W.L.R. In Re C(A) (an infant) [1970] 1 W.L.R. 288, B v B, The Times, November 29th 1972.

192). (an infant) [1955] 2 All ER 202.

193). at p.205.

194). (an infant) [1965] 1 Ch. D. 23.

195). Re E(P) (an infant) [1969] 1 All ER 323, especially : Re C(MA) (an infant) [1966] 1 W.L.R. 646.

196). cf above Chapter III, pp. 114, 117.

197). (an infant) [1962] 3 All ER 970

right to change the child's surname, this right rested with the father. A few years later, the welfare principle found its way into this branch of law via Y v Y.<sup>(198)</sup>

There is then also a particularly bold understanding of the welfare principle. In Re W,<sup>(199)</sup> an adoption case, where the parental consent cannot be dispensed with on welfare considerations, the judge clearly felt this to be out-dated. After some sharp censuring of delay in children's cases he opined that the child's welfare should really be the paramount consideration in adoption cases as it was in other proceedings. However, he refrained from acting according to his own suggestion, in conformity with the principle of separation of powers, "the Adoption Act, 1958, had presented serious difficulties. After 13 years' experience it might be that time had come to change the law and to make the interest of the children the paramount consideration as it was in other disputes about children".

e) Cases after 1973

- Dipper v Dipper<sup>(199a)</sup> -

This a divorce case with several legal issues involved, including custody.

There were three children, aged 10, 7 and 5. The single judge had awarded sole custody to the father and care and control to the mother. There were cross-appeals, an order for joint custody was made.

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198). [1973] 2 All ER 579 (the case is in fact from 1969).

199). (an infant), The Times, 28th January, 1972.

199a). [1980] 2 All ER 722.

In this case neither parental rights nor the welfare of the child are expressly referred to, but it is safe to state that the latter was considered to be self-evident and therefore had not to be asserted. There is, instead, a very practical attitude to social matters, "In day to day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation as far as education or any other serious matter is concerned is quite wrong. So the basis of the judge's order giving custody to the father and care and control to the mother was, in my view, unsound . In any event, these split orders are not really desirable. There are cases where they serve a useful purpose but care has to be taken not to affront the parent carrying the burden of the day to day looking after the child, by giving custody to the absent parent. In this case a joint custody order seems to me entirely right, because this is a case where the father has an intent to play an active part in his children's lives", (200) and, "The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other matter... What is not practicable, when a judge is worried about the moral aspect of the parent who is going to have care and control, is to

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200). Ormrod L.J. at p.731.

try to resolve the problem by giving the other parent an apparent right to interfere in the day to day matters or in the general way in which the parent with care and control intends to lead his or her life. If anxiety is such as to call for an active control, the usual method is by making a supervision order. That would not be sensible in this case..."<sup>(201)</sup> This latter quotation clearly shows the effect of the 1973 Act, it does not, however, refer to the statute.

In respect of this custody question no authority is cited neither from statute nor from precedent. Nevertheless it shows an interesting feature of reasoning. Without much ado the court all but abolishes the split-custody orders, for practical reasons. This type of order had been invented in 1954 Wakeham v Wakeham<sup>(202)</sup> by Denning L.J. to give a father whose child had been taken to South Africa by the mother custody but so that he might have a basis to proceed from in a South African court of law. It was affirmed in Re W (JC)<sup>(203)</sup> that s 5 of the 1886 Act indeed gave authority for this type of order. Normally such a case would have provided a precedent. If in the present case the single judge had had jurisdiction to make the order he made, and in his discretion, considering the welfare of the children had done so, one would have expected that his decision was overruled either by overruling the precedent or by stating that the

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201). Cumming-Bruce L.J. at p.733.

202). [1954] 1 W.L.R. 366.

203). (an infant) [1963] 3 All ER 459.

judge had exercised his discretion wrongly. A statement as made here by the court<sup>(204)</sup> is only understandable against a well established background of statute law with embodied principles, it stands for a minor form of law-making under the shelter of existing statutory provisions.\*

In respect of the other legal issues at hand, two things are noticeable. First there are four references to public policy, public interest or public importance,<sup>(205)</sup> emphasizing the importance of goals of the community for the law and their impact on judicial decisions. The other is a quote from Roskill L.J. :

"It seems to me that the right approach to the question whether the judge had jurisdiction to make this order is first to look at the relevant statutory provisions unguided by judicial decision".<sup>(206)</sup>

(However thereafter he does evaluate cases on the matter).

Concluding, this case may be described as a case with civil law reasoning, the remnant of a common law approach being that there are in fact three judgments by a prominent judge each, instead of one : The reasoning is based on principles, public policy plays an important role, statutory provisions are given primary importance, and the court very silently embarks on judicial law-making under cover of the statute.

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204). cf. Ormrod L.J. as quoted at fnt. 200.

205). at pp.732, 737, 734 (twice); at p.732 however, the judge states that the court has no jurisdiction for the decision the single judge made for public policy reasons, implying that only Parliament could give such a jurisdiction. The other references state that it is according to public policy that the court should not have this jurisdiction.

206). at p.725.

\* There is, however, a hint of an intention to legislate against the letter of the law. The judges go very far in favouring the concept of joint guardianship<sup>(206a)</sup> which the judiciary had already favoured before the 1973 Act.<sup>(206b)</sup>

206a). see above, pp. 120ff.

206b). see above, p. 116.



- other cases after 1973 -

In this period the blood-tie rule is finally worked  
(208)  
into the welfare principle. In the two cases of M v J and  
S v O (209) - in both cases the putative father applied  
for access - it is made finally clear that access is a  
right of the child and is only to be decided on welfare  
considerations.

Also in adoption cases the welfare principle is worked  
deeper into the law. It is finally established that the  
welfare can be taken into account when the court has to  
decide whether to dispense with parental consent. The  
parental consent can be dispensed with as unreasonably  
withheld when a reasonable parent could come to the con-  
clusion that it would be better for the child to be  
adopted. (210) However, unreasonable withholding of con-  
sent may only be presumed when the refusal of the parent  
falls outside the band of possible reasonable decisions.  
By going this far, the court stated at the same time that  
any step further in this direction had to be made by Parlia-  
ment. This reluctance to trespass into the province of  
Parliament is in accordance with the common law doctrine  
of separation of powers. It should not be forgotten,  
however, that even in a civil law system the courts would  
not have been any more likely to go so far as to ignore

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208). (1978) 8 Fam.Law 12.

209). (1978) 8 Fam.Law 11.

210). Re H, Re W (adoption parental agreement) (1983) 4 F.L.R. 614.

statute in such a case. Though it has to be conceded that it would have been easier for them to do so.

There is an element in common in some of the cases which could also be seen in Dipper v Dipper, and this is a very practical approach to the social and sometimes the legal issues at stake. This approach goes often hand in hand with quite strong language, "one of the myths that the court has been trying to explode for many years",<sup>(211)</sup> "a fallacy which continues to raise its ugly head".<sup>(212)</sup> Other examples are, "nothing is more depressing than to have a mother brought back to the court over some infringement of this requirement, such as registering the child in a particular play group under the name of B when it ought to be D. Fortunately, at the end of the day, the father, I think, has realized that substantive issues are what matter to children and trivial issues can be left to look after themselves. If they are forgotten about nobody will worry about them."<sup>(213)</sup> "I remember that at the time it was directed to preventing parents with custody or care and control orders changing children's names by deed poll, or by some other formal means, but, unfortunately it now seems to be causing a great deal of trouble and difficulty to school authorities and to children and the very last thing that any rule of this court is intended to do is

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211). Dipper v Dipper, Ormrod L.J. at p.730, referring to split custody orders.

212). *ibid.* Cumming-Bruce L.J., at p.733, referring to the same issue.

213). D v B (otherwise D), a name-case [1979] 1 All ER 92, Ormrod L.J. at 100,

to embarrass children. It should not be beyond our capacity as adults to cope with the problem of dealing with children who naturally do not want to be picked out and distinguished by their friends and known by a surname other than their mother's..."<sup>(214)</sup> This attitude is very practical and unfettered by any consideration of legal rules. The judges, by making such personal statements and acting according to them interfere directly with the family life. They seem to see themselves as social engineers who "mend" the families coming before them in court disputes, rather than just applying the law. They thus represent the interference of the community with the private life of the citizen and there is accordingly no more room for individual rights in this branch of law.

I should like to finish with two odd cases which each stand alone with their approach, one of them being archaic the other very progressive. In B v B<sup>(215)</sup>, on an application for custody by a mother who had left her husband, a clergyman, and children of 6 and 8, to live in adultery, the court found that it was still the law that where a mother had disrupted the home and committed adultery the wishes of the father could rightly be taken into account (the father had stated that he could not give the children the moral upbringing he wanted when they were delivered up to the mother). In the other<sup>(216)</sup> case a judge applied s.10(3) of

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214). Another name case R(BM) v R(DN) [1978]2 All ER 33, Ormrod L.J. at 33; see also Re D(minors) (1981) 2 F.L.R. 102, Ormrod L.J. at 107.

215). The Times, 15th May, 1975.

216). Re S (infants) [1977] 3 All ER. 671.

the 1975 Children's Act which was not then in force, on the grounds that the provision though not in force represented the will of the legislature. The appellate court upheld this decision, Ormrod L.J. stating, "It is undoubtedly embarrassing to the exercise of a discretionary power to find on the statute book a provision which appears to be an expression of the views of Parliament on a relevant matter which is not to become effective until some later and indeterminate date. In circumstances such as these the judge cannot be criticized for, at least bearing in mind the philosophy behind such an approach"<sup>(217)</sup>. This is taking the spirit of the law very far indeed and it also means the revoking of any ideas of certainty of the law which is traditionally a residual element in common law.

To summarize, one can say that overall the judicial reasoning since 1973 has acquired so many features of civilian reasoning that it can no longer be considered as common law reasoning. There is a broad approach to statute and a 'loose' view of precedent, the reasoning is principle based, the idea of certainty of law has lost its overall importance, state interference in private matters is viewed as being necessary and not in a hostile way, the implantation of collective goals into the law is accepted. What remains of the old common law reasoning is the scarcity of single judgments by a court of several judges and the impact of the individual judge's personality on his judgments.

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<sup>217)</sup>. at p.674.

#### 4. Conclusion

The development of judicial reasoning proceeds in fits and starts. However, if one compares the method of reasoning in the first case of this sample with the reasoning in the last case, it becomes clear that the method has indeed changed and that it has become very much like civil law reasoning. However, there are periods and cases which stick out and do not comply with the general line of development. One example is the principle-based reasoning in the cases after the 1839 Act, another is the time between about 1860 and 1925 when the methods of reasoning, like the attitudes towards social concepts, vacillate strongly between very common-law-like and more progressive approaches. With the exception of these examples the judicial reasoning at the outset of the period is rule-based, faithful to precedent, usually not very broad in its approach to statute, protective of individual rights. Very gradually the approach to legal sources changes<sup>(218)</sup>, and only after the second World War the change in approach to legal sources becomes swifter. The attitude to certain social concepts, though with more vacillation changes<sup>in</sup> all in all with the same pace over the period concerned, which is also true for the substitution of rule-based by principle-based reasoning. And

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218). I have not been able to trace a significant change in approach to legal writers though. However, Paterson has found evidence for increased reference to living legal writers, op.cit., p.16.

in due course by the end of the time considered the reasoning is based on principles, statutes are approached broadly and precedents loosely and public policy is no longer too unruly a horse. There are also examples of covertjudicial law-making under the shelter of statutory law, though, when asked for too much in this respect, the English judge of today will still stoutly refuse to invade the province of Parliament.

CHAPTER VCONCLUSIONS

This study has shown how the law of parental status has developed since about 1800, It has traced aspects of social development of the development of substantive law and of methods of statutory drafting and judicial reasoning. At the outset of the relevant period the father's right was the main feature of this branch of law. It could only be interfered with on narrow grounds. The father's right stood for the right of an individual as a residual right which was to be left alone by the state.<sup>(1)</sup> As according to the common law husband and wife became one person in law on marriage, the wife and mother had no status and no rights of her own. When deciding family disputes, the judges in their reasoning were guided by the following considerations . They had an individualistic outlook. Convinced that individual freedom was best protected by non-interference of the state, they were loath to interfere with the father's position<sup>(2)</sup>. They were sceptical of intangible ideas and extra legal considerations according to the empirical tradition of the common law, thus often against their better feeling they would not let aspects of morals or public policy or of idealistic philosophy enter their

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1). cf above, pp 25f.

2). cf above, p. 50.

reasoning<sup>(3)</sup>. They favoured certainty of law as the predominant part of justice<sup>(4)</sup>, and they were bred with the notion that only where there were legal remedies were there also rights to be protected by these remedies.<sup>(5)</sup> This made it impossible for them to depart from precedent (which had so far favoured the father's right) and to consider the position of mother and child beyond what had been laid down by earlier cases; there was no remedy for the mother, or the child, so the judges could not invent one. As in those days, at least in this area of law "equity too dutifully followed the law"<sup>(6)</sup>. There was not much to choose between the two systems.

This structure of law was then confronted by the rapid social changes which ensued during the industrial revolution. Large parts of the population emigrated to the towns, where neighbours were strangers, where the traditional family structure which included most of the more distant relatives proved cumbersome rather than vital for the survival of its members. The traditional division of labour which ensured economic dependence of small communities no longer held good. The individual lost his importance in the anonymous masses of city life, he would no longer be heard as an individual voicing his grievance but he had to form interest groups like trade

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3). cf. above R v Greenhill, p 163.

4). cf above, p. 162, fn. 56.

5). Dicey, Constitution p.199.

6). Lord Upjohn in J v C [1970] A.C. 668 at 721, cf. also observations on the De Manneville cases, above pp. 164f.



unions in order to be listened to. Women increasingly entered gainful employment, male protection was no longer desirable as it might have been in the Middle Ages which had so decisively influenced the structure of English property and family law. In due course women strove for emancipation. The number of marriage breakdowns increased (and possibly also, if more in our century, the number of illegitimate births).

As traditional values and attitudes no longer held true, traditional mechanisms of social control, workable in a small rural community and within large families, provided no solution for the problems arising from the social changes. Where formerly the village rector, the grandmother or the neighbour might have interfered when a man maltreated his wife and children, after they had moved to the slums of the big city, he was now left to do as he pleased. The situation of women and children was made even worse by the bad working and housing conditions in the towns. Some broad-scale intervention became necessary.

Facing this upheaval of social values and structures the traditional judge-made common law proved unable to cope with the new situation. It emphasized the father's right, thus it was no fitting tool for interfering with it. It was inflexible with its narrow approach to precedent and its slow and piecemeal way of developing new law. The swift and more comprehensive change of the law which would take into account goals of the community who could not afford to let larger parts of the population sink into depravity could only come from Parliament.

Parliament in its turn did intervene in the area of law which is relevant here, though at first it did so tentatively and piecemeal, amending the judge-made common law by giving the mother a remedy<sup>(7)</sup> and thereby something like an "equitable right". Changes in other branches of law followed. The law of divorce was secularized<sup>(8)</sup>. The property law was changed to ensure the independence women had gained by entering employment.<sup>(9)</sup> Eventually women were also given the vote<sup>(10)</sup>. However, the woman's or rather the mother's right to her children as granted to her by Parliament in 1839 did not enjoy an independent existence for long. The concept of individual rights as represented by the father's right had proved unworkable in the face of novel social conditions, thus protection by state interference had become necessary which could not be achieved by giving the mother a right of her own. This could only be achieved by making inroads into any individual right whether the mother's or the father's on behalf of the welfare of the children.<sup>(11)</sup> As early as 1852 one of the reasons for the enactment of the Talfour's Act was seen to be the welfare of the child. It was in Re Halliday that the Court stated that the only reason for the age limit of 7 years fixed by the statute was that it was generally better for

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7). Talfourd's Act, 1839.

8). Starting with the Matrimonial Causes Act 1857, cf. above, pp. 53ff.

9). Starting with the Married Women's Property Act, 1870, cf. above p. 63.

10). cf. above p. 65.

11). It is interesting to note that the new legislation was often also viewed to protect the mother rather than to give her a right cf. e.g. In re Taylor (1976) 4 Ch.D. 157, Jessel M.R. at p.160.

such young children to be with their mother.<sup>(12)</sup> It is perhaps no wonder that the shift from the father's right to the child's welfare brought about a different perception of justice : an individual right can best be protected by not interfering with it and by providing a set of rules in case of disputes arising. It is important for the individual to know what these rules are, certainty of the law will ensure his or her freedom. Protection of the weak by state interference, which will have to assume a different shape in every individual case, needs flexibility rather than certainty<sup>(13)</sup>, substantive justice rather than formal justice. It also asks for substantive rather than procedural law.<sup>(14)</sup>

Flexibility was needed and provided by legislation. However, the traditional, casuistic statutes did no more than provide a few more narrow rules that strongly resembled judge-made rules. Thus, eventually, broad principles were embodied in the law to ensure the flexibility needed for the protection of children, which had become a public interest. The broad principles, the increase in substantive law and the increase of legislative law in general made it necessary to cast the statutes into form, to give them a systematic structure.<sup>(15)</sup>

The judges, however, with their inborne narrow approach

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12). (1852) 2 L.T.O.S. 17.

13). For the abandoning of certainty cf. especially the case of Re S (infants) [1977] 3 All ER 671 and the observations on it, p.109.

14). For the traditional predominance of procedural law in the sense of remedies provided for the aggrieved individual in English common law, cf. Dicey, Constitution, p.199.

15). cf. above p.141 f.

to legal sources, fostered by their belief in certainty of law as the primary aspect of justice and their belief in the individual's liberty showed themselves hostile to legislative interference (if not so much in the area of law which is relevant here).<sup>(16)</sup> They construed statutes narrowly which in turn led to exceedingly elaborate and detailed statutory drafting<sup>(17)</sup>, from which the English Statute has not yet recovered<sup>(18)</sup>. The recent development<sup>(19)</sup> of judicial reasoning, however, shows a distinctive retreat from narrow construction of statutes and rule-based reasoning to a principle-based reasoning and a 'contextual'<sup>(20)</sup> and systematic interpretation of statutes.

Two quotations from the recent case of Gillick v West Norfolk<sup>(21)</sup> may demonstrate the method of modern judicial reasoning as well as the different weight given to in judge-made law:

"The House...is to search the overfull and cluttered shelves of the law reports for a principle, or set of principles recognized by the judges over the years but stripped of the detail which, however appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work". (22).

and

"If certainty be thought desirable it is better that the rigid demonstrations necessary to achieve it should be laid down by legislation...unless and until Parliament should think fit to intervene, the

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- 16). cf. especially the cases immediately after the Talfourd's Act above, pp. , this promising start, however, subsided in later years, cf. pp. 177
- 17). Allen, op.cit., p.516, Bennion op.cit., p.43. Atiyah, Law and Modern Society, p.128.
- 18). cf. The statutory provision cited in Chapter IV B at. p.146, ibid. 19.
- 19). cf above p.109
- 20). Reading the words in context with the whole statute and possibly other statutes in pari materia not leaving out the social context of the statute, cf. E.A. Driedger, The Construction of Statutes, (1974), at p.67.
- 21). [1985] 3 W.L.R. 830. This was a case where a mother alleged that  
(footnote contd/..overleaf..

courts should establish a principle flexible enough to enable justice (he means substantive rather than formal justice!) to be achieved by its application....(23)

There is also no doubt today that children are no longer treated like their father's property but as persons in their own right, "...parental rights are derived from parental duty and exist only so long as they are needed for the person and property of a child." (24). If Sir Leslie Scarman (as he then was) had to advocate as recently as 1967 :

"We must get into the habit of looking first for our law in the statute book and turning to the case law only if the law cannot be found in the statute. There is nothing revolutionary in such a change. Indeed it is belated; for already the bulk of the English law that matters has found its way into the statute book," (25),

there is now evidence for a change, when English judges start their reasoning by first looking at the statute and then viewing the cases which provide a gloss on it. (26) As can be seen inter alia from the Practice Statement 1966, there is also evidence for a relaxing attitude towards the binding force of precedent.

English judges are also no longer afraid to take extra legal considerations into their reasoning. They no longer adhere to a strict separation of law and morals,

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Footnote 21). Contd/..

the recommendation of the relevant Health Authority to doctors that in exceptional cases contraceptives and contraceptive advice might be given to young people under 16 without knowledge and consent of their parents. Mrs. Gillick wanted the Health Authority to withdraw the regulation and to give an undertaking that its doctors would not give contraceptive advice or contraceptives to Mrs. Gillick's own daughters while under 16, without her knowledge and consent. The petition failed.

22). Lord Scarman, at p.853.

23). at p.855.

24). at p.854.

25). Law Reform - The New Pattern, p.67.

26). Dipper v Dipper [1980] 2 ALL ER 722, analysis above, especially pp 204f.

as can be seen from recent cases where the judges apparently see themselves as social engineers with the task of mending, as far as possible, the fates of broken families<sup>(27)</sup> rather than as stern administrators of the law applying a set of rules to disputes brought before them. It is to be hoped that draftsmen in their turn will acknowledge this change and adapt their drafting methods to this new form of judicial reasoning.

There is one other less significant but nevertheless interesting feature to accompany the changes just described : with the exception of divorce law reform<sup>(28)</sup> it is only at the very beginning of the relevant period that law reform was influenced by individuals<sup>(29)</sup>. With the loss of importance of the individual and the rise of collectivism, interest groups, e.g. women's groups or parties took their share in reforming the law.

It becomes clear that the common law system has moved towards something closely resembling a civil law system<sup>(30)</sup>, if one recalls the typical features of civil law methods of judicial reasoning and statutory drafting, with its overall importance of legislative law, the prevalence of broad principles rather than narrow rules in

27). cf above, p.208.

28). cf Allan P. Herbert's influence on the Matrimonial Causes Act, p.71.

29). Sergeant-at-Law Talfourd, cf. above pp.82 f Mrs. Caroline Norton cf. p.82.

30). Though examples could not be found in the area of law which is relevant for this study, there is otherwise evidence that there has been relaxation of the rule against citing living academic writers, cf. Paterson, op.cit., p.16. There have also been voices in favour of in part relaxation of the rule against citing legislative history, cf. Cross, Statutory Interpretation, pp. 132 ff, Allen, op.cit., p.527.

legislative and judicial law and the importance of extra-legal consideration like philosophical ideas or 'good morals' being embodied in the law<sup>(31)</sup>. Remaining common law features may be seen in some aspects of statutory drafting i.e. some very detailed provisions<sup>(32)</sup>, and in the strong impact of the judges' personalities on their reasoning. This change of the English system into an ~~almost~~ civilian system can be explained by the fact that the continental legal systems were better suited for the changing social conditions in the wake of the industrial revolution and thus retained their main features<sup>(33)</sup>; the emphasis on substantive rather than formal justice on collective goals rather than individual rights and on state intervention rather than individual freedom. However, changes have also taken place in civil law systems.<sup>(34)</sup>

It would be mere speculation to suggest how much further the shift will go which has taken place in the English system. I would like to finish with the observation, that whereas it would probably alleviate the work of draftsmen as well as judges and barristers, if English

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31). cf. above, p.30 with reference to para.242 of the German civil code.

32). cf above, 146 ; also the relatively small compass of statutes which is still far away from the broad coverage of a code.

33). see David, op.cit., pp 24, 308 Friedmann, op.cit. p.550

34). In respect of the approach to precedent, the function of the judges, the attitude towards judicial dissent, in respect of submissive law see a move of the French concepts of matrimonial property law towards the common law system cf. Friedmann, op.cit., pp.550, 524.

statutes were cleared of their more awkward provisions, it seems less desirable that the English judge should dwindle into something like his somewhat colourless continental counterpart. Legislative interference with the common law was necessary after the rapid social changes of the last two centuries, but state interference can seriously jeopardize the individual's freedom. A judiciary with an individualistic outlook consisting of strong personalities may provide an effective counter-balance to such tendencies.



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