

Eyre v Countess of Shaftsbury 2 Peere Williams 103, 24 ER 659

Report Date: 1722

[2-Peere Williams-103] Case 24. - Mr. Justice EYRE versus Countess of SHAFTSBURY. [1722.]

[S. C. 1 Wh. & T. L. C. 7th ed. 4:73. Referred to, Attorney-General v Magdalen College, Oxford, 1854, 18 Beav. 245; Bell v Holtby, 1873, L R 15 Eq. 192.]

Lord Macclesfield.

2 Eq. Ca. Ab. 710, pl. 3; 755, pl. 4.

A guardianship devised to three, without saying, " and to the survivors or survivor of them," yet the survivor shall have it.

The, late Earl of Shaftsbury, by his will dated 10th November 1710, devised the guardianship of the person and estate of his infant child (the present Earl) to Mr. Justice Eyre and two others (since deceased) without saying a d to the survivor of them and this devise of the guardianship was until the child should come to 21 years of age.

Lord Shaftsbury died beyond sea, and the infant Earl was now twelve years of age, when Mr. Justice Eyre, perceiving that his lordship had not a proper governor provided for him by the Countess his mother, and that the person who was ordered to attend him as his gentleman, was not a fit person for that purpose, petitioned the Lord Chancellor, that he, as sole surviving guardian, might have the ordering, as he should think proper, of such governor, gentleman and other servants to attend the said infant Earl, and that the person of the said infant Earl might be delivered over to the petitioner.

On the behalf of the Countess it was insisted by the solicitor general, Mr. Lutwiche, Mr. Cowper, and Mr. Talbot, that the guardianship being devised to three, without saying and to the survivor of them, the same did not survive; that it was but a bare authority, and no interest, in regard no profit could be made thereof; that if a power were given to three, and one of them should die, the survivor could not execute such power; that if two were made committees of a lunatic, on the death of one of them, the commitment would determine; that this was a trust annexed to the person, and not assignable, nor was it reasonable it should survive, forasmuch as the testator might think it proper to trust three, but not to invest a smaller number with a charge of that importance,

Also it was said, that if the infant Earl should die without issue under age, in such case the late Earl by his will had given an annuity of £500 per annum to Mr. Justice Eyre, which made it improper, that he alone should be intrusted with the [2-Peere Williams-104] person of the infant Earl, who would be, gainer on his dying without issue and under age; that the will having appointed three guardians to the infant, it was the same thing, as if the testator had appointed those three jointly, and then it was plain, that if one should die, the survivors could not act; that according to auditor Curl's case (11 Co. 2 b), where an office is granted to two, on the death of one of the grantees the office determines.

And though it might be attended with some inconvenience, were such guardianship or authority to determine on the death of one of the persons intrusted, yet it must be allowed to have been in the power of the testator to have prevented this inconvenience, by limiting the guardianship to the survivor by express words. Salk. 465.

It was moreover urged, that this was a matter of trust, for every guardianship was a trust (see vol. 1, 704, Duke of Beaufort v Berty, and Frederick v Frederick, 721); that the Crown, as parens patriæ, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing, as to take away an infant under thirteen years of age, from so careful a mother as the Countess was; that the tender calls of nature were on the mother's side; and then there were two physicians (Doctor Robinson and Doctor Friend), who both testified, that the infant Earl was of a tender and sickly constitution; so that at least the Court might refuse to grant this in a summary way, or otherwise than upon a bill.

Also with regard to the servants, it was represented to be a very hard thing to turn away such as the Countess had experienced to be good servants, and to take persons in their [2-Peere Williams-105] room, whom she had no experience off particularly, that Doctor Stubbs the governor came in at first, with the approbation of Mr. Justice Eyre, and that he was a man of learning, probity, and piety, and a clergyman.

On the other side it was said, that this guardianship was not devised to three jointly, but to three until the infant Earl should come to twenty-one; that a guardian had not

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only a bare authority, but also an interest, for he might bring a writ of ravishment of ward, or might make a lease during the minority of the infant as was, determined in the case of Shopland versus Rydler, Cro. Jac. 55, 98, so that guardians had an interest coupled with their authority, and consequently the office would survive.

It was true, it could not be granted over; no more could the office of executorship but yet there could be no question, but that if there had been two executors, and one should die, the other would take the whole executorship as survivor.

And as to the objection, that there was no profit in the guardianship, and therefore it should not survive, the same way of reasoning would hold in the case of an executorship, for that was barely a trust, and no ways profitable; notwithstanding, which, being a legal interest, it would survive. It was likewise said, that in case where three guardians were appointed, if this were supposed to be but a joint authority, and consequently not to survive, it would prove a great inconvenience, and in a good measure frustrate the intention of the person appointing them.

As to what was held in auditor Curl's case, viz where an office has been usually granted to two, and one of them dies, that this is a determination of such office, the reason must be [2-Peere Williams-106] supposed to be, because they both make but one officer, as in the case of the sheriffs of Middlesex.

That with regard to the £500 per annum given to Mr. Justice Eyre, in case of the infant's death without issue, and under age, that could be no objection in case of a testamentary guardian appointed by the part himself, whatever it might be where the guardian was to be appointed by the court; for where the testator himself says, that J. S. shall be guardian of his son, and by the same will also declares, that the said guardian shall have the whole estate, in case the child should die within age, surely that would be good; much more shall the devise in our case, which is but a small part of the estate.

Then as to the objection of hardship from the guardian's being impowered to impose servants, governors. &c. who, will put upon the young Lord by such guardian, would probably not regard the Countess, as having no dependence upon her, this might be as well turned the other way, viz. that if they were put in by the mother, they would have no regard to the guardian, who yet was intended by the will to be in loco parentis, and to supply the father's place.

That Dr. Stubbs the governor might be a good scholar, and a pious man, and yet it would not necessarily follow, that he was a proper governor to attend the young Earl to court, or to noble families, or at the exercises of dancing and riding, which it was fit his Lordship should be acquainted with.

[2-Peere Williams-107] Besides, it was of great consequence, in regard such servants are apt to flatter their young masters, and to entertain their thoughts with such things as would be rather pleasing than useful to them.

Lastly, With respect to the tenderness of the young Lord's constitution, that was, however, of late grown stronger, and he being now upwards of twelve years of age, this was the proper crisis for forming his mind, and instilling into him a taste of those noble qualities, and that spirit, which became a person of his high station, in order to make him useful to his country; and this being the proper time, surely it was reasonable to trust Providence in these cases, and to send the young nobleman to some public school.

Lord Chancellor. The father by the statute(12 Car. 2, cap. 24) has a right to dispose of the guardianship of his child until twenty-one, and having done so here, it will be binding, unless some misbehaviour be shewn in the guardian, in which case it being a matter of trust, this court has a superintendency over it. (Vide Dillon v Lady Mountcashell, 3 Bro. P, C. 341. S C 9 Mod. 135, nomine Morgan v Dillon.)

But as to the objection, that this right of guardianship does not survive, because it is not said in the will in express terms, that it shall go to the survivor, there seems to be no colour for it, because where several guardians are appointed by a will, each of them seems to be a complete guardian, like the case where, there are two or three churchwardens of a parish, each of them is a distinct churchwarden; and it would be mischievous, and of very ill effect, if where there are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do anything; and yet this must be [2-Peere Williams-108] the consequence, if a guardianship devised to several should be taken to be one joint naked authority; such construction would make the act of little force; a guardian has an authority coupled with an interest, and may bring a writ of ravish-

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ment of ward on the infant's being taken from him; and though it is true, that the damages recovered shall by the statute go towards the benefit of the ward, yet the declaration must lay it ad dampnum, of the guardian the plaintiff.

The reason of auditor court's case, where, on the office of auditor being granted to two, without saying and to the survivor, such office, on the death of one, was held to be determined, was, because in such case both made but one officer, as the two sheriffs of Middlesex make, as to their office, but one person. In the present case, here is a plain right placed and vested in Mr. Justice Eyre as the surviving guardian, and who, every one is assured, will well execute such trust, which it will be

impossible for him to do, without being allowed to place and choose the governor, gentleman, &c. to attend upon and take care of this young nobleman.

And though Dr. Stubbs may be a good, learned, and pious man, yet he may not be so fit to attend the young Earl to all places, for instance, to courts, places of exercise, and diversions, &c. at which it may be proper for his lordship to appear.

But I must differ from Mr. Justice: Eyre, as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery.

[2-Peere Williams-109] Wherefore per Cur': Discharge Dr. Stubbs from being governor, as also Mr. Bennet from being gentleman, and deliver the infant into the hands of his guardian Mr. Justice Eyre, who desired the young Earl might dine with him.

But Lord Chancellor said, that this was in confidence that the judge should return him to his mother the Countess at night, for that as yet, the Court would not make any order touching the custody of the Earl's person.

Afterwards on the great seal's being taken from the Earl of Macclesfield, and, placed in the hands of three Lords Commissioners, on 18 March 1724, Mr. Justice Eyre (lately made Lord Chief Baron of the Exchequer) exhibited his petition to the Lords, Commissioners, setting forth the former proceedings, and that the infant Earl, who was now just fourteen years of age, and had been married to Lady Susanna Noel, daughter to the Countess of Gainsborough, was detained from the petitioner; that such marriage was without the consent or privity of the said Lord Chief Baron the surviving guardian; therefore the petitioner thought it his duty to lay these things before the Court, praying, that the custody or tuition of the infant Lord might be, granted to him, and that the Court would make such order touching this matter, as they should think proper.

Upon this the Countess Dowager of Shaftsbury petitioned the Lords Commissioners, that the order of the late Lord Macclesfield, declaring the right of guardianship to belong to the Lord Chief Baron Eyre, and directing the person of the infant Earl to be delivered to the said Lord Chief Baron, might be set aside.

[2-Peere Williams-110] Also the infant Earl petitioned the Lords Commissioners, insisting, that the guardianship of his lordship given by the will, was determined by the death of two of the guardians, and praying that his lordship, being now of the age of fourteen years, might be at liberty to choose his guardian.

On hearing these petitions, the Court ordered a sequestration, unless cause, both against the Countess [dowager] of Shaftsbury, and against the Countess of Gainsborough, for their contempt in contriving and effecting this marriage without the consent of the guardian, and without applying to the Court.

And the person of the infant Earl was ordered to be restored by the Countess [dowager] of Shaftsbury to the Lord Chief Baron, it being the opinion of the Court, that though the declaration made by the late Lord Chancellor, that the right of guardian ship did belong to the Lord Chief Baron as surviving guardian, and the order made thereupon, was ever so erroneous, yet that the same was a good order until reversed, and consequently it was a contempt (1) to break it.

On the 15th May, the three Lords Commissioners, viz. Sir Joseph Jekyll Master of the Rolls, Mr. Baron Gilbert, and Mr. J. Raymond, having heard this matter solemnly argued by counsel on both sides, their judgment, which was delivered by the Lord Commissioner Jekyll, that the court were all of opinion, the sequestration against the Countess of Shaftsbury ought to be absolute.

The marriage of a ward without the consent of the guardian, is a ravishment of the ward, 2 Inst. 410, and aggravated in this respect, that after such ravishment by marriage, the ward cannot be, restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher.

By the statute of Westminster 2, cap. 35, it is enacted, that if one be guilty of ravish-

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ment, either of a male or female ward, if the ward be restored, though not married, the ravisher shall be punished with two years imprisonment; but if the ward be not restored, or if be restored and be married, the party guilty of such ravishment (if he cannot make satisfaction for the marriage) shall be punished by imprisonment for life, or by abjuring the realm, at the discretion of the court where he is tried; so that a ravishment of ward became an offence not only against the guardian, but against the King: and whereas, on the ward's being married, the ravisher was to be punished by perpetual imprisonment, or by abjuring the realm; this shews [2-Peere Williams-111] the greatness of the offence, by the grievousness of the punishment.

And the matter of marrying infants without the proper consent of guardians, is provided against, both at law and in this court, especially the latter, it being notorious, that a court of equity entertains no

greater jealousy of, nor shews more resentment against any thing, than the unlawful marriage of infants.

In the case of the marriage of a lunatic, viz that of Mr. Packer's marrying Mrs. Ash (vide Preced in Chan. 412), the Court committed Mr. Packer, the parson, and others that were their agents, and Packer continued in custody for a considerable time; and infants and lunatics may be compared together, both of these being unable to take care of themselves.

[2-Peere Williams-112] In case where an infant is committed by the Court to the custody or care of any one, such committee gives a recognizance, that the infant shall not marry without leave of the Court, which form is very rarely altered, and on special circumstances (vide vol. 1, Dr. Davis's case, 6 9 8); so that if the infant marries, though without the privity, or knowledge; or neglect of the committee, yet the recognizance is in strictness, forfeited, whatever favour the Court upon application, may think fit to shew to such committee, when he appears not to have been in fault.

In Lord Sommers's time, Mr. Goodwin married an infant (Mrs. Knight) and was committed, and this commitment was followed by an act of parliament for dissolving the marriage.

So on Sir Edward Hannes's daughter and heir, (2) who was an infant, being inveigled from her guardian Dr. Waugh, and married to one Willis, though Mrs. Hannes was not taken from a guardian assigned by the Court, yet, in that case, both Mr. Willis, and the parson, and the agents, were all committed by the Master of the Rolls, Sir John Trevor, and the order afterwards confirmed by Lord Harcourt; and as this Court punishes the instruments where such marriage is had without the consent of the guardian, so if there be only an apprehension, that the infant will be, married unequally, either by the guardian, or by his neglect, a court of equity will interpose, and send for the infant, and commit him to the custody of a proper person, or relation, in order to prevent such danger; as was done in the case of the infant Lady Catherine Annesley by Lord Chancellor Harcourt, and likewise in another case, viz. [2-Peere Williams-113] that of Mr. Vernon of Staffordshire, by Lord Macclesfield. (Et vide Lord Raymond's case, Ca. temp. Tal. 58. Smith v Smith, 3 Atk. 304)

But the present case is still of a higher nature, as it is the case of a peer of the realm, in whose education the public is interested; and where the guardianship of him is devised by a peer of the realm, viz by the will of the late Lord Shaftsbury.

As to the objection that has been made to the order of this Court, that there are no words therein, that the infant shall not be married without the consent of the guardian.:

Resp. The Court could not suppose, or foresee, that any person would marry the infant without the guardian's consent and for that reason, there was no express provision against it in the order; but, still this prohibition is implied, viz that no person, without the leave of the guardian, should marry this infant; besides, by the same reason that these words ought to be inserted, the order should likewise have provided, that no person should take away, or ravish this ward from the guardian, &c. all which things are surely implied; but further, it is a sufficient answer to this objection, that such negative words are never inserted in the order.

But then it is objected, here is no disparagement in this marriage; forasmuch as the birth of the noble lady to whom Lord Shaftsbury is married, and also her quality, are equal to those of her husband; and she has had the advantage of being educated under the Countess of Gainsborough her mother, a lady of great honour, virtue, and quality.

[2-Peere Williams-114] Resp. Admitting all this to be so, yet it may be reasonably supposed, that

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if the infant Earl had staid till he, had attained his age, and could have made a jointure and settlement, in such case his lordship might have had a better portion.

But in reality, though there be no disparagement, yet this is only by way of extenuation, and can never be urged as a justification, for it is the marriage without the consent of the guardian, that constitutes the offence, so that such marriage having been to one of equal degree and fortune, can at most tend but to extenuate.

And it is observable, that the disparagement of the ward was not where such ward without the guardian's consent married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree, for which see the statute of Merton, cap. 6 & 7, 2 Inst. 89, 92.

Object. The punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage having been once solemnized and perfected, the same cannot be afterwards rescinded or dissolved.

Resp. The like objection might be made, though the marriage were ever so much to the disparagement of the ward; but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of wards.

[2-Peere Williams-115] Object. This marriage is by the Countess the mother of the infant Earl, Who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward.

Resp. The right of a testamentary guardian takes place of a guardianship by nature; by the express words of the act of parliament the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

Object. There is no instance of any one, case, where a complaint has been against an infant's mother, for taking away her own child.

Resp. The Lords Selkirk and Orkney, guardians of the infant Duke of Hamilton, petitioned against the Duchess of Hamilton for taking away the infant Duke out of their custody, and their complaint was received; upon which the Court would have proceeded against the mother, but the guardians could not make out their right of guardianship, by reason of some defect in the instrument under which they claimed.

So that all these objections being answered, the Court are of opinion, that the sequestration against the Countess dowager of Shaftesbury ought to be made absolute,

As to the case of Lady Gainsborough, that seems to differ; and here the question is, whether the Countess of Gainsborough's consenting that her daughter should be married to the infant Earl, be not a contempt

[2-Peere Williams-116] 8 Edw. 3, page 52. The case was, a writ of, ravishment of ward was brought against four men and a woman, the men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter; upon which Hille, C. J., gave the rule, that the woman was equally guilty with the four men, of the ravishment of the ward; the marriage of the infant, without the consent of the guardian, constituting the offence; and though the guardian be not appointed by the Court, nor any commitment made by the Court of the infant, yet have those been punished, who have married the ward without the consent of the guardian, as appears from the above cited case of Mrs. Hannes, where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir Edward Hannes the father's personal estate, and for an allowance of maintenance for the infant. Whereas in the principal case, the decree goes something further, as it directs that the will of the late Earl of Shaftesbury should be performed part of which will is, that the infant Earl should be under the care and guardianship of the persons named therein.

In 3 Co. 38 (Ratcliff's case), it was resolved that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward, against any one for taking away his heir apparent, male or female, and for marrying such heir, and that it is not material of what age such heir then was; and as the ancestor might bring such action for taking away and marrying the heir, so also might the guardian for taking away and marrying the ward.

It does not appear, that the late Earl of Gainsborough left any testamentary guardians of his children, so that the Countess was guardian of them by nature, the marriage of her [2-Peere Williams-117] daughter belonged to her, consequently, it is to be presumed, that she married her daughter to the infant Earl, at least if she did not, she may purge herself by oath.

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But it is material, that the Lord C. B. Eyre, the guardian of the infant Earl, has not in his petition, made out any direct charge, or prayed any thing against the Countess of Gainsborough, and possibly the Court may not be bound, ex officio, to punish for a ravishment of a ward, where there is no complaint.

The Court has the care, but not the guardianship of infants, and the Lord C. B. Eyre is not a guardian appointed by the Court, but by the will of the father, in which respect the Court is the less concerned. (Vide the case of Goodall v Harris post, 562.)

And though the stat. 12 Car. 2, c. 24, says, that a testamentary guardian may maintain an action of ravishment of ward, if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian.

So that in this case, forasmuch as the testamentary guardian has not complained of, or prayed any redress against Lady Gainsborough, the Court will do nothing against her, but discharge the order of sequestration with respect to her. (As to the punishment of contempts in marrying infant wards of the court, vide Mr. Herbert's case, post, 3 vol. 116.)

And now we come to the petition of the infant Earl of Shaftesbury, where it is first objected, that though the Court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship, unless the matter be brought judicially before them, by bill, answer, and proofs.

[2-Peere Williams-118] Resp. In this case, here are a bill and answer, and both the will, and the devise of the guardianship, are set out by the bill, whereupon the decree says, that the trust of the will shall be performed, one of which said trusts is the guardianship of the infant.

It is not material that the Earl was defendant, for so it was in the case of Mrs. Hannes, who was married to Mr. Willis, without the consent of the guardian; and this Court may, upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard the care of all infants is lodged in the King as pater patriæ, and by the King this care is delegated to his Court of Chancery.

In F. N. B. 232, the King is bound of common right, And by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law, of this realm, every loyal subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as pater patriæ, and there is the same reason to extend this care to infants. (But the cases of lunatics and infants are distinguished by Lord Hardwicke, in Ex Parte Whitfield, 2 Atk. 315. So Ex parte Phillips, 19 Ves. 118.)

This is the reason given in the writ de idiota inquirendo, which the King issues out to take care of him, who regimini sui ipsius, & bonorum, & terrarum suarum minime sufficit, which reason also appears in the writ de lunatico inquirendo, and in 4 Rep. (Beverley's case) infants, as well as idiots, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves.

[2-Peere Williams-119] In like manner, in the case of charity, the King pro bono, publico, has an original right to superintend the care thereof, so that, abstracted from the statute of Eliz., relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery the Attorney-General's name for the establishment of charities.

Also in the case of Berty and Lord Falkland (2 Vern. 333), the Lord Sommers, in delivering his opinion, takes notice, that several things are under the care and superintendency of the King, as he is pater patria, and instances in all charities, idiots, lunatics, and infants.

Indeed several acts of parliament have made alterations in some, cases of this nature, which so far stand altered, and no further; but unless there be express words in an act of parliament for that purpose, the original jurisdiction of this Court remains as before; but there is not any one act that has taken away the original Jurisdiction of this Court with respect, to this care and superintendency in the case of infants, charities, idiots and lunatics. Si-nee the statute which took-away the court of wards, the jurisdiction of wardship returns to the Court of Chancery (2 Vern ubi supra); and, it appears by the Register 21 b 198, that a writ may issue out of this Court to remove the guardian of an infant, and to put another guardian in his stead.

The law is particularly favourable to, and careful of an infant's interest, and though the infant himself cannot bring an account against the guardian, until his coming

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of age, yet a third person may bring a bill for an account against the guardian, even during the minority of the infant. (So Earl of Pomfret v Lord Windsor, 2 Vez. 484.)

[2-Peere Williams-120] So in all decrees against infants, even in the plainest cases, a day must be given them to shew (3) cause when they come of age.

Lord Sommers has often said, that this Court should be always open for petitions; and orders on petitions, in regard to the guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship.

Thus in the case of Lord Tenham and Barrett there was no bill depending in this Court, but only a petition, desiring, that Lady Tenham the mother, being a papist, might not have the guardianship of the infant (18 March 1718) determined on petition against the mother; upon which an appeal was brought to the House of Lords, before whom it was never objected, nor once thought of, that this Court could not, on a petition only determine the right of guardianship; and on the appeal the Lords also determined the right against the mother.(4)

Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity, no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill.

[2-Peere Williams-121] But in the last place it is objected, that upon the wording of this will, the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying and to the survivor of them, and that this is a joint personal confidence wherewith three are intrusted, wherefore by the death of any one, the guardianship is determined; and to prove that a guardianship is, personal, it has been urged, that it is not assignable, nor will it go to executors or administrators.

Resp. I admit a guardianship is not, assignable, neither will it go to executors or administrators; but for all that, it is coupled with an interest, and is not a naked authority; I admit also it has been said, that where a naked authority is given to two, if one dies, the survivor cannot act; but the same book, viz. 1 Inst. 112, 113, says that where an authority is coupled with an interest, it does survive. (So Peyton v Bury, post, 628.) In the case of Gardiner and Sheldon (Vaughan, 182), the case of a guardian is compared to that of an executor or administrator, which is not assignable, but yet survives; and though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship, by appointing an executor by his will, yet the case of a guardianship devised to two, is strictly like the case of an administrator granted to two, (5) (especially where the debts amount to as much as the assets); for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship, it will not go to his executors or administrators, but to the surviving administrator; [2-Peere Williams-122] such an administrator is accountable to the creditor for every thing, as much as the guardian is to the infant such an administrator can make no profit.

And that a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action and avow in his own name, may make leases (2 Roll. Abr. 41, pl. 3), during the minority of the infant, and may grant copyholds even in reversion, as dominus pro tempore.

A guardianship is not properly an office, nor, to be resembled (for instance) to the office of a parkership; for the former has an interest in the infant's estate; but a parker has no right or interest in the park, or land enclosed therein, and the owner of the land may determine such office by disparking the park, or killing the deer; and whereas in Pop. 204, it is said, that where the Lord Grey committed the custody of his son to four, and one of them died, the authority determined; this case is put upon the clause of the statute of 4 & 5 Phil. & Mar cap. 8, which says, " that whosoever takes a damsel unmarried, and under the age of sixteen, out of the custody of their father or mother, or any such person to whom the father in his lifetime, or by his will, or by any act in his life-time has appointed the same, shall be subject to the pain of two years imprisonment, or to the payment of such fine as the Court shall appoint." So, that by that act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as the guardian has, he had but a bare authority.

[2-Peere Williams-123] As to auditor Curl's case, that depended upon the statute of the 32 H. 82 cap. 46; but in the principal case, when the now infant Earl was soever young as not to be above a year old, and the testator had appointed him three guardians, it

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was hardly probable, that the testator himself could imagine, that all those three, guardians should live until the child's age of twenty-one; and then to say, that the guardianship shall determine by the death of any one of the guardians, would be to affirm, that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were-appointed by the father, the less likelihood there would be that they all should live till the child should arrive to twenty-one.

Lord Commissioner Gilbert was of the same opinion with Lord Jekyll, observing further, that the Court of Chancery has an original of the right of guardianship, and as formerly the lord by priority, i. e. that lord of whose manor the lands which were first in the family were 61d, had a right to the guardianship, so the Court of Chancery could determine touching that priority.

And though tenures in chivalry be taken away, yet the jurisdiction which the King had, as pater patræ, remains.

It appears from Bracton, lib. 3, cap. 9, and Fleta, cap. 2, and Stamford, fo. 37, that the King is protector of all his subjects; that in virtue of his high trust, he is more particularly [2-Peere Williams-124] to take care of those who are not able to take care of themselves, consequently of infants, who by reason of their nonage are under incapacities; from hence natural allegiance arises, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince.

It has been objected, that this is a matter of right, and must be determined by a decree on bill and answer.

But possibly then it will be too late; and when this right depends upon the plain words of a will why should the infant be delayed, or put to the charge of a decree?

This is an authority coupled with an interest, and no pretence that the guardians are obliged to act jointly. The actions given by the law plainly shew, that the guardian has an interest. The remedies are, 1st, trespass if one takes away the ward, and the guardian has got possession of him again, or if the ward is still (retained, then a writ of ravishment of ward.

And as to the objection, that the guardian can make no profit of his guardianship, if this be for the service of the family (as surely it is), why should it not be as valuable, as if the same could have been turned to his own advantage?

The father may bring an action against any person for taking away his heir, and so might any ancestor against any person except against the lord of whom the lands were held in chivalry, before such tenure was wholly taken away.

[2-Peere Williams-125] The case in Poph. was only, where the parties having the custody of the infant given to them, were invested with a bare authority for a particular purpose, and so the death of one of the guardians determined this joint authority; whereas the statute of 12 Car. 2 (which was drawn by Lord Chief Justice Hale) gives the guardian an authority coupled with an interest.

Such; testamentary guardian takes place of all other guardians, and his interest is for the good and honour of the family; as the father was the head of the family, so the statute puts him in loco patris.

Wherefore he agreed with Lord Jekyll in toto, as did also Lord Commissioner Raymond.(6)

(1) So in Polls v Norton at the Rolls, 24th April 1792, the testator by his will left considerable legacies to the infant children of his brother, and also an annuity to the brother himself, making it his particular request to his brother, that he would Commit the education of the children to his, the testator's executors, and revoking the gift of the said annuity in case the brother should refuse to comply. Several of the children were taken from the brother by the executors without any objection being made, and were placed by the executors at different schools; and the brother received his annuity. Upon an application to the Court for maintenance for the infants, it was ordered, that the Master should inquire whether the brother was willing to commit the education of the children to the executors, and in that case the Master was as to inquire what was proper to be allowed for their maintenance. The Master reported that the brother had appeared before him, and consented thereto; and this report was afterwards confirmed and certain sums allowed for maintenance. The

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brother having afterwards taken away two of the children from the schools where they had been placed, the executors by their present petition prayed that he might be ordered to replace them. The brother appeared to the petition, and insisted that he had never given his consent that the care of his children should be taken from him; and it was strongly insisted on his behalf, that the Court had no jurisdiction to take a child from his parent without the parent's consent (as to which vide Duke of Beaufort v Berty, ante, 1 vol. 705, and Creuse v Hunter, there mentioned). But his Honour said, he would not go into this question while the Master's report of the brother's consent remained in force-the brother must make such application as he should think fit, to take off the effect of that proceeding-but for the present his Honour ordered the brother to replace the children.

(2) 22 Mail 12 Annœ Reginœ, Hannes versus Waugh, at Knightsbridge. See the discourse of the judicial authority of the Master of the Rolls, p. 104,

(3) Vide vol. 1, 504, Fountain v Caine & al'; where it appears that an infant on his coming of age, and before the decree made absolute, may put in a new answer. See also the case of Sir John Napier versus Lady Effingham, post, 401.

(4) 2 Bro. P. C. 539 [4 Bro. P. C. 302, 2nd ed sub nom. Teynham v Lennard] Et vide, Harg. Co. Litt. 88, note (16). On the appointment of guardians on petition where no suit has been instituted, see Ex parte Whitfield 2 Atk. 315. Ex parte Salter, 3 Bro. C. C. 500; Dick. 769. Ex parte Earl of Ilchester, 7 Ves. 348. O'Keefe v Casey, 1 Sch. & L. 106. Corbett v Tottenham, 1 Ball & Be. 60. Ex parte Mountfort, 15 Ves. 445. Ex parte Myerscough, 1 Jac. & W. 151. A guardian was appointed on petition to an orphan infant without property, for the purpose of consenting to her marriage, In re Woolscombe, 1 Madd. 213; but this is rendered unnecessary by the St. 4 G. 4 c. 76 s. 14 16.

(5) See 2 Vern. 514, Adams versus Buckland, where on an administration being granted to two, and one dying, it was held to survive to the other; and more particularly the case, of Hudson v Hudson, 30 July 1735, where Lord Talbot determined accordingly on hearing civilians (Cas temp. Talb. 127).

(6) The substance of the cases respecting the several kinds of guardianship, and the origin and extent of the jurisdiction of the Court of Chancery, in the superintendence of guardians, is to be found in Harg. Co. Litt. 88 b, notes 11, 12, 13, 14, 15, 16. Et vide Powell v Cleaver, 2 Bro. C. C. 499. See also Ex part Earl of Ilchester, 7 Ves. 348. De Manneville v De Manneville, 10 Ves. 52. L Bathe v Lord Fingal, 16 Ves. 167. Villareal v Mellish, 2 Swan. 533. Curtis v Rippon, 4 Madd. 462. Wright v Naylor, 5 Madd. 77.