On Some Changes in the Legal Status of the Child since Blackstone.

Suggested by Dr. Wilson's Lectures in American Law.

Blackstones Commentaries
Schouler Domestic Relations.
Simpson Law of Infancy.
Bingham Infancy and Coverture.
Wines Prisons and Child Saving Institutions.
Brace Dangerous Classes of New York.
Life of Mary Carpenter by P. E. Carpenter.
Short History U. S. by Henry Cabot Lodge.
Year Book of Education.
Encyclopedia of Education.
3rd An. Rep. Mass. St. Board of Health, Charity and Lunacy.
Labor in Europe and America by Ed. Young, Ph.
Laws of New York affecting children with the Laws of the U. S. compiled under the auspices of N. Y. S. C. C.
British Statutes 1802-1862.
Jules Simon L'ouvrier de huit ans. Rev. d.d. Mondes
Proceedings of Convention of Associated Charities, Boston, 1881.
Reform Schools by Mary Carpenter
Legal Status of Married Women by A.G. Spencer

wish to train quiet citizens for the state;
with large allowance for every danger-
ous tendency; the result as it stands
written in the statutes of the 19th century,
is yet, in its far reaching care for the
fatherless and the oppressed, a noble
embodiment of the tender spirit of Him
who said of the helpless little child:
"Of such is the Kingdom of Heaven."

development of the principal in legislation of caring for every child's moral welfare. So marked however, is the emphasis now laid by the law on the individuality of the child, that one writer has said that the child's present position as favorite of the Law is attained largely at the expense of the family, the proportion of truth diminishing constantly in the statement "the Law secures the welfare of the child by upholding parental rights and enforcing parental duties."

Nevertheless, giving due gravity to this danger and assuming the whole body of legislation for education and the child's welfare to have been accomplished by mere state craft inspired only by the

precedence of the moral over the legal aspect of the home in the eye of the law itself.

This is perhaps the one dangerous force of all which have been moulding Infancy-legislation;-for the child's prime safe guard is the family and whatsoever strikes the family wounds the child.

In the wish to state fairly this one possible harm to the child among the many improvements in his status, the assimilation of the status of the "other" child to that of the child normally placed has, perhaps, been exaggerated in the foregoing discussion in the effort to give due weight to the dangerous as well as to the helpful features of

practise so shape the law as to make individuality superior to the unity of the family. This is clearly seen in the relation of custody. When the Law breaks by divorce the legal family giving the child its choice of abode with either parent it emphatically asserts this supremacy of the individual. When the Law removes a delinquent child from the family relation into which it was born and places it through the working of reformatory legislation in a home selected by the agents of the Law; emphatically does it assert the precedence of the child's moral welfare over the legal unity of the family and the

Schouler Dom. Rel. Custody.

bear upon legislation affecting children. The extent of the change wrought in this way cannot, of course, be calculated: but the influence of Mary Carpenter[1] upon penal and reformatory legislation affecting children in Great Britain, is a conspicuous example of what is taking place unobserved elsewhere.

A third force which has contributed to secure the recognition of the child as an individual possessed of legal status independently of his family ties, is the growing value attached to human life and human personality and the attendant respect for individuality in every form. At present, this does in

1. See Life of Mary Carpenter. by Philip Estlin Carpenter.

governed wholly in and through the family, to its present position in which it is in great measure subject to the direct action of legislation.

Underlying all child governing legislation of the present century is the same impulse towards guarding unrepresented classes which has altered the status of women, made legal provision for the dependent and defective classes, ameliorated the condition of the Indian, and lifted the Negro bodily out of the unrepresented condition. This tendency has acted both directly and indirectly, directly, in altering legislation and indirectly in bringing the influence of women[1] to

1. See Life of Mary Carpenter by Philip Estlin Carpenter

has generalized custody protection and education until they have ceased to be paternal duties and rights and have become tacitly acknowledged as rights of the child without reference to the family, is evident elsewhere. Two mighty forces impelling legislation in this direction are steam[1] which has given to the child the novel rôle of industrial being, and enfranchisement which has forced the state in self preservation to compel his education as future citizen. But not these two forces alone have forced the child's partial emergence from its former position in which it existed (according to the legal hypothesis) almost solely within the family.

1. See Young p. 184. Labor in Europe and America

human beings responsible to itself without the intervention of parent or guardian, by including the orphan and the illegitimate child and improving their condition, diminishes the proportion in which the legitimate child living in normal legal relations is especially cherished; and strikes a blow at the legal family. This Statute law since Blackstone has increasingly done, guarding all children without reference to the family, diminishing paternal power and making the child more and more nearly the ward of the state.

[1] This tendency it is which is characteristic of the 19th Century legislation governing minors And the same movement which

1. See British Statutes. 1802-1882. as illustrating this tendency better than all our scattered legislation affecting children.

removes education from the family to the state; through societies chartered by law he is restrained from overworking in the factory, and from buying intoxicating liquor and obscene literature; and he, too, profits by the municipal ordinances which recognize in the newsboy and bootblack industrial beings whose rights demand the protection of municipal license. So far is his condition assimilated to that of the legitimate child that the statement is now true that "the chief legal disadvantage of the illegitimate child is his inability to inherit."[1]

Indeed, every new law which guards all children, acting on them directly as

1. See Schouler Dom. Rel. illeg. child.

once paternal duty of education has been transfered bodily to the state.

The illegitimate child's position is somewhat modified by direct legislation but, apart from the recognition by statute of his need of and right to be in his mother's custody and to have her responsible for his maintenance, his status improves with every growth of legislation touching children as individuals, removed from the domestic relations and directly responsible to the state. As a pauper the illegitimate is treated as the legitimate pauper child is treated; as future citizen he is trained in the public schools profiting by the growth of law which

See Schouler Dom. Rel. illegitimate child.

The relations of childhood discussed by Blackstone as domestic were the paternal rights of custody, possession of the child's earnings, and maintenance in indigent old age; with the paternal duties of maintenance, education and protection. We have seen that the discussion of custody as a purely paternal right is wholly inadequate; the legal provision for the child's maintenance is revolutionized by the extended duties of the mother; and, though parental, is no longer wholly paternal; present legislation proceeds upon the principle that every child whether in a family or not, must be protected and whoso will may protect him; while the

1. See A. J. Spencer in Pop. Sci. Mo. 1881 on Leg. Stat. married women.

prestige and prerogative of the legitimate child lost.

Only when the family itself sustains an injury through divorce or pauperism or cruelty or the emergence of the child too early into the field of the labores, can the strong arm of the Law prove itself tender and merciful also, by directly sustaining and defending the hapless children

Inevitably, therefore, care for the welfare of the child has asserted itself chiefly in legislation touching children ~~in~~ directly and outside the domestic relations Bub, in so doing it has extended many safe-guards formerly wholly domestic.

1. See Societies for the Prevention of Cruelty to Children chartered for this purpose.

of the legitimate child within the family is substantially as it was in the time of Blackstone. Domestic affection sufficed then as now, for securing these three necessaries for the child within the family, and legal provision need be made only as the family itself altered, and then only in giving to the father's love and care the reinforcement of legal power in the mother as she emerged from legal nonentity. Hence the chief change in the status of the legitimate child is negative, his legal position being partially and gradually approached by the status of the illegitimate[1] and the pauper child, and somewhat of the

1. Schouler Dom. Rel. on the illegitimate child.

general suffrage would naturally maintain a system of general education as well; but it is also true that, where suffrage is general, the state must make education so, in self defence."[1]

It would seem, therefore, that the growth of care for the moral welfare of the child and the removal of the duty of education from the family to the state must receive a decided impulse from every extension of suffrage, and the foregoing comparison would seem to offer confirmation of the theory.

From a survey of the changes of status of the child as affected by custody, protection and education, it would seem that the position

1. See Horace Mann Lect. on Ed. vol. I.

almost nothing in securing education to the one class of children with whose education Philanthropy concerned itself.

On the introduction of more general suffrage followed steadily increasing legal provision for the child until to-day the English suffrage roughly corresponds to the Suffrage of New England in the 17th century and the present legal provision for education in England secures a degree of universally compulsory education also roughly corresponding to the education of New England at that time.[1]

It is doubtless true that the same liberal spirit which maintains a

1. MacMillan. Aug. 1876. Eng. Factory Act and Compulsory Education.

In a comparison of the legal provision for the education of the child in England and in America one striking fact presents itself. New England in the 17th century was the purest democracy then on the face of the globe, and New England made the most thorough legal provision for the education of every child. In old England, suffrage was restricted, and, in the absence of legal provision for education, the children educated corresponded pretty nearly to the number of families whose property secured them suffrage. After the introduction of steam, philanthropy accomplished in thirty years (1802-1832)

See Lodge Short Hist. U.S. Ch. 22

That is to say, in 1855 the recognition of the child's right of being educated had so far grown that the pauper child could not be deprived of it while the administration of the means of education had been transferred bodily to the state.

Subsequent legislation governing education has proceeded in the same direction and the adoption of the principle of compulsory education in 1874 was the culmination of the development of the principle of caring for the welfare of the child as a child which was first embodied in Lord Ashley's bill of 1832.

1. 18 and 19 Vict. c. 34.

encouragement to the making of such schools by grants of public money where a government inspector is admitted, and, in 1849[1], the half-acre restriction is removed.

In 1855[2] guardians are permitted to grant relief to enable poor persons to educate their children in any school approved by the guardians.

In 1856[3] education becomes for the first time a recognised function of the state and the Queen is empowered to appoint a vice president of the council of education from the Privy Council who shall sit and vote as a member of Parliament in Commons.

1. 12 and 13 Vict. c. 49, ~~1855~~

2. 18 and 19 Vict. c. 34, ~~1855~~

3. 19 and 20 Vict. c. 116. ~~1856~~

makers are forced to supply half time schools or furnish at the demand of the government inspector, the certificate of attendance at a certified school, of every child employed. So, too, the mining industries; and, last of all, the young canal drivers are included under special provisions of these acts.

Hand in hand with this extension of the child's legal claim to education has gone the extension of legal provision for furnishing him the means of training.

Five years after Victoria's accession the permissive act[1] of 1836 was extended to permit any number of half-acre grants for separate schools and this in turn is extended in 1844[2] by provision for

1. 6 and 7 W. IV. c. 70.

2. 4 and 5 Vict. c. 38.

first Factory Act, had already resulted in the extension of care for their education to factory children employed in Worsted, Hemp, Flax, Tow, Linen or Silk manufacture, in addition to the cotton and wool workers first provided for."

Every legal provision for the education of the English child beyond these limited and inefficient beginnings is included in the Victorian statutes, and hardly a year has passed without adding to their scope or efficiency. Year by year one industry after another has been brought under the Factory acts until all the textile and metal industries, and after a long and bitter struggle, the brick and tile

1. Young. Young Labor in Europe and America

mitigating the evils which the factory system developed."

Three years after Lord Ashley's bill, in 1836, another bill - not a factory act - was passed which was almost as significant of the growing legal care for the education of the child as Sir Robert Peel's bill of 1802. Almost as slight a wedge and quite as trivial in its immediate effects, this bill permitted gifts to be made of parts of waste lands and commons for sites for poor schools, - limiting the gift to one statute half acre.[1]

Such was the legal provision for education at the accession of Queen Victoria. Two wedges had been inserted, and one of them, the

1. 6 and 7 Wm IV. C. 70.

this is shown by the author referred to as follows:

"The earnings of children became an irresistible temptation to the parents. They were sent to the factory at the earliest age and they worked during the whole hours that the machinery was kept at work."

To meet this the act of 1819 was passed[1] "which, being the first measure restricting the labor of unapprenticed children, was, properly speaking, the first of the Factory Acts. This act and the one of 1825 remained practically dead letter for want of adequate enforcing clauses, and it was not until Lord Ashley's bill in 1833 establishing a stringent system of government inspection that any progress was made in

1. Arthur Young- Labor in Europe and America, p. 182.

was that, as apprentices were already under statutory provisions and were subjects of a legal contract, it was permissible that their hours of labor should be regulated by positive enactment. . . . . Through this narrow door the first of the Factory Acts was passed. . . . If the evils of the factory system had not begun to be observable in the labor of apprentices there is no saying how much longer those evils might have been allowed to fester without even an assertion of the right to check them." Of course the assumption was that all children not apprenticed were sufficiently educated through paternal care and affection, but the reverse of

1. Argyle. Reign of Law, ch. VI.

small number of spindles to furnish apprentices instruction in reading, writing and arithmetic or either of these according to the abilities of the apprentice, a part of each day within working hours, for the first four years."

- This bill is most significant. In commenting upon it the Duke of Argyle says,[1]

1. "It is characteristic of the slow progress of new ideas in the English mind, and of its strong instinct to adopt no measure which does not stand in some relation to preexisting laws, that Sir Robert Peel's bill was limited strictly to the regulation of the labor of apprentices.... The notion

1. Labor in Europe and America, p. 184

Thus education was, in general, the prerogative of the child possessed of normal domestic relations and sufficient property to permit his receiving the training of one of the so called public schools. While the pauper child received such manual training by means of apprenticeship as removed him at the earliest possible moment from the care and cost of the parish; and the laborer's child received nothing.

[1]Here the matter rested until 1802 when the elder Sir Robert Peel carried a bill[2] through Parliament compelling masters and mistresses of cotton and woollen mills employing more than a fixed

1. 2 Geo. IV., c. 73.

2. For the futility of this act (except as a wedge) see Jules Simon "Ouvrier de huit ans". Rev. d. d. Deux Dec. 1864.

Of education Blackstone observes that[1] "The last duty of parents to their children is that of giving them an education suitable to their station in life, a duty pointed out by nature as of far the greatest importance of any. Yet the municipal laws of most countries seem to be defective on this point by not constraining the parents to bestow a proper education upon his children."

He further mentions that in respect to one sort of education the children of poor persons are better off than the children of the rich, since the overseers of the poor are legally bound to have them apprenticed to a trade.

1. Bl. § 451.

or less exactly according to circumstances, during two centuries and a half the growing provision for education holding a rough proportion to the extent of suffrage.

In England, however, education was still a purely paternal function in Blackstone's time" and the development of legal provision for education during the present century has been thoroughly organic, illustrating more strikingly than either of the functions hitherto discussed, the extremely gradual recognition of the child as a being possessed of distinct and individual status, independent of domestic relations.

See Bk. Parent and Child.

the child outside of the family.

A third right which illustrates the growth of legal provision for the child as such, and independent of the family, is the right to such education as shall make him an intelligent citizen.

In this country, education had been acknowledged as a function of the state throughout the New England colonies a century before the Commentaries were written, and the growth of legal provision for the performance of the function has been chiefly geographical, - one state after another imitating New England more

1. See Lodge Short Hist. U. S. ch. 22.

for his child; and for enabling other agencies to enforce his own performance of his duties as parent. Here, too, the process of generalization goes on; and the legal paternal right of protecting one's chattel becomes the universal right of the child to be protected. Inherent in every child is the need of protection, and when the paternal function fails, the Law charters a society giving to the orphan and the illegitimate child what substitute it can for the lost safety of the legal family.

But that also is a blow struck at the legal family since that also helps

Lee Bl. Parent and Child.

child stealing a felony; giving the father the right of action for injury to the child's person; making vaccination obligatory; ensuring to the pauper child more healthful care than is given to the pauper adult; prohibiting the sale of liquor and obscene literature to children; restricting the hours of the child worker; and incorporating societies for protecting children from cruelty, sometimes that of the parent himself. More distinctly here than in most cases the law makes two fold provision for the care of the child by arranging for the father in his right of caring upholding

1. Schouler Dom. Rel. p. 358.

discusses Protection like custody, as a purely paternal function, observing merely that a parent may justify an assault and battery in defense of the persons of his children. Indeed he regards protection as a "natural right rather permitted than enjoined by any municipal laws, Nature working so strongly in this respect as to need rather a check than a spur."[1] Since Blackstone, however, the child's welfare has demanded that this parental duty and right should be supplemented by positive legislation punishing the suppression of the fact of the child's birth[2], making

1. Bl. § 450.

2. 9 Geo. II. c. 21.

separates the child within normal domestic relations and the child without them, not diminishing the happiness of the former but letting the latter approach it and so diminishing in some measure the legal prestige of the child within the family.

Another right of the child which was slightly treated by Blackstone and has grown gradually into recognition is the right to protection.[1] A survey of the legal provision for this relation gives further evidence that the child as such was slightly guarded under the Common Law; for, vitally essential to every child as this protection is, Bladestone

1. See Bl. Parent and Child.

male child was a chattel dependent for custody upon its owner's whim; the illegitimate child was without legal custody: the pauper child was not different from the pauper adult, childhood was swallowed up in pauperhood; the delinquent child's childhood was merged in his delinquency and his custody upon that basis was the adult delinquent's custody."

Now, the child is a child in the eye of the law: be he legitimate, or illegitimate, or pauper, or delinquent, and his custody is arranged in recognition of the fact. But that is also a blow struck at the legal family, since it tends towards bridging in some measure the gulf which

1. Mary Carpenter. see ante 23.

the child's custody. Blackstone's discussion of custody as a parental right has become inadequate. Present legislation proceeds upon the principle that custody rests not on any parental vested right, but on the right of the child to be in the care most fit to secure his welfare, whether that of father, mother, guardian or Board of Charity, or board of women visitors, or some adoptive parent: and nothing is more significant than the growing recognition of the child's need of and right to be in the care and custody of women."

Under the Commentaries the legiti-

1. Mass. Gen. Stat. 1868 – 1882

to the legal family; for in practice it relieves the parent or guardian from further responsibility; not attempting to reach the child through the legal domestic relations. This last mentioned, possibly undomestic, feature is, however, the sole point in which the present legislation of Massachusetts affecting children resembles the view of the delinquent child derivable from Blackstone; and the custody of delinquent children indicates perhaps better than anything else, the total emergence of the child from his former legal oblivion." In view of the growth in complex provision of law governing

1. Simpson Definition of Law of Infants.

of public officials of whom by law some must be women. Here, too, is growing care for the child's welfare and growing recognition of his individuality with its need of individual care. Here is also the assertion by the state of its power and will to decide the home of the child and of the superiority of the moral over the legal qualification of the home in securing the child's welfare. Such legislation is an acknowledgment that the personal relation of home life must be provided by the state for its wards as better than the impersonal custody of the jail; but it is indirectly a blow

1. Proceeding of Convention of Associated Charities. Boston, 1881.

In this provision for the custody of delinquent children, all growth has tended towards supplying to the child who has proved his natural guardian unfit to restrain him and, by being committed, has forfeited his normal legal custody, such home life & personal care as shall replace, as far as possible, the lost normal relation. Leaving such children to the actual guardianship and custody of the state as embodied in the jail proved destructive; and present legislation in Massachusetts gives instead, quasi-parental home life under the guardianship of a board

ters of whom two are women.

legislation which pays respect not only to the grade of offense of the minor, but to his age and sex. The delinquent child, becoming by this commitment a ward of the state, is withdrawn from the school at the earliest possible moment and placed in an individual home,[2] under the care of a member of an auxiliary board composed of women if the offender be a boy under fourteen years or a girl under twenty-one; and his ever finding his way into a jail depends upon such repeated evil doing as proves the offender adult in crime, if a child in years.[3]

1. See Mass. Genral Statutes for acts of incorp. of Westborough and Lancaster schools, and the State Primary school at Monson 1848, 1866. See further act of July 1879 by which these schools are all under care of a Board of five trus-
2. See Act of 1880. 3. See 3d An. Rep. State Board Ch. and Ls.

or conduct in prison."[1] And Mary Carpenter wrote bitterly[2] "the only school provided in Great Britain by the state for her children is the jail."
In Massachusetts on the contrary, at the present day, if a child appear before a magistrate and is liable to commitment in default of bail, agents of the State Board of Health, Charity and Lunacy have been instructed to be present and offer themselves as bail[3] in order that this individual care may prevent the child's falling into public custody. Should the child, however, be committed, he or she goes to an industrial school under

cannot be punished if committed by children.

1. Wines. Prisons and Child Saving Institutions.
2. Carpenter - Reform Schools p. 261.
3. 3a. Ann. Rep. Mass. St. Bd. of Health, Charity and Lunacy

specific provisions of law, made for the express purpose of securing his moral welfare.

Again, in the case of children removed from parental custody by reason of juvenile crimes and misdemeanors; according to Blackstone, under the Common Law the child susceptible of sentence of incarceration seems to have undergone the same custody as the adult, Blackstone making no mention of provision for supplying any different custody. Indeed as late as 1823 under Sir Robert Peel's consolidated jails act "legal offense was made the basis (of classification) without regard to age, character

1. In stating limitations under which children are susceptible of capital punishment Bl. 469 gives a good illustration of the fact stated in the introduction - that the child's life is additionally protected since certain capital crimes

parent, proving that he cannot maintain it, forfeits the trust of custody; and the impersonal custody of the almshouse being morally and physically injurious, the personal relations of home life are substituted so far as possible[1]. But, where the state makes this transfer of the child on these grounds, it asserts its recognition of the moral welfare of the child over the legal right of the family; and furnishes evidence of the altered position since Blackstone's day, of the child destitute of property; since, now, the mere fact of childhood brings the young pauper under elaborate

1. 3rd An. Rep. Mass. St. Bd. Health, Ch. & Lunacy.

is cited as embodying in its legislation the best expression of the modern view of the child, the effort of the state is towards making custody the means of securing the child's welfare. The law assumes that a parent unable to keep his child out of the almshouse forfeits the trust of guardianship; and the state finds a home and other guardians for such children[1], making all possible effort to supply the lost parental relation by the pseudo-parental relation of adoption. That is, the law assumes that every parent normally retains custody of his child, but the pauper

1. 3rd An. Rep. Mass. St. Bd. Health, Ch. and Lunacy

home can be found for it.

In the Primary school the child becomes a ward of the state and is in the legal custody of the State Board of Health, Charity and Lunacy thus legally as well as personally removed from the adult pauper population.

So far as is possible, the child under two years of age, also, is removed from the almshouse, being placed in the personal care of one woman, and the legal custody of the women in charge of the Massachusetts Infant Asylum.[1]

In all legal provision for pauper children in Massachusetts which

legislation.

1. See Mass. Gen. Acts 1867 Incorp. Mass. Inf. Asy. and Sup. Acts 1870 and 1880.

in England than is seen in our American Law; for at present "pauper children, whether legitimate or not are, under the English Law, made inseparable from the mother within the years of nurture." (i.e. from birth to the age of seven).

In Massachusetts, on the contrary whose legislation affecting pauper children is believed to be the most enlightened yet attained, it is now, by statute, illegal to permit any child to remain in any almshouse after reaching two years of age,[2] at which time a State primary school receives the child until an individual

1. Schouler Dom. Rel. p. 382.
2. A good example of the "additional favorable provisions" mentioned in the Introduction. The herding together which is arranged for adults proving fatal to children has led to this special

the maintenance of the poor, impotent old, blind and such other being poor and not able to work;" terms including pauper children without specifying anything whatsoever concerning their custody. Later he tells us "a board of three commissioners was appointed empowered to issue all such "rules and regulations as they think proper for the maintenance, education and apprenticing of the children of poor persons."[2] The custody which resulted from this law is known to readers of Oliver Twist. Here also, as in the case of the custody of the illegitimate child, there is less change

1. 43 Eliz. c. 2.

2. 4 and 5 Wm. III. c. 76 § 15; continued by 3 and 4 V. c. 42; 5 Vict. c. 10, and 5 and 6 V. c. 57 to July 31st 1847, see Wendell's Bl. vol. I. p. 358.

and that she is entitled to control it. A provision of infinite value to the child where mother and child are victims of bigamy; and of value to it in any case as securing to it fixed, definite, legal guardianship.

The growing care for the child has changed in a most marked way its position when, unhappily thrown out of the domestic relations by reason of pauperism or the absence of legal guardians, it is left to the care of the public. Of this class of children Blackstone merely says that overseers of the poor were appointed in each parish "to raise convenient sums for

1. Schouler Dom. Rel. p. 384.

ative one that "he hath no father."[1]
In this respect the English Law has changed comparatively little; for the English authority - Simpson writing in 1875 says,[2] "In the eye of the law the illegitimate child is filius nullius and consequently has no legal guardians not even the mother or putative father." But the American authority Schouler, writing in 1870 says, "American policy is in general more favorable than that of England, as to the mother's rights. In New York it is broadly ruled that the mother, as its natural guardian, is bound to maintain an illegitimate child

1. Bl. 459, ch. XVI. § 3.
2. Simpson, Law of Infants, p. 126.

ience and respect".

Great however, as is the change in provision for the custody of the legitimate child within the family; its effects, in changing the actual circumstances of children, are probably far less than the effects of the growth of provision for custody of children outside of the legal family.

Care for the welfare of the child in legislation governing the custody of illegitimate children has grown perhaps in equal proportion. In the Commentaries, no provision whatsoever is made for this matter of vital importance to the child, except the neg-

Bl. Ch. 16, § 2.

ference and respect."[1]

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[1] Bl. ch. 16, § 2.

will go if he be of proper age."

And, in New York, to prevent the father's depriving his legitimate child of its mother's care and custody after his death, the consent of the mother is required to an appointment of testamentary guardians.[1] To this point has the recognition of the child's welfare grown in the time since Blackstone; and incidentally has grown with it this recognition of the child's need of legal power in the mother, making a change very marked since the dictum of Blackstone,[2] that the mother as such is entitled to no power but only to rev-

1. N. Y. Stat. 1862, ch. 18, § 2.
2. Bl. 463.

may forfeit by his misconduct." "It is an entire mistake", says Judge Story, "to suppose that the court is bound to deliver over the infant to its father, or that the latter has an absolute vested right in the custody." The cardinal principle in such matters is to make the welfare of the children paramount to the claims of either party. And judicial precedents, judicial dicta, and legislative enactments, all lead to one and the same irresistible conclusion." So far has the care for the child's individuality grown that the same authority adds, "The practice is to give the child the right to elect where he

v. Schouler Dom. Rel. p. 342.

or interests of the children strongly require it, withdraw their custody from the father and bestow it upon the mother, or take the children from the parents and place the care and custody of them elsewhere[4]. The rule as to legal preference is essentially that of the common law, with, however, an increasing liberality in favor of the mother; strengthened in no slight degree by positive legislation."

"[5] The father has then, the paramount right to the custody of the children independently of all statute to the contrary. But this right he

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woman. Simpson, Law of Infants (1875) p. 139.

3. Schouler Dom. Rel. p. 338-339.

4. Kent Com. § 205 and cases cited.

5. Dom. Rel. p. 342.

possession of the mother until the child should reach the age of sixteen under the same circumstances as before.[2] And it is now laid down that "the court of Chancery (English) will interfere with the rights of a father to the custody of his children; the object of the interference being, of course, the benefit of his children, not the punishment of the father, on grounds of unfitness of character and conduct,"[2] while the American authority, Schouler, writing in 1870 affirms that:[3] "In this country the doctrine is universal that the courts of justice may in their sound discretion, and when the morals or safety

1. Simpson Law of Infants (1875) p. 137.

a minor, he could deprive his child of its mother's care by appointing testamentary guardians with absolute power.

The growth of this branch of the Law is marked. The first change was made in England by the Wills act[3] which debarred a minor from appointing testamentary guardians. Next, in 1839 the custody of Infants act[4] provided for giving to the mother access to her children under the age of seven or possession of them to that age under certain specified circumstances. Finally, in 1873, the Infants Relief act[5] provided for the access or

3. 1 Vict. c. 26 (Wills Act).
4. 2 and 3 Vict. c. 54
5. 36 and 37 Vict. c. 12.

The child's welfare being in no sense an object to be secured, there is in the Commentaries no provision for granting to the legitimate child the benefit of transfer from the custody of a delinquent father to that of its mother or any other person. The father owned his legitimate child. It was his chattel to be kept or given according to his whim. So absolute was the paternal possession that, though a minor, the father could give or bequeathe away his child's custody despite its mother, though it were an infant in the arms or even before its birth.[1] And though the father died

[1] Bl. Com. ch. 16, § 2. "A mother as such is entitled to no power but only to reverence and respect."

the ownership of property - somewhat as an appendage to it; and the discussion has reference more to the property than to the child.

So throughout the Commentaries, the child is merely an incidental phenomenon and his moral welfare is ignored. This is well illustrated by the relation of custody. Perhaps no relation of childhood is so universal as this; but Blackstone discusses it under the head Parent and Child, regarding it purely as a paternal right, ignoring the welfare of the child, and emphasizing only the absolute ownership of the father.[1]

1. See Blackstone. Parent and Child

the illegitimate child is summarily devolved upon the father or the parish, as circumstances decide, without reference to the good of the child.[1] Nowhere in the Commentaries is there a hint that the Common Law regarded the child as an individual, with a distinctive legal status. The nearest approach, perhaps, to this is in the discussion of legal disabilities where it is stated that "Infants have certain privileges and certain disabilities but their very disabilities are privileges preserving them from the consequences of their own rash acts;" but, even here, the child is viewed in connection with

1. Bl ch. 17, § 3.

expressed chiefly in laws which benefited the legitimate child within the family, and which acted in and through the family or its substitute the guardian; and at best the development of the principle was merely germinal. One evidence of this is that Blackstone has no chapter upon Infancy. The domestic relations of the child are discussed under the head Parent and child; the relation of the young criminal is dismissed with a brief discussion of the age at which criminal responsibility is attained; the disposition of pauper children falls naturally under the Poor law, and the maintenance of

1. Bl. ch. 17.

always existed. It is chiefly the product of the present century and is therefore of statute origin[1]; and it has been attained by legislation involving consequences not, perhaps, wholly foreseen. The existing mass of laws affecting children has been created in ever-increasing recognition of the child's welfare as a direct object of legislation, apart from the family relation; and herein lies the cardinal distinction between the status of the child to-day, and its status under Blackstone.

In the Commentaries, although the principle of especially caring for childhood was recognized, it was

1. See Schouler Dom. Rel. Introduction.

bestows favor upon the child in systems of public education provided by the state, in the development of factory acts, in legal disabilities imposed and special provisions enacted for the child's protection.

In the case of dependent and delinquent children, too, recent statute law provides modified treatment quite in the spirit of the old common law provision which pronounced a child under seven years conclusively incapable of crime and a child under fourteen prima facie so.[1]

This extremely favored position of the child under the law has not

1. Bl. ch. 17.

under legislation rich in provisions for his interests.[1]

Primarily, the law assumes that parental affection secures this threefold protection; and therefore upholds parental rights and enforces parental duties; yet it recognizes the fact that parents may be dead or delinquent and provides for this contingency by instituting the quasi-parental relations of guardianship and adoption, and by providing for the transfer of custody and the settlement of paupers and illegitimate children. Wholly apart from the paternal relation the state now as never before takes cognizance of and

1. Bl. ch. 17, § 3. Infants have various privileges and various disabilities but their very disabilities are privileges in order to secure them from hurting themselves by their own improvident

The child's position under the Law at this time, is unique in the extent to which care for his welfare is carried.

Whereas the state, through its judicial function, gives to the adult protection in the enjoyment of Life, Liberty, Property and the pursuit of Happiness; to the child it gives the same protection of Life with additional favorable provisions; the same protection in the enjoyment of Liberty to an extent restricted only for his good; and the same protection in the enjoyment of his property

1. Habeas Corpus applies to the child. See also Schouler Dom. Rel. Custody.

On Some Changes in the Legal Status of the Child since Blackstone.

Suggested by Dr. Wilson's Lectures in American Law.