act, he is to be taken to authorize him to do it in a lawful and not in an unlawful manner, and that the Statute declared for that purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent or knowledge, that the publication did not arise from want of due care or caution on his part.

In substance, the Statute modified the grounds on which the proprietor was criminally liable for a libel published in his paper according to the Common Law of England. But we cannot hold that the provisions of that Statute are applicable to this country, and we must determine whether the accused is or is not guilty of defamation with reference to the provisions of the Indian Penal Code. We consider that it would be a sufficient answer to the charge in this country if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his absence, and that the libel was published without his authority, knowledge or consent. As the Judge has however misapprehended the effect of Act XXV of 1867, we shall set aside the order of acquittal made by him and direct him to restore the appeal to his file, to consider the evidence produced by the accused and then to dispose of the appeal with reference to the foregoing observations.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

READE (DEFENDANT), APPELLANT,

and

KRISHNA (PLAINTIFF), RESPONDENT.*

1886. February 4. March 5.

Guardian—Custody of minor—Change of religion—Act IX of 1875, s. 2., cl. (5).

A Bráhman boy, 16 years of age, having left his father's house went to and resided in the house of a Missionary, where he embraced Christianity and was baptized.

In a suit by the father to recover possession of his son from the Missionary:

Held, that the question whether the boy was a minor, was to be decided not according to Hindú law, but by Act IX of 1875;

* Second Appeal 701 of 1885.

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(2) that the claim was not affected by s. 2, cl. (*b*) of that Act;

(3) and that the father was entitled to a decree that his son should be delivered into his custody.

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of the District Múnsif of Cuddalore in suit No. 21 of 1884..

This case came before the High Court on Second Appeal in March 1885, and is reported at p. 31 of the Indian Law Reports 9, Madras Series.

The facts and arguments so far as they are necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

The Acting Advocate-General (Mr. *Shephard*) for appellant.

Rámá Ráu for respondent.

JUDGMENT.—The respondent Krishnáchári is a native of Cuddalore and has a minor son named Subba Ráu. Subba Ráu joined the Mission School in New Town in July 1881, and continued to study in it till 1883. In the latter part of that year he went often to the appellant's house and attended the religious meetings and class which she used to hold. In January 1884, he renounced his father's religion and embraced Christianity, and at his request the appellant caused him to be baptized. Prior to his baptism, he left his father's home and protection, and he since lived in the appellant's house and under her care. Thereupon, the respondent sued in the Court of the District Múnsif of Cuddalore, to recover possession of the minor, alleging that, as the minor's father, he was the legal guardian, and that the appellant unlawfully took the boy out of his protection and detained him against his (father's) will. He stated also that the appellant caused damage to the minor's religion and person and claimed Rupees 100 as compensation for the expenses of expiatory ceremonies which it was necessary to incur in order to take the boy back into the Hindú religion. But both the Courts below dismissed this claim, and the respondent has not appealed from so much of the decree as related to it. As to the right to the custody and control of the minor, the appellant asserted that Subba Ráu was not a minor, and that he had sufficient discretion to act for himself in matters of religion. She denied that she either took him wrongfully out of his father's protection or unlawfully detained him; and relying

on Act IX of 1871, contended that the District Múnsif had no jurisdiction to entertain the suit. The District Judge at first upheld the plea to the jurisdiction, and his decision on this point came under our consideration in *Krishna* v. *Reade*.(1)

We then held that according to the true construction of Act IX of 1871, it merely provided a special and prompt remedy by application on petition, and that it was not the intention, and that there were no words of which the effect was to take away the ordinary remedy by regular suit, in cases in which the special procedure prescribed by the Act was not availed of. Though in connection with the petition of Second Appeal now before us, it was again urged as an additional ground that the District Múnsif had no jurisdiction, the learned Advocate-General did not press it upon us at the hearing. As to the plea that Subba Ráu was not a minor, the Judge considered that it was not proved, and observed that the utmost use he could make of Doctor Robertson's professional evidence was to accept the minimum fixed by him, viz., 16, as the probable age in 1884. We are bound to accept this finding on a question of fact in Second Appeal. Adverting to the contention that the question raised in the suit was not one of Subba Ráu's majority or minority, but substantially one of religion in regard to which he was entitled to make a free choice, the Judge observed that the case before him was not that of interfering with any one's religion, and even supposing that the father would make efforts to bring about a change in the son's religious views, it could not be accepted as a sufficient ground for taking away the right of the former to the custody and control of the latter. With reference to the argument that the appellant did not actually detain the minor, the Judge remarked that the boy had in law no will of his own, and that there was improper detention because the appellant kept him in her house contrary to his father's will. In the result, the Judge confirmed the decree of the District Múnsif which directed "that defendant do deliver to plaintiff the minor Subba Ráu."

It is urged in the petition of Second Appeal—

(I) That Act IX of 1875 does not apply to a case where religion is in question, and that under Hindú law Subba Ráu was not a minor;

(1) I.L.R., 9 Mad., 31.

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(II) Even if he were a minor, the respondent would not be entitled to his custody unconditionally and absolutely;

(III) That the appellant did not actually detain the minor and there is no evidence of such detention; and

(IV) That at any rate no decree ought to have been passed in the form in which it has been made.

At the hearing, the learned Advocate-General strongly objected to the form of the decree, and argued that guardianship for nurture ceased at 14, that a minor who had attained the age of discretion was not liable to be compelled to return to his father against his will, and that though there may be a decree to release him from improper custody, there ought to be no decree for his delivery to the respondent. He drew our attention to *The King* v. *Greenhill*,(1) *The Queen* v. *Clarke*,(2) *in re Shannon*,(3) *in re Connor*,(4) and *The Queen* v. *Vaughan*.(5)

On the other hand it was contended for the respondent that the rule as to discretion has no application in this case, and reliance was placed on *The Queen* v. *Nesbitt*,(6) *in re Hemnath Bose*,(7) and *in re Calloor Narainsawmy*,(8) *R.* v. *De Manneville*,(9) *in re Clarke*,(2) *in re Elizabeth Daley*,(10) and *The Queen* v. *Howes*.(11)

There can be no doubt that a minor under 14 years of age has no will of his own, or that his detention against his father's will is unlawful. In *Ratcliff's case* (12) it was held that guardianship for nurture continues until the child attains the age of 14. In *Howe's case*(13) however, it was considered by analogy to penal enactments to extend to 16 years in the case of girls.

With reference to the offence of kidnapping from lawful guardianship, the Indian Penal Code, s. 361, fixes the age at 14 in the case of a boy, and 16 in the case of a girl. As observed by Lord Campbell in *The Queen* v. *Clarke* (2) the guardian for nurture has by law a right to the custody of the child and may maintain an action of trespass against a stranger who takes the child. With reference to such child brought up on a writ of *habeas corpus*, the learned Chief Justice said:—"the child is

(1) 4 A. & E., 624. (2) 7 E. & B., 186. (3) 20 L. T., 183.
(4) 16 Ir. C.L.R., 112. (5) 5 B.L.R., 418. (6) Perry, O.C., 103.
(7) 1 Hyde, 111. (8) Mayne's P.C., s. 361, notes. (9) 5 East, 220.
(10) 2 F. & F., 258. (11) 30 L.J. (M.C.), 47.
(12) 3 Rep. 38: vol. 2, p. 105 of *Thomas & Fraser's* edition. (13) 3 E. & E., 332.

supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian, and when it is delivered to him the child is supposed to be set at liberty." He deprecates the contention, that the capacity of the child to make a choice for itself should be tested by the Judge, and observes that "the consequences which would follow from allowing such a choice would be most alarming." Nor is there room for doubt that when the father is entitled to the custody of the child, the proper mode of enforcing his right consists in a decree for its delivery. The order usually made on a *habeas corpus* when the child is too young to elect its own custody, is a direction that the child be delivered to its lawful guardian. The same is the case when the Court of Chancery interferes on petition for the possession of a child. The substantial question then for decision is, what is the law of guardianship applicable in a civil suit in respect of the right to the custody and control of minors. There may be guardianship by nature, by nurture, and by personal or statute law. The English cases cited by the learned Advocate-General no doubt show that a child over 14 is allowed to choose his residence when he is brought up on a writ of *habeas corpus*. But they show also that the *ratio decidendi* is the limited purpose for which the writ is designed. To quote from Coleridge, J., in *The King* v. *Greenhill* (1) "*a habeas corpus* proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, viz., the individual who has been under the restraint is declared at liberty, and the Court will even direct that the party shall be attended home by an officer to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists; and where the child is in the hands of a third person, that presumption is in favor of the father. But although the first presumption is that the right custody according to law is also the free custody, yet if it be shown that cruelty or corruption is to be apprehended from the father, a counter-presumption arises." Again in *The Queen* v. *Vaughan* (2) which is the leading Calcutta case cited on the appellant's behalf, Phear, J.,

(1) 4 A. & E., 643. (2) 5 B.L.R., 427.

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says, "The writ of *habeas corpus ad subjiciendum* is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen is illegally confined against his will. It is issued on behalf of the person illegally confined, and not issued for the purpose of lending the arm of law to any person claiming authority over him. It is only where the person confined is under any personal disqualification the guardian or protector is looked to, and in such a case the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian." He also remarks in his judgment that he was not adjudicating upon a question of civil right between party and party. On the other hand, Rawlinson, C.J., and Bittleston, J., held in September 1858 in *Calloor Narainsawmy's case*,(1) that a Hindú youth of the age of 14 who had gone to the Scotch Missionaries should be given up to his father, though he had become a convert to Christianity and desired to remain with his new protectors. A similar decision was passed in Calcutta by Sir Mordaunt Wells in regard to a boy over 15 and under 16 years of age (*in re Hemnath Bose*).(2) Though in *Nesbitt's case*(3) the boy brought up on *habeas corpus* was only 12 years of age, the learned Judges pointed out the extreme undesirability of emancipating a minor from parental control on the ground of discretion in this country. In the note subjoined to that case, reference is made to the Code Civil, and the practice on the Continent being in accord with Hindú law which recognizes no such choice as is contended for on behalf of the appellant. In passing, we may also state that Lord Campbell refers to this case and to the opinion thereon of Patterson, J. That eminent Judge observed to Sir Erskine Perry: "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *habeas corpus*. The general rule is clearly so, and even after the age of 14, whereas this boy (Shripat) was only 12." The result then of the examination of the authorities to which we were referred is, that according to the latest decision in this Presidency and Bombay, a minor though over 14 is not at liberty to choose his own custody as against the father, even when brought up on the writ of *habeas corpus*, that the decisions to the

(1) Mayne's P.C., sec. 361, notes. (2) 1 Hyde, 111. (3) Perry, O.C., 103.

contrary proceed on the view that the writ is not the appropriate remedy prescribed for enforcing the authority of the father over his son, and that when the son is over 14 and competent to make a choice, its purpose is satisfied by allowing him to choose his own custody, and leaving it to the father to vindicate his right by a civil suit. It follows then that the contention that according to general principles the father's guardianship ceases (*quoad* his right to custody) when the son completes his 14th year, cannot be supported. It may cease for the purpose of visiting third parties with penal consequences, and for the purpose of a writ of *habeas corpus*, but that cannot preclude a father from asserting his right by a civil suit even against the son's choice to his lawful custody and control.

It is regarded by the Court of Chancery acting as *parens patriæ* as a settled rule that except under special circumstances a minor must be brought up in his father's religion. As to what are to be recognized as special circumstances warranting a departure from the general rule, James, L.J., says in *Hawksworth* v. *Hawksworth*(1) that the Court will be reluctant to depart from the general rule unless the impressions produced on the child's mind by the course of education which he is receiving, are so great and permanent as to induce the Court to fear lest any attempt at altering them would do more harm than good, and would end in unsettling the child's faith altogether and so produce a fatal result in that respect. Again, in *Curtis* v. *Curtis*(2) Kindersley, V.C., says, "After hearing so much about the father's religious principles it is proper for me to say that I cannot act on those principles unless they are such as are contrary to the law of the land. The only view in which they are material is that a father may permit his child to be brought up by other persons of a particular profession so as to make it difficult for the Court not to see that the happiness of the children must be affected in the course of their education in those principles."

Nor do we see our way to uphold the contention that it is the Hindú law and not Act IX of 1875 that governs this case in regard to the age at which minority ceases. It is no doubt true that under Hindú law a boy or girl was *sui juris* on the completion of his or her 16th year, but Act IX of 1875 altered this. The

(1) L.R., 6 Ch., 539. (2) 5 Jur., N.S., 1147.

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Act is applicable to all persons domiciled in British India, and it provides (s. 3, paragraph 2) that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before. The suit before us is one brought by the father to enforce his parental right to the custody and control of his minor son, and as that right is an incident of guardianship, and as it is not excepted from the operation of the Act, we cannot say that the case falls to be decided under Hindú law as to the age of majority. The personal law applicable to Hindús has been repealed, and a territorial law has been substituted for it, and our decision must be in accordance with the latter.

As a minor may be *sui juris* for some purposes, though not for others, the next question for decision is, whether the father's right is specially taken away by the Act in any case. It is provided by s. 2 "that nothing contained in the Act shall affect (*a*) the capacity of any person to act on the following matters viz.: marriage, dower, divorce and adoption; (*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or (*c*) the capacity of any person, who, before this Act comes into force has attained majority under the law applicable to him." The construction suggested for the appellant is that when a Hindú youth of 16 changes his religion, his father's right to custody ceases; and adopting as we must do, the finding of the District Judge that the youth had completed his 16th year, he was according to Hindú law *sui juris* and therefore competent to change it; still this would not affect the right of the father to the custody and control of his minor son, and that right is not taken away by the Act; and in this suit the question with which we have to deal is, as the District Judge very properly remarks, not a question of interference with the right of a Hindú son to change his religious persuasion, but whether a Hindú father is entitled to the custody of his son and to such control over him as he may lawfully be entitled to exercise.

On these grounds we are of opinion that this appeal fails, and we dismiss it with costs.

We think, however, that the decree may be more appropriately worded by directing "that the son be delivered into the *custody* of the plaintiff;" and we direct that it be amended accordingly.