BENSON, OFFG. C.J., WALLIS AND SANKARAN NAIR, JJ.

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will only be a charge on the income in his hands and does not show that the surplus is not at his disposal.

My reply to the reference is that, in the absence of any evidence to the contrary, the Pandara Sannadhi as such is not a trustee. He is also not a life-tenant for the reasons already given.

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

1910. April 12.

A. H. POLLARD (PLAINTIFF),

v.

F. ROUSE (DEFENDANT).*

Minor—Determination of custody of—Contract of apprenticeship by minor, how far enforceable—Injunction against minor for breach of such contract—When Court will take minors from custody of parents or persons selected by them.

A minor may bind himself by a contract of apprenticeship if it be for his benefit; but such a contract cannot be specifically enforced against him either directly or by restraining him from taking service under others or by restraining others from employing him.

DeFrancesco v. *Barnum*, [(1889) 43 Ch.D., 165], referred to.

If the contract is for the benefit of the minor apprentice an action will lie for enticing away such apprentice and to recover his earnings.

Parents and guardians cannot divest themselves of their right of guardian ship by any contract. A delegation of such right is revocable at any time and the parent or guardian is bound to revoke it if it is used to the detriment of the children; and it is open to the Court within whose jurisdiction the children are found to exercise the same power, if cause is shown for such interference.

The jurisdiction of the Courts to take away children from parents or from persons selected by them is a parental one and the Courts must do what a wise parent under the circumstances would or ought to do.

The Queen v. *Gyngall*, [(1893) 2 Q.B.D., 232 at p. 248], referred to.

The main consideration to be acted upon is the benefit or welfare of the child; the welfare of the child means not only its physical but also its moral and religious welfare.

A male child above the age of 14 and a female child above the age of 16 years will not ordinarily be compelled to remain in custody to which he or she objects; and in the case of younger children who are still old enough to form an intelligent preference, their wishes will form one of the elements for consideration.

The Court will remove children from the custody of one from whom cruelty or corruption is apprehended.

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* Civil Suit No. 99 of 1910.

APPLICATION for interlocutory injunction. The facts of the case are fully set out in the following judgment.

D. M. C. Downing and *Nugent Grant* for defendant.

M. A. Tirunarayanachariar and *S. Gurusawmy Chetty* for plaintiff.

JUDGMENT.—This is an application for an interlocutory injunction in a suit filed by Mr. A. H. Pollard, the Proprietor and Manager of the Lilliputian Opera Company, against Mr. F. H. Rouse, Consulting Engineer residing at Bangalore. The plaintiff's troupe consists of minors under articles of apprenticeship to him, and the suit is brought against the defendant for procuring these apprentices to break their contracts with the plaintiff and removing them from his custody and giving performances by their aid and depriving the plaintiff of their guardianship; and the plaint prays that the minors may be delivered up to the plaintiff and the defendant restrained from giving performances by their aid, and for an account of the defendant's profits, and damages and costs. The interlocutory motion which was supported by affidavits asked for an injunction restraining the defendant from giving any further performances with the aid of the minors and from removing them from this jurisdiction or sending them back to Australia pending the disposal of this suit.

In his counter-affidavit Mr. Rouse deposed that while the plaintiff's troupe was performing at Bangalore he had satisfied himself that there has been cases of gross ill-treatment of the children but gave no specific instances, that he was in Madras on business when the plaintiff came here with his company and that the children then refused to go any further with the plaintiff and the plaintiff consented to abandon the tour and hand them over to the defendant on the defendant undertaking to have their passage money paid back to Australia.

When the case came on on notice and an application was made for leave to file reply affidavits, I pointed out that the affidavits filed by the defendant did not disclose any answer to the motion, as, assuming the plaintiff had consented to the removal of the minors by the defendant, he could not by such consent disentitle himself to their custody, and that good cause must be shown for depriving him of it. On this, the defendant filed further affidavits which contain specific allegations tending to show that the plaintiff was not a fit and proper person to be entrusted with the

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custody of the children and the plaintiff filed counter-affidavits denying the allegations against him. In view of the seriousness of the allegations and the necessity of deciding promptly as to the custody of the minors, I allowed the various deponents to be cross-examined on their affidavits and further evidence to be given; and I have now to give my decision on this evidence and the legal contentions which have been raised before me.

Before coming to the facts it will be convenient to deal with the legal considerations that arise. On the present motion, the questions appear to me to be one between the plaintiff on the one hand, and the children and those responsible for them on the other, as the defendant has no personal interest in the children or their services and no right to their custody, and in whatever he has done has been acting on their behalf and in what he conceived to be their interests, and his object is to send the children back as speedily as possible to their parents and natural guardians in Australia. This was admitted at the hearing, and it was agreed that the proceedings should be treated as on *habeas corpus* under section 491, Criminal Procedure Code, for the purpose of determining the custody of the children, but no formal proceedings have been taken under that section, and it is not clear that the matter cannot be disposed of satisfactorily on the motion as it stands.

In the first place I propose to deal with the plaintiff's right in respect of the children considered as his apprentices. It is well settled that a minor may bind himself by a contract of apprenticeship if it be for his benefit, but it is also settled that no action will lie against him for failing to serve as such, and that if such a remedy is desired, it is necessary to get a covenant from the guardian on which the guardian himself can be made liable. It is also settled that the contract of apprenticeship is one which cannot be specifically enforced against the apprentice either directly or by restraining him from taking service under others, or others from employing him *De Francesco* v. *Barnum*(1). In that case the plaintiff, a dancing master, had entered into a seven years' contract with two minors to instruct them "in the higher branches of the chorographic art," and the minors in breach of their contract had accepted engagements under *Barnum*, the well-known showman and another to appear as dancers at *Olympia* in

(1) (1889) 43 Ch.D., 165.

London. It was then held that no interlocutory injunction could be granted either against the apprentices or against *Barnum* and subsequently at the trial of the action all claim for an injunction was abandoned, and it was contended that on the authorities a master was entitled to maintain an action for enticing away his apprentices and also to recover their earnings *DeFrancesco* v. *Barnum*(1). This was not denied, provided the contract was beneficial to the minors but the Court held that it was not beneficial and dismissed the suit. Mr. Grant has argued that these contracts should be held void for similar reasons. Both contracts no doubt enable the master to take the apprentices out of the jurisdiction in which they were made and all over the world, but there are material differences, and I am not prepared at present to hold at any rate at this stage and in the absence of further evidence that these contracts are void as not beneficial to the minors. It is in evidence that it is more than thirty years since Mr. Pollard's father first started a touring company of Australian children and toured with them in the East, and members of the family have been conducting such tours ever since almost continuously both in the East and in America. In these circumstances, I am not prepared at this stage in the absence of further evidence to say that such tours must necessarily be injurious to the children engaged in them and that these contracts are therefore void. I am anxious however not to be understood as expressing any opinion in favour of theatrical companies of Australian children touring in the East. On the contrary, I think it would be much better for them to get their theatrical training elsewhere.

The result of the authorities would appear to be Mr. Pollard as master has no legal right to the injunction prayed for either as against his apprentices or against Mr. Rouse. At the same time the fact that Mr. Pollard has lawful contracts of apprenticeship with the children is, I think, a factor of which the Court is bound to take account in considering his further claim based on the fact, that under the contracts which are signed by their parents and natural guardians, the children have been placed exclusively "under the care and parental control" of the plaintiff. It is hardly necessary to say that parents and guardians cannot divest

(1) (1880) 45 Ch.D., 430.

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themselves of their rights as such by any contract. This delegation of parental authority to the plaintiff is revocable at any time, and it is the duty of the parents and guardians to revoke it if used to the detriment of the children. And it is also open to the Court within whose jurisdiction the children are found to revoke it at any time, if sufficient cause be shown for interference. Ordinarily, no doubt, the Court will be very slow to interfere with parents or the arrangements made by parents for the custody and education of their children, but it will deprive them of such custody if it be absolutely necessary in the interests of the children, and, *a fortiori*, it will for similar reasons take the children out of the custody of persons selected by the parents, especially when the parents have put it out of their power to interfere themselves for the protection of their children by sending them touring round the world in the custody of strangers As observed by Kay, L.J., in *The Queen* v. *Gyngull*(1), one of the most recent and authoritative cases, the jurisdiction of the Court in cases like this "is essentially a parental jurisdiction and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again, the term 'welfare' in this connection must be read in the largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the Court in the exercise of this jurisdiction." The term 'welfare' is also explained by Lindlay, L.J. in *In re McGrath*(2), where he says, "The welfare of the child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." Long before this in *The King* v. *Greenhill*(3), it was laid down that if, in the language of Coleridge, J., "it be shown that cruelty or corruption is to be apprehended from the father," the Court would deprive him of the custody of his children. See also *In re G.*(4), where a mother was held unfit to have the custody of her children on the ground

(1) (1893) 2 Q.B.D., 232 at p. 248.
(2) (1893) 1 Ch., 143 at p. 148.
(3) (1836) 4 A.& E., 624 at p. 643.
(4) (1899) 1 Ch., 719.

that she was living in open adultery with a married man in the home in which she was bringing up the children. Lastly, it is well established that the Court will not ordinarily force a minor of more than 14 if a boy, and of more than 16, if a girl, to remain in a custody to which he or she objects, and that before deciding as to the custody of younger children who are still old enough to form an intelligent preference, it will take account of their wishes as one element in the case. The provisions of the Guardian and Wards Act (see sections 11 and 17) show that the same principles are applicable in India.

Coming now to the acts of cruelty and misconduct imputed to Mr. Pollard in the course of the tour from the time when the company left Melbourne in July 1909 until it broke up in Madras on February the 18th owing to the refusal of the children, with the support of the defendant and other sympathisers, to proceed any further, I may say at the outset that I attach great weight to the evidence, so far as it goes, of Miss Thom, who was in charge of the girls on this as on previous trips and of Mr. Counsell who was also on the previous trip and among his varied functions had a good deal to do with looking after the boys. Both speak to acts which are said to amount to cruelty, and Miss Thom also speaks to facts showing the existence of an improper intimacy between Mr. Pollard and the girl Irene Finlay, a member of the troupe now eighteen years of age, who has been in the Company since 1900. The manner in which these witnesses gave their evidence impressed me favourably. There does not appear to be any ground for suggesting that they are prejudiced and their evidence appears to be opposed to their own interests, as the breaking up of the Company means to them the loss of well paid employment. Here I may say, I am unable to accept the evidence of Mr. Shrouts, Mr. Pollard's advance agent, that Miss Thom and Mr. Counsell made previous statements to him or in his presence inconsistent with their present evidence. No such suggestion was made to Miss Thom whilst under examination. Mr. Counsell on the other hand denied the suggested statement when put to him and I see no reason to disbelieve him. Taking the alleged acts of cruelty in the order of date, the first is said to have occurred at D'Jockshe in Java about the beginning of August, when the plaintiff, after finding fault with some of the girls for playing in the afternoon during lying down hours, is said to have overheard the girl Millie

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McGorlick a girl of 17 say "Does he think we are pigs?" and to have got into a passion, and hit her with his fist and knocked her down and kicked her when on the ground. The evidence of Millie McGorlick to this effect is corroborated by Dora Isaacs, a girl of about the same age. Mr. Pollard's story is that he was obliged to take the punishment of this girl into his own hands as she was too much for Miss Thom and had once kicked her in the stomach, and that he only boxed her ears. The girl admits having kicked Miss Thom but says it was accidental. Making every allowance for exaggeration, I think it is shown that Mr. Pollard lost his temper and used excessive violence on this occasion. It is significant that at Penang, one of the next places they stopped at, the girl made an unsuccessful effort to escape and get back to Australia, and that ill-treatment at the hands of the plaintiff was the reason she gave for running away. The next incident happened at Kuaralampa in the Federated States, when Mr. Pollard had occasion to find fault with one of the girls for taking the younger girls out without leave into the jungle and afterwards going for a ride in the motor-car with a stranger. According to Miss Thom, the girl did not answer when taxed with this, and the plaintiff then struck her on the forehead with a walking stick inflicting a wound over the eye which bled freely and also several times about the body and broke the stick. Mr. Counsell, who examined the girl on the same night, says that the bruise was a very severe one and bled freely; and they both state that the scar was visible for four or five weeks until she went back to Australia, and that it was not likely to go away for three or four months. Mr. Counsell also speaks to treating John Heintz, a boy of 14, at Penang for a cut over the eye which the boy said had been caused by a blow with the buckle end of a strap inflicted by Mr. Pollard, and says that he mentioned this at the time to Mr. Pollard who did not then deny it. Mr. Pollard says he does not remember beating the boy with a strap and his case is that the boy was treated for a boil. I am unable to accept his version.

Then at Calcutta, Mr. Counsell says that he found Ivy Fergurson one afternoon suffering from fever with a temperature of 102° to 103° and that in the evening she was still feverish and he told Mr. Pollard that she was unfit to go on and might collapse at any time if she did so, but that the plaintiff insisted on her going on, with the result that at the end of the performance she

was in a state of collapse and unable to walk. He is corroborated by the girl who says that after the performance Miss Thom took her home in a gharry. Mr. Pollard on the other hand says that both Mr. Counsell and the girl herself said she was fit to go on as her part (that of *La Poupee* in the opera of that name) was a light one. There is no doubt that in general Mr. Pollard treated this little girl whom he described as the cleverest of his troupe but very delicate, with care and kindness, but I see no reason to disbelieve Mr. Counsell's account of what happened. The next incident occurred outside Watson's Hotel at Bombay one evening on the way to the theatre, when Mr. Pollard hit Violet Jones, a girl of nearly sixteen, on the calf of the leg with his stick for answering back when he found fault with her for speaking to a jockey and his wife at the hotel against the rules. Mr. Counsell says she screamed and Miss Thom says the blow was a severe one; both say it left a big bruise four inches long which lasted for a week. Mr. Pollard says he merely tapped her with his stick, but I am unable to believe him; and I need hardly remark on the gross impropriety of beating a girl of this age in the open street until she screamed. Violet Jones also states in her affidavit that at Bangalore the plaintiff found her in bed at 9-30 A.M. and made her get up and followed her into the bath-room where he hit her on the head and "bashed" her head several times against the wall raising a big lump on the side of her head. She is not corroborated as to this, and by some oversight was not cross-examined about it.

This is denied by Mr. Pollard who asserts that the limit of chastisement was, "spanking" in the case of boys and boxing the ears in the case of girls, and that he was driven to undertake the correction of the bigger girls himself because Miss Thom was unable to cope with them. Violet Jones also gave a statement to Mr. Bewes, the attorney, on behalf of the S.P.C.C. on February 15th at the Castle Hotel and Mr. Pollard admits that on finding this out he told her he had spared her in the past but would not do so in the future, and that he would cut her hair off, but he denies having told her that he would make her life a hell upon earth in consequence.

On this part of the case, speaking generally, I find that on several occasions Mr. Pollard lost control over himself and subjected the children to cruel and unjustifiable violence and I think the children will occasionally be exposed to similar treatment in future,

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if they are restored to his care. I also find that in Calcutta he insisted on Ivy Fergurson going on when she was not in a fit state to do so.

Next, as to the improper intimacy between the plaintiff and the girl Irene, a member of his troupe, I find that it is fully proved apart altogether from the evidence of the children to which I shall refer later. Miss Thom deposes that she constantly saw the girl in his bed-room in her night dress both at night and in the day time—from the other evidence, I gather that she generally wore a kimono as well—and that she constantly used to sleep in the afternoons in the plaintiff's bed-room with the plaintiff. The girl's own sister Mrs. Queely who was also employed with her husband on the tour and appears to be a truthful witness and gave her evidence with great pain and reluctance, says she discovered these relations in the flat they were staying in at Melbourne before they started, and the plaintiff then admitted them and said that they had been going on for 12 months, which points to his having seduced the girl on the previous trip, and that he would have nothing to do with her on this trip and that he would divorce his wife and marry her when they got to America. Miss Thom says she observed what was going on as soon as they left Australia on the "*Grachus*" and that she spoke to Mrs. Queely who said she could do nothing. In Madras Mr. Frost, the proprietor of the Castle Hotel, speaks to an act of familiarity which indicated the relations between the parties; and Mr. Sinclair who occupied the room between the plaintiff's and the room occupied by the girl Irene, and who slept on the verandah in view of the door of Mr. Pollard's room, tells us that supper used to be brought to them in the plaintiff's room every night, after the rest of the Company had retired, that the door was shut and that Irene remained with the plaintiff for 20 minutes to an hour. There is also evidence as to what passed there on the night of the 15th February to which I do not advert, because on that night it appears capable of an innocent explanation. I may observe further that the girl Irene admits that she was in the habit of going to Mr. Pollard's room every night after the theatre, though she says the boy Leslie Donaghy was always there, and some of the children also speak to her presence there. Mr. Pollard on the other hand said that boy always went, but said nothing about her being there too. Lastly, there is the fact that after the 16th February the girl Irene left

the rest of the troupe and went to live with the plaintiff at the Elphinstone Hotel under conditions which are in evidence and accompanied only by the boy Donaghy whose presence cannot be a sufficient protection to her.

To come now to the evidence of the girls. Ruby Ford and Millie Mc.Gorlick, both seventeen, corroborate Miss Thom generally as to the girl's spending the afternoon in Mr. Pollard's room and both speak to seeing her lying down with him. Miss Thom's statement that the plaintiff always travelled in India in the same railway carriage as Irene, Violet Jones and other girls is admitted to be true, and Violet Jones tells us what she constantly observed on those journeys. Her statement is uncorroborated but seeing the relations which existed, I fear it is only too likely to be true. We have also the evidence of three smaller girls aged 14, 13 and 12, who at different times, occupied the same room as Irene in the hotels where they stayed. Experience shows that evidence such as this coming from young girls of this age requires to be carefully sifted and must be accepted with great caution. The first of these girls speaks to an incident which happened at Surabia at the beginning of the trip, but as she admits that she did not mention it to any one until after the breaking up of the company on the 16th February, it is not, I think, a statement on which I ought to act. The other two speak to incidents at Bombay, Poona and Bangalore. The incidents at Bombay and Poona are such as may well have happened, but the story they tell is not devoid of improbabilities in some respects and I hesitate to accept their allegations as satisfactorily proved. At Bangalore, they speak of impropriety to one of themselves while the plaintiff appeared to be under the influence of drink, but their stories are not at all consistent. It appears exceedingly improbable that anything of the sort should have taken place in the girl Irene's presence, and I am quite clear that their evidence as to this cannot safely be acted on.

It is further charged against the plaintiff that he has broken his contract to educate the children and give them such teachings at such convenient times as the conduct of the business would permit. The evidence is that he directed Ruby Ford, one of the elder girls to call herself school mistress and advertised her as such, and stated to the press that she was a salaried officer of the Australian Government, but it is clearly proved that she was merely

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one of the girls, and that the children received no education whatever, except in the parts they had to play. Then as to the wishes of the children the revolt against the plaintiff's authority seems to have come to a head at Bangalore, as shown by the fact that a petition was signed and sent to the Chief Presidency Magistrate of Madras. It does not appear that this was brought about by the exercise of any sinister influence by Mr. Rouse or any one else, and I think the facts which I have already found, sufficiently explain it. Further, apart for the question of demoralization which I shall come to, there can be no doubt that the plaintiff's relations with the girl Irene impaired the respect and authority in which the plaintiff was held by the other members of the troupe, and that the exceptional position accorded to her as to which there is abundance of evidence, caused much heart burning especially among the elder girls. As regards the girls over 16 and boys over 14, it is now conceded, in accordance with the principles I have explained, that the Court cannot in the present case force them to return to the plaintiff against their will. Then as to the other children, is the Court to restore them to the plaintiff against their wishes, or is it justified in depriving him of their control and send them back to their parents and guardians in Australia as it is in a position to do, owing to the exertions of the defendant, Mr. Rouse, and the gentlemen who have acted with him? Now, as already observed, the Court will deprive even a father of the control of his children if, in the language of Coleridge, J., already quoted "there be a danger of cruelty or corruption to the children." As regards cruelty, I am of opinion in the light of evidence, that there would be some danger of cruelty to the children in the event of their being restored to the plaintiff. As regards corruption the case is even stronger. The plaintiff, a married man, has seduced a minor belonging to the troupe and during the whole of the trips while she was under his care and parental control has lived with her in clandestine adultery though leaving her nominally on the same footing as the other girls. The example to the other children was as bad as if he had been living openly with her as his mistress, as the true nature of their relations can hardly have been a secret from any one, and the risk of contamination was in my opinion considerably greater. That this risk is no imaginary one, appears from the evidence on this point of the children themselves, which it is no doubt

difficult to sift, but which I by no means dismiss as altogether unfounded.

In these circumstances it seems to me that it would be not only the right, but the duty of a wise parent acting for the true interests of the children to withdraw them from the plaintiff's custody. This is also the standard to which, as already pointed out, the Court is bound to conform as far as it can, and subject of course to the possibility of making suitable provision for the future custody of the children. On the facts which have been proved, I have no hesitation in holding that the plaintiff by his conduct has disentitled himself to the custody of these children, and that the present motion must be dismissed with taxed costs, the defendant Mr. Rouse undertaking to send them back to Australia before the 23rd instant in the charge of Mr. Counsell and Miss Thom.

Messrs. *Short* & *Bews*—attorneys for defendant.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 16. September 29.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF ARBUTHNOT AND COMPANY, INSOLVENT DEBTORS (APPELLANT),

v.

D. RAJAM AIYAR (RESPONDENT).*

Banker, payment to, with instructions as to disposal, effect of.

When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*, held :—

Per MUNRO, J.—That the bank became the debtor of *B* in respect of such money.

Per ABDUR RAHIM, J.—That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent.

Official Assignee of Madras v. Smith, [(1909) I.L.R., 32 Mad., 68], dissented from.

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* Original Side Appeal No. 26 of 1908.