The Mortara Case and the Murphy Case.

ART. II.—1. *The Tablet*, October 30 and December 3, 1858.
2. *The Weekly Register*, October 30, 1858.
3. *The Union*, October 29, 1858.
4. *The Jurist*, October 30, November 12 and 26, 1858.
5. *The Law Journal for* 1857.

SEVERAL cases having occurred in which the English or Irish Courts, have directed that the children of Roman Catholics shall be brought up as Protestants, there was a natural desire expressed among Roman Catholics for some explanation of the principles on which the Courts acted; and there arising at the same time a great clamour respecting the Mortara Case, which was determined by the Roman Courts on similar general principles, it became necessary to enter into some consideration of the mutual connection between the laws of Rome and England. It is unfortunate that subjects of this nature are so often made themes for mere sectarian vituperation and anti-catholic clamour. There are persons in this country who seem to lie in wait for some topic on which to raise a "cry" against Rome. It seems as though it were their sole business.

Mr. Disraeli, in his *Coningsby*, makes his Tadpoles and Tapers enlarge on the importance of a "cry," and the enemies of the Church in every age have been well aware of it. It has formed a main portion of their tactics in this country, ever since, aye, long before the time of Lord Shaftesbury. The Irish massacre, or the Titus Oates "Plot," each in its turn answered the object of exciting popular feeling against Popery; and a similar policy has in our own time resorted to similar means. The "cry" a few years ago was "Papal aggression." Later still it was the Madiai. The other day it was the case of the Mortara. This was a good cry;—a child taken away by the Inquisition! A good cry—for it was not only English but European. It was a cry raised all over Europe; it was echoed and re-echoed, and was even represented to have been taken up by every European government, even by every Catholic government, except Austria. It was pretended that almost every European government had remonstrated with the Pope, and protested against his conduct in the case. This was found first to be an exaggeration, and then a pure invention. It

turns out, on the contrary, according to the latest accounts, that no European government had remonstrated with the Pope, unless that of France. It may possibly turn out after all that even this is a falsehood, and that no government has presumed to remonstrate, or to participate in the "cry," except, perhaps, our own. The British government has been moved to do so. Certain societies which exist only for the purpose of getting up these periodical cries against Rome, have vehemently incited it to do so, and have eagerly availed themselves of the occasion to take up their parable "against Babylon." And strange to say these were the very same people who moved heaven and earth, or at least the Court of Chancery, to take little Alice Race from her mother, and who were at the very same time in Ireland busily engaged in moving the Irish Court of Chancery to take the little Murphys from their paternal guardians.

There is no consistency in bigotry; and it has neither conscience nor memory; else one would have thought that the recollection of these recent acts of their own might have deterred them from very shame, from raising a "cry" against the Holy Father on the subject of infant guardianship. But no! bigotry is blind; and while Lord Chancellor Napier was preparing his judgment on the case of the Murphys, these people took up, and loudly re-echoed the "cry" of the false "liberals" of Europe about the Mortara case. Too blind to perceive that if that judgment, and the judgments of our courts in other similar cases could be justified, it could only be upon the ground of a professed application of the very principle on which the Holy Father had acted.

Ignorance and bigotry generally go together; at least taking the most charitable view of bigotry, that it does not arise from want of charity. And not one in ten thousand of those who joined in the senseless "cry" against the Holy Father upon the Mortara case, had the slightest idea of the principles upon which our Courts of Chancery have acted, and constantly act in cases involving similar principles. The laws of Europe are, for the most part, based upon the Roman law. By which we mean not, of course, the law of old Pagan Rome, but the Roman law as it was modified by edicts of the early Christian emperors, from Constantine to Justinian; as it was ultimately moulded and adapted to the principles of Christianity

under the auspices of the Roman Church. Those edicts protected the baptized children of Jews from their parents; and forbade them to have Christian servants, or to retain any who desired to be Christians. And the whole law was moulded in conformity with Christianity; the civil was made to blend with the canon law, the *patria potestas* was made to bend to the higher obligations of religion, and the state assumed the lofty function of guardian of all its Christian children. This was the Roman law; the noblest work of the declining empire, its grandest legacy to the Christian world. And it was clung to with grateful admiration by all the nations who had received the rich treasures of civilization and religion from Rome; and, by the Briton and the Frank, by the Saxon and the Goth, was made the basis of their Christian law. It could, indeed, scarcely have been otherwise, since these various tribes, barbarian when conquered, could derive civilized law only from their conquerors, the then masters of the world. And the grandeur of the Roman Empire, even in the ages of its decline and decay, impressed the savage tribes whom it subjugated with wonder, and an admiration which long survived its power. Historical records, and critical research, legal antiquarianism, and the internal evidence afforded by every European code, equally attest the fact, that the civil law of Christian Rome formed the basis of every European system of jurisprudence. And the knowledge of the fact is essential to an enlightened appreciation of the comparative merits of any of those systems of law which, by course of time and national peculiarities, have necessarily become in a very great degree diversified. Tracing a common origin, founded on common principles, it is by an appeal to these principles we can the most impartially determine any disputed question that may arise, and best free ourselves from national prejudices and all the bigotries which they engender. What we have said applies to the law of England, along with the laws of every other European country, although not perhaps in so great a degree. By reason of our insular position, of our national obstinacy, and above all, by reason of that change in our national religion which has necessarily influenced our laws, the outward cast and character of our law may not at first sight so resemble the Roman law as those of other countries, even under our own crown. Thus the law of Scot-

land, as well as that of France, more resembles that of Rome, than does that of England. But this is a difference more either of procedure, or of statutable regulation, than in principle and real essential character. And the most learned of our jurists agree in ascribing to the Roman law the origin and foundation of our own.

Thus old Coke strenuously maintained that our law was not essentially altered in the time of the Saxons, from that which existed in the time of the Britons and the Romans; and that the basis of our common law is to be found in the Saxon laws. This is quite in accordance with the very latest researches on the subject; and thus Professor Creasy, in his interesting little work upon our constitution, shows clearly that the Saxon conquest by no means exterminated the British element in our language or our laws, but rather incorporated and adapted it. And the Norman conquest only overlaid the Saxon law with the feudal system, which has now for ages been obsolete. This being so, it follows that our common law must have had in it all along, a large admixture of the Roman law, for no one will seriously maintain that the barbarian Britons, as found by Cæsar, could have had any law worthy of the name. Coke and Blackstone, who, each in his own age, strove to the utmost to flatter the sentiment of nationality as opposed to Rome, carefully kept out of sight the Roman element in our law, and wrote of the Saxon or Briton law as if they ever had a real separate existence, which they never could have had, at least as a civilized law, seeing that when subdued by the Romans they were simply in a savage state, and learnt from Rome both law and religion. Surely the most ardent "Anglo-Saxon" can scarcely be serious in supposing that the savage hordes who came over with Hengist and Horsa had any organized and civilized system of jurisprudence. But the matter is not open to argument; for any one who reads the Anglo-Saxon laws will see, that, except so far as regards the half extinct traces of such barbarous customs as serfdom or ordeal, or the like, their origin and character were Roman: even the canons of the Roman Church being solemnly recited and recognized. And here, as in Rome, the Roman civil law was necessarily harmonized with the Roman canon law, which still to a great extent is acknowledged by, or rather incorporated with, our own. The law of the Church must necessarily have

modified the civil law, and imbued it with its own spirit, and adapted it to its own principles. And this law it was on which the Britons and Saxons, when successively Christianized, moulded their systems of law, and which, therefore, as Coke shows, formed the basis of our ancient common law.

This perhaps is for several reasons more true, or at least more discernible, in a system of equity than of law. In the first place, equity being rather a science of pure justice and conscience, is based on broader principles, less open to change, and less affected by positive law, than is the case with what is in a narrower and stricter sense called law. We say in a narrower and stricter sense, for originally equity was deemed a necessary attribute of law. Our oldest textwriter, Bracton, basing his work upon the code of Justinian, thus describes it. And even in the year books, instances can be found of the Judges appealing to the "Imperial Law." Equity is in its principles as ancient as the civil law; and its rudiments may be traced in Cicero's treatise *De Officiis*, where cases are put which would at this moment probably be acknowledged and followed in our Court of Chancery. Principles founded on equity never change; and it is a curious fact illustrative of our argument, that the civil law of *cessio bonorum* forms the basis of our modern law of Bankruptcy. And so as to the doctrine of trusts.

All this is pre-eminently the case with regard to the law as to guardianship in infancy, which in this country is chiefly administered in Chancery Its principles can be traced all through the Roman law, even up to the Twelve Tables. "Howsoever a father of a family directs by will as to his property, or the guardianship of his children, such shall be the law. But if he dies without a will, and has no direct heir, the nearest male relation on the father's side shall have the property," and doubtless, according to the spirit of the law, the guardianship. That it was so indeed is clear from later versions of the Roman law. Any father might leave whom he pleased as guardians (tutores) to his children. But if he died intestate, this charge devolved by law on the nearest relation by the father's side. When there was neither a testamentary guardian nor a legal one, then a guardian was appointed to infants by the Prætor, who answered to our Chancellor. If the Guardian did not discharge his duty properly,

there could be a suit against him. And, as Mr. Bowyer states in his "Commentaries," the Prætor could interfere even with the will of the father; the principle being, to regard the welfare of the infant as the paramount consideration.

Now our law followed the Roman in this as in every other subject, save so far as it was modified by the feudal system, which in the case of heirs to landed property, altered the guardianship of the person, with reference to the rules of descent, and severed the guardianship of the estate from that of the person, a distinction indeed to this day recognized both in the English and the Scottish courts. But when the feudal system was abolished, and the statute of Charles II. gave to the father the right of appointing a testamentary guardian, the law of guardianship became in substance assimilated to that of Rome, and the Court of Chancery, then establishing and consolidating its jurisdiction, declared guardianship a trust, and claimed to enforce its due administration, and to supply the want of any constituted guardianship, by its own power of appointment, on the part of the Crown, as *parens patriæ*, and guardian of all the unprotected infants in the realm. This jurisdiction, though practically it may not be enforceable but by means of money, is not limited to cases of property, but rests, as will be seen, on a broad principle, applicable to every child not having a natural or legal guardian; and as regards the discharge of the trust of guardianship, applicable to every child in the kingdom.

It is impossible to imagine any jurisdiction of greater social importance. The more so in this country, especially as to Catholics, by reason of the diversities of religious persuasion, the number of mixed marriages, and the consequent embarrassments which result from contests between surviving relatives as to the religious education of children who have lost one or both of their parents. There is on this account all the greater necessity to resort, as much as possible, to principles common to all, based on the principle of doing equal justice to all.

So long as the penal statutes existed against Catholics or Nonconformists, this, of course, could scarcely be. Now happily it may be; and our courts acknowledge that it ought so to be, and recognize the principle that guardianship should be administered without reference to religious

differences. As a cardinal principle, this is recognized equally by the law of Rome and of England. By which we mean that the Roman and the English laws equally recognize the great principle of religious liberty, that a parent may bring up his children in any form of religion, or in case of death decree that they shall be so brought up. But then our law as well as the Roman, does not allow of any absolute arbitrary right in the parent to deal with the religion of his children as his caprice may dictate, to the prejudice, or at the risk of injury to their moral and religious welfare. The laws of Rome and of England equally regard guardianship, natural or legal, as a trust, rather than a mere arbitrary right, like that of property. Though even as to property, no man may use his own so as to injure any other. And the law of England, not less than that of Rome, denies that parents can capriciously exercise their natural or legal rights to the injury of their children. Guardianship is a trust to be administered with a view to the welfare of the children; that is the great principle common to the laws of every European state, and recognized equally in the courts of England and of Rome.

Therefore the English court of Chancery does not hesitate to take children even from their father, if he is a sceptic. Witness the case of Shelley, whose avowed Deism enabled Lord Eldon to take his children from him. But the English law, as well as the Roman, recognizes the right of the Jewish parent, the Socinian, or the Lutheran, or the Calvinist, to bring up his children in his own form of religion. To a certain extent, Rome recognizes the parental right as founded on the law of nature, or rather on a law of God, prior to that of revelation. And so as to the law of England. But the moment that a child's religious education is trifled with, tampered with, or dealt with capriciously, the courts both of England and of Rome interpose, and say, "this must not be." And why? Upon the principle that capricious changes in the religious education of a child, tend to unsettle his mind, and therefore tend to that which Christians of all persuasions regard as an evil, viz.: scepticism. It is impossible, surely, to question the soundness of the principle, however we may in particular cases sustain its application. No Catholic can question, on such a subject, a principle recognized at Rome. And that it is recognized there is as much beyond a question, as that it is recognized here.

The Jew at Rome may bring up his child a Jew, but he must not bring up any one a sceptic, and therefore he must not so deal with him as to tend to that fatal result: and so unsettle his mind as to make him a sceptic. So in this country. The Court of Chancery will not allow a parent, even in his own life, to trifle either with the temporal or spritual interests of his children. Thus when a Baptist let his daughter live for some years with a Church of England relative in wealthier circumstances, who provided for the girl, and educated her so as to fit her for a superior station in society, the court would not permit the father to take her back. No one can help seeing the principle, and no one can avoid acknowledging that if it is right and just as regards mere temporal interests, it is infinitely more so as regards spiritual. But further, our own courts favour the Established religion: a century ago Lord Hardwicke took the child of a deceased Jew from his paternal relatives, and gave him up to his mother, who had become a Christian. It may be that this decision would not be followed now; but that is no reason why Roman Courts should follow ours. It is a curious circumstance, that among our Protestant fellow-countrymen, the question of guardianship as to religion has hardly ever arisen in a purely religious form. In that form it has almost always arisen as between Catholic and Protestant. But in all the cases our courts have at all events professed to act upon the same principle, viz.: that the parental right, even in the parents' lifetime, and of course *a fortiori* the right of testamentary guardianship, must so far be controlled, that it must not be allowed to be arbitrarily or capriciously exercised, so as to risk any injury to the child, especially in respect to its religious belief. That diversities of religious teaching tend to infidelity, no Christian, certainly no Catholic, can doubt. And no man of sense would deny that to teach a child one year this form of Christianity, and next year another, and then another, and so on, would be an evil. But the important point is, that the Court of Chancery claims to control parental rights on its own ideas as to the welfare of children. It does so on the only principle capable of fair and equal application by a Protestant court, equal application to all religious persuasions. Whether or not it has always been so impartially applied, might be a question. We believe, on the whole, it has been.

There must of course be this difference between the Roman and the English courts on the subject, that whereas the former from their very constitution recognize an infallible authority, the moment they assume any jurisdiction to act at all, they can admit no doubt as to what is the right religion; whereas our English courts, in theory, regard all forms of Christianity as equally entitled to respect. But then as neither the courts of England nor of Rome assume jurisdiction to act against the natural guardian, until there has been some breach of trust, by some capricious or mischievous exercise of the natural right, or some violation of positive law or obligations recognized by law, or some misconduct in the eye of the Church, what follows upon their exercise of that right is, for the purpose of this argument, altogether immaterial. If the father's right is to be displaced, it matters little, as regards that right, in what religion the child is brought up. The Roman and the English courts concur as to the cardinal principle upon which they displace the paternal right. They differ only on the principle on which they proceed to exercise their own guardianship. The courts of England order the child to be brought up in the form of Christianity in which it has been previously instructed before the capricious change, without reference to its religious truth. The Roman courts, of course, direct the child to be brought up in the Catholic religion. This we repeat is a difference subsequent to the assumption of the right of guardianship by the state, and therefore having nothing to do with the present question, which is the assumption by the State of that right. As to that, the Roman and the English courts act on the same cardinal principle, that guardianship, natural or legal, is a trust, and is not to be capriciously exercised. In practice, the English Court of Chancery secures the same result as the Roman in this respect, that for the most part, the child is brought up in the Established religion. Partly by reason of the legal presumption that every one not proved to be of a different religion is of the established religion. Partly, perhaps, through other causes. But whatever the cause, the fact is certain; and we are not aware of any instance in which the Court of Chancery has interfered, as to the religious education of a child, where the religious instructions had been uncertain, in which the result has not been that the child has been brought up in the

Church of England as by law established. This is natural, almost inevitable, where there is an established Church. And it would scarcely be fair to murmur if the same result followed in Rome as in England. Undoubtedly in England it is so. In the case of poor Mrs. North, who just before her husband's death became a Catholic, as he was about to do, though unhappily for himself, and his wife and children, he delayed the act a few weeks, until, alas! too late; in accordance with the settled principles of the court, her children, though some were of tender age, were taken from her, and given to paternal Protestant relatives, upon the ground partly that it would be prejudicial to them to have their religious instruction changed; but partly that their father having left his religious belief uncertain, it must be presumed that he continued of the established religion.

Now to understand the full force of these decisions, and of the doctrine of our courts on which they proceeded, we must bear in mind that by the common law of England, the mother surviving the father, is natural legal guardian; so that here the Court of Chancery took away a natural and a legal right, upon the ground that, according to its principles, to permit the mother to retain the children and bring them up in a different religion, would be a breach of trust, and tend to their prejudice. It could not have been merely on the ground of the paternal right to have his children educated in his own religion; for he left that uncertain, and the court went on the legal presumption that it was the established religion. The father's wish was disregarded; just on the same ground as that in which it was professedly regarded in the other cases; namely, the welfare of the children: with reference to which, it is plain, the Court of Chancery allows or disallows the paternal right at its own discretion. It is obvious that these cases can only be reconciled upon the cardinal principle already above referred to, which has been always acknowledged as the guide of the court, in the exercise of this branch of its jurisdiction, viz.: that the benefit of the infant (and of course this means the court's idea of it) is to be primarily considered. On that ground it was that the paternal right in some cases, and the maternal right in other cases were alike disregarded. The court in the first case denied that a father had any absolute or arbitrary right of dictating the religion in

which after his death his child should be brought up. And in the case of Mr. Wellesley, the House of Lords distinctly laid down what had already been decided by the Court of Chancery in the case of Shelley, that the jurisdiction of the court could and would be exercised in the lifetime of the father, as well as after his death, and against his natural right, not less than that of the mother's, if the benefit of the infant should require it. There is, according to the law of nature, and the common law of England, no difference between the right of a father to the guardianship of his children, and that of the mother surviving him. This was lately decided solemnly by the Court of Queen's Bench. When, therefore, Lord Justice Knight Bruce took Mrs. North's children away from her, he acted upon the principle that he had authority to set aside the law of nature and the law of the land, in the exercise of the supreme and paramount jurisdiction of the Crown as *parens patriæ*, and as sovereign guardian of all the children in the realm. And who can fail to see that that was the assertion of a jurisdiction not one whit less sovereign and supreme, than any which the Pontiff, in the exercise of his jurisdiction as supreme Judge in his dominions, might claim to exercise? So in the case of Alicia Race; the Vice-Chancellor Kindersley, although the Court of Queen's Bench had solemnly adjudged that by the law of the land the child ought to be in the mother's custody, took the child away and gave her into the care of strangers, and this, although the father had distinctly in his last will confided his child to her care! In the cases of Mrs. North and Mrs. Race, the desire of the father that the child should be with the mother had no effect upon the court. Shall we say that there was inconsistency, or partiality, or injustice here? No. There was an appearance of inconsistency, but all the cases are at all events thus far consistent, that they are reducible to one great cardinal principle, which in all the cases the courts have solemnly asserted that their jurisdiction, in the matter of guardianship, is sovereign and supreme, and is exercised only with regard to that which the courts consider the welfare of the child. Upon that principle the cases are reconcilable and consistent, but upon no other. And of course it involves this, that the jurisdiction of the court is paramount to any parental right, paternal or maternal.

So in the Race and Stourton and Whitty cases. The Court of Chancery took the child from the mother in the first case, because it had in fact been brought up a Protestant, and it would in the opinion of the court have injured it to change its religious education. The court in the other cases declined to give the child to the paternal guardian to be brought up in the father's religion, precisely upon the same principle, viz.: that he had, in fact, though improperly, been brought up in the protestant religion, and that a change of religious instruction would injure him. In all these cases it is clear the court dealt with the maternal and paternal right upon the same principle, and claimed to displace either at its own discretion, with a view to the welfare of the child. In the Stourton and Whitty cases this was most clearly laid down. There the paternal guardian claimed the child, to bring him up a Catholic according to the will of his father. The court declined to take the boy from his mother, and vindicated its course upon the cardinal principle that the court must act on its own view of the benefit of the infant. The Lords Justices said that that must be the primary consideration, and that the wishes of the father could only be considered so far as they were consistent with that primary object. The court thought that it would not be for the benefit of the infant to remove her from her mother, and declined to do so, and in defiance of the father's will the child is being brought up a Protestant. It can make no difference in point of principle that the father was dead; the cases show that the court set at nought the paternal authority whenever it pleases, be the father living or dead, and although one of the Lord Justices who decided Stourton *v.* Stourton, said, in the cases of North and Whitty, that "faith must be kept with the dead;" yet in disregard of that principle, so solemnly and doubtless so sincerely asserted, the court did not scruple to direct that the child should be brought up in a faith different from the father's; and why? simply on the cardinal principle, that the court's jurisdiction is paramount to parental, even to paternal authority; and is to be exercised on the court's view of the welfare of the infant; and it is only fair to add that we know of two cases in which the court has acted on this principle in favour of Catholics.

Nor has the principle ever been questioned, averse as is this country to arbitrary power. Perhaps this may be be-

cause as yet it has for the most part been exerted against Catholics and in favour of Protestants. Of course, however, this can scarcely be said to affect the soundness of the principle, and certainly Protestants cannot question it, since for ages they have profited by it, and their courts constantly assert it. And not only so, public sympathy and support have been appealed to in order to provide the funds necessary to enable zealous Protestants to enforce the exercise of this arbitrary jurisdiction of the court against Catholics. We never can forget the efforts which were made to wrest little Alice Race from her mother; the agitation; the subscriptions; the colourable endowment, and all for what? To enable the Vice-Chancellor to say, "I am supreme and sovereign guardian of the child, and I say that it is for her benefit that she should be not with her mother, but with strangers, and I order that she be taken from her mother and given to strangers!"

It hardly seems credible that the very men who agitated and subscribed to secure this result, should have come forward and raised a "cry" against the Holy Father for taking a Christian child from a Jewish parent, in order to its being brought up a Christian. Yet so it is. Such is the unscrupulous inconsistency of bigotry.

What was the Mortara case? There is in the Papal States a law, that Catholic servants must not live in Jewish families. The known reason of the law is, that the general law of the Church as applied to such servants of Hebrew children, obliges them, should children be taken dangerously ill, to baptize them. And, by another law of the Papal States, such baptism will be a ground for removing the Christian child from the parental custody, and for placing it under the guardianship of the sovereign. With a knowledge of these laws, the Jew Mortara had a Christian servant, and not only so, but allowed her to have the care of his child at a time when it was very ill. That was in 1852; and the servant then did what he knew she must do, that is to say, she baptized the child. In other words, she, with his allowance, with his tacit acquiescence, so far as his indifference and negligence amount to acquiescence, made the child a Christian. During six years he allowed the child to remain under her care, either knowing or not caring to know, and not taking the trouble to enquire whether she had done what he must have known the law bound her to do; and six years afterwards, and

when the child was an instructed Catholic, the fact came to the knowledge of the Papal government, and in June, 1858, the child, according to the law of the Papal States, was taken from the father, and placed under the guardianship of the Church. Just as, in Mrs. North's case, her children were taken from her, and placed under the guardianship of the court. Just as, in the cases of Mrs. Race, and Lady Darnley, and a host of others, the same course was taken. Just as, in the cases of Wellesley and Shelley, the children were taken from the paternal custody, as in the other instances they were taken from the maternal care.

The English Chancellor has always acted on his view of the welfare of the child. The Roman Pontiff acted upon his. No doubt those ideas greatly differed; and Lord Cottenham, who gave Mr. Gorham the living of Bamford Speke, did not believe in baptismal regeneration. But all along we have taken care to point out that the question is not as to the exercise of the jurisdiction, so much as to its existence; and, above all, as to the cardinal principle on which it is asserted. The English Chancellor thinks it conclusive that a child has been a few years taught the Church of England Catechism, and sent to church. The Roman Pontiff deems it conclusive that the child has been washed in the laver of regeneration, and made a new creature in Christ Jesus. But the one not less than the other asserts his right to act on his idea of the child's future welfare. Why is one to be abused as tyrannical or arbitrary, any more than the other? What greater interference is there with natural rights in the one case than in the other? Nor let it be forgotten that our own Ecclesiastical Courts have recognized the doctrine of baptismal regeneration, and also given to Baptism some legal effect; for the Privy Council have affirmed that the established religion may teach baptismal regeneration, and need not bury persons who die unbaptized. And all Jurists allow that the positive laws of a state not contrary to nature or Christianity, bind those who live under its jurisdiction. All our natural rights, after all, as Blackstone shows, are controlled by the regulations of society; even personal liberty. And certainly the Court of Chancery regards not the father's wishes as the primary object of consideration, but the benefit of the infant. So is it with the Holy Father. He acts upon the very

same principle as that upon which our courts profess to act. He and they would not exactly agree as to what is for the welfare of an infant; but that does not affect this question, which is as to the existence of a jurisdiction to declare and secure what is deemed to be such welfare. And why should not such a jurisdiction be exercised by the Chief of the Roman Church, and the Sovereign and Supreme Judge of the Roman States, as it is by Vice-Chancellor Kindersley, or Lord Justice Knight Bruce?

There are even Anglicans who have been able to see this, and have had the manliness to avow it. The following article appeared in the *Union*, and so much to its credit is the publication, that we copy it entire.

"Our Exeter Hall friends will, doubtless, exclaim against the Pope's retention of the Jew child; although it has been in conformity with the child's own wishes, expressed at one of the father's visits. They should, however, pause awhile before they cry out, and take a little care to be informed as to the principles upon which our own courts act in such matters. They should remember that they themselves argued, in the case of Mrs. Race last year, that a child, even between seven and ten, might be allowed a *choice* to remain away from her parent, in order to be brought up in accordance with 'religious impressions' which the child had contracted. And the Court of Chancery, in Lord Stourton's case last year, gave a child of ten years of age an election to go with his mother, or stay with the paternal guardian. The child, of course, preferred the former; professing to have 'religious impressions' in accordance with his mother's, and at variance with his father's. The real reason, however, in all probability was (though it did not occur to the learned Lords Justices) simply that the child did not like to be placed in a school, which was what the guardian wished to do with him. But in that case, the court laid it down that the father had no absolute right to prescribe the religion of the child; and that the matter to be considered was *the welfare of the infant*.

"The same court, in Lady Darnley's case, took away a child from the mother because she was an Irvingite. What will Mr. Drummond say to that? In the last case on the subject the Lords Justices thus lay down the rule:—'It is the first duty of the court to consult the well-being of the infant; and, in so doing, it recognizes no religious distinctions. If, consistently with this primary duty, the wishes of the father (*or mother*) can be attended to, the court pays attention to his wishes; but if they cannot be carried into effect, *without danger to the welfare of the child*, the father's wishes cannot be attended to.' (*Lord Stourton's Case.*) Now this is just what the Pope says. The child is old enough to value the grace of baptism, and to be resolved to continue a Christian: were

he given up, he would be *forcibly* subjected to the Jewish religion, against his will. We would ask, then, are children to be declared incapable of having Christian faith? And does not Christianity, to a certain extent, confer civil rights, as it certainly does spiritual and civil responsibilities?

"By the law of the Church a child of seven is capable of mortal sin; and, by the law of this country, is capable of committing a capital crime! The Court of Queen's Bench allows that the law books did not define the exact age within which the Court would order a child to be delivered up to the parent; but, from the mere necessity of fixing *some* age, declared that the law fixed fourteen as the age at which a child might *choose* its home. The Court of Chancery has practically permitted the choice much earlier, even under ten; for not only has it *asked* the child its choice, but it has also *followed* its choice, though not professing to act solely upon its choice. The Court professes to act on its own notion of the child's welfare: what is that notion? Always, of course, in favour of the National Church; and what else does the Roman Pontiff than this? he acts on *his* idea of the child's welfare; but at the same time also on a higher idea of the privileges of a baptized child. It is easy to abuse: recent events show that the vulgar and the ignorant are always most prone to revile; but our readers have, we are sure, more candour and more charity; and, above all, too deep a sense of the respect due to the rights of a baptized child, who is an intelligent agent, to blind themselves to the real truth and justice of the case."

It will be observed that our contemporary points out the fact that the child *desired* to remain with its Christian guardians, and sincerely embraced the Christian religion. The *Weekly Register* enlarged on that view of the case, and had an article entitled "The Liberty of a Little Child to be a Christian;" asking if the English Court of Chancery would force back into parental custody a child of seven years of age who became a Christian. That is a most interesting and momentous view of the question, and in that respect the case may often present itself. We should be sorry to suppose that in such a case the Court of Chancery, in the face of its own maxim, that it is to look to the benefit of the infant, would do its utmost to compel the Christian child to apostatize, and force it back into the care of those whose idea of duty would be to coerce the child into apostasy? Suppose one of our Exeter Hall societies were to do in such a case what they did in the case of Alice Race, and what the Holy Father (oh! in how different a spirit!) did in the Mortara case? make a provision for the child, with a view to its being

brought up a Christian; and suppose the Vice Chancellor were to converse with the child—as he did with little Alice—and were to find that the child was as sincerely a Christian as a child could be, we want any Chancery lawyer to tell us whether the Court of Chancery would force back that child to its Jewish parent? we believe it is plain that it would not. If it would, then was Mrs. North cruelly ill-treated, and Lady Darnley most unjustly dealt with. If it would not, then what becomes of the cry against the Holy Father upon the case of Mortara? That is one view of the case, taking into account the child's age and religious impressions.

But putting that out of the question, and supposing the child incapable of personal opinion or decision, then we not the less recur to the cardinal principle of the English and Roman jurisdiction in guardianship, that the welfare of the child is to be the primary consideration. In that view the only distinction that could be suggested by an English lawyer would be as to the grounds upon which the jurisdiction might be asserted in England and in Rome. No doubt there may here be a distinction, but it is one without a difference, or rather it is a difference without a distinction. The precise state of facts would arise in this country which has arisen in Italy. But resemblance of circumstance is not essential to analogy of principle, and the question is as to general principle. In the Roman States the breach of certain particular laws gives the state the right to assert its sovereign guardianship. In England it is the disregard of certain other laws. What does that matter? How does that affect the question of jurisdiction? In England a very little will suffice to enable any one to make an infant a "ward of court," and the Chancellor its guardian. Witness the case of Alice Race, where a trifling colourable endowment did it. The Pope has done as much for little Mortara; he has engaged to provide for him for life. In that respect there is no difference. Then as to the grounds or reasons on which the English court will take a child from its parent or paternal guardian, they are not very serious; in Mrs. North's case and Lady Darnley's it was merely the fact that they had been brought up as Protestants. The Roman Pontiff deems baptism of more moment than any merely human teaching, for he believes it works a sacramental change upon the soul.

As if to prevent any cavil or quibble on the subject, even while the journalists of this country were reviling the Holy Father for rescuing the child Mortara from compulsory apostasy, Lord Chancellor Napier was here in Dublin acting upon the selfsame principle, or at all events professing to do so, exercising a jurisdiction which he could not have any right to exercise except upon the selfsame principle as that on which the Roman Pontiff acted, viz., a supreme regard for the future welfare of the child. The case of Murphy is the exact parallel of that of Mortara. Murphy was a Catholic who carelessly allowed his wife to bring up his children Protestants, just as the Jew Mortara carelessly allowed his servant to make his child a Christian. Nay, the Jew's case is stronger, for he acted in contravention of a positive law, which Murphy did not. Murphy had no distinct notice by an express law, that if he let his children go to a Protestant Church a year or two, they would be prevented by the Court of Chancery from being brought up Catholics. And one benefit which will result from these discussions is, that they will serve to bring home to the minds of careless Catholics, the fearful risk they run, and the awful responsibility they incur in this respect. Well, Murphy, on his deathbed, solemnly re-claims his children for the Church, and commits them to Catholic guardianship, from which they are at once taken by the Lord Chancellor. Why? because he professed to deem it for the benefit of the children that they should be brought up Protestants. We doubt not he sincerely thought so. And what is more to the purpose, we acknowledge that in asserting this jurisdiction, he was warranted by the authorities in our Courts of Chancery. His sophistical astuteness in that reasoning upon the evidence by which he attempted to sustain his conclusions as to the facts, are quite another matter. We are dealing not with the manner in which the jurisdiction is exercised, but with the existence of the jurisdiction. Lord Chancellor Napier does not the less assert and possess a power to set at nought the paternal wishes as to the religious instruction of his children, because he tries to justify its exercise by reasoning which sounds like sophistry. Undoubtedly he has the jurisdiction—that is what we are dealing with. And why should not Pope Pius have it as well as a Lord Chancellor Napier?

We put the question in the very lowest light. We ask

no more for the supreme Pontiff than what is conceded to Lord Chancellor Napier, or Lord Chancellor Chelmsford. Surely that is not an "extreme," or an "ultramontane view." Our Equity jurisdiction, as we have seen, is, in its origin and its principles, Roman. Why should it in its original seat and source, be less rigorous than it is in those lands which borrowed it from Rome? Lord Chancellor Napier lays it down (says the *Register*) that the advantage of the child is the real object of the court; and it is obvious that every Judge, both in England and Ireland, must regard it as the greatest possible advantage to be a Protestant, and the greatest misery to be what they call a Papist. No doubt: and our Protestant fellow-countrymen have no objection to the exercise of such a jurisdiction by Protestant Judges over the children of Catholics, although they are seized with horror when a similar jurisdiction is exercised at Rome over the children of Jews. Is there any honesty or consistency in this? Does it not savour of the rankest bigotry?

In the Murphy case, as in the Race case, strangers were allowed to constitute the infants "wards of court," by what precise means is not very intelligible nor very material. It is unnecessary to lay down with precision what will be enough to make an infant a "ward of court," in other cases than those of testamentary guardianship. That always creates a trust to be administered under the control of the court. But it is clear that the jurisdiction of the court is not confined to testamentary guardianship. In the Wellesley case, the House of Lords laid down, as indeed had already been illustrated in the case of Shelley, that the court could control the education of a child, even in the lifetime of its *father*. And, as we have seen, the cases are numerous in which the court has displaced the mother, whose right at common law is clear when she survives the father. So that the Courts of Chancery in this country can, and do, whenever they think proper, displace the natural parental guardians; and when they have done so, act as they think best for the welfare of the infant, and that without, in theory at least, and, as we believe for the most part, in practice, without any preference of one religion over another.

Now the law of guardianship, like that of marriage, or of contract, is necessarily in other countries as it is in our own, a creature of positive law, and must depend upon

domicil. And the House of Lords, a few years ago, recognized the right of the Court of Chancery to appoint guardians for infant foreigners in this country, even though they had guardians abroad. In our own courts it is perfectly recognized that the *lex loci* regulates the marriage, even of British subjects abroad, and regulates all contracts made abroad. In the Sussex Peerage case, for instance, Cardinal (then Dr.) Wiseman was examined at the bar of the House of Lords, as to the law of marriage in Rome, which it was allowed would bind even a British subject of royal blood. Now the law of guardianship, in Rome, constitutes the Sovereign and Supreme Judge the guardian of a Jewish child, in case he is baptized, and binds Christians to baptize such children in case of illness, and for that reason, warns and prohibits the Jewish residents in the Papal States not to have Christian servants in their houses. The Jew Mortara wilfully broke this law, and not only had a Christian servant, but permitted her to have care of his child while in that state in which, as he well knew, she would be forced to baptize him, and thereby to make him a "ward" of the Holy Father. The act was done, and, by the law of the Papal States, the child, in consequence of that act, became the ward of his Holiness.

Be it observed that, though in principle the Papal law may require the removal, or at least securing, of the baptized child, so soon as baptized, at whatever age, and certainly before it attains the age of religious impressions; yet it was not required in this case, which is in fact, infinitely stronger in favour of the Holy See, for the Jew father, for six years after baptism, left the child under the care of the Christian servant, so that the boy attained the age of *seven* under her charge. And thus the case was brought within the authority of a host of cases in our English Courts, which decide that parents or parental guardians lose their right by neglect, and that after allowing a child to be brought up in a certain form of the Christian religion, they cannot capriciously change it for another. That was the very ground taken by the Lord Justices in the Whitty and Stourton cases. It is not likely that the Catholic servant who had felt bound to baptize the child, would neglect to instruct him. And the father was well aware of what she would deem her duty, and tacitly by his indifference acquiesced in it.

Thus, as to the first step, the placing the child under apal guardianship, it was as much the consequence of e carelessness, or indifference, or even the tacit acquiscence of the father, as the education of the little Murhys in Protestantism, was the consequence of their ather's acquiescence or indifference; and in Whitty's ase of the Catholic guardians. Lord Chancellor Napier inds no difficulty in saying that as the penalty for his indifference, the dying father's too tardy exercise paternal authority is to be set at nought, and that he as to have "no place of repentance," albeit he "sought carefully with tears." Yet that same Lord Chancellor ossibly is scandalized at the Holy Father's exercise of is judicial authority in enforcement of the plainest laws. Poor Murphy little knew that he, by his carelessness, was ealing his children's fate for ever. There was no express aw, warning him that the result of letting them go to Church would be to deprive him of all parental power over their religious instruction. In the case of the Jew, here was a clear plain warning, an express prohibition, a solemn legislative admonition, which he wilfully disregarded. Now surely the case of the Irish parent was more strictly dealt with than that of the Jewish parent at Rome. It does not appear that if there had been no express law in the case, the Pope would have acted as our Protestant Chancellor has done. The express law brought the matter home to the parent; gave him distinct notice of what he had to expect; put it in his power to avoid what took place; and made him alone responsible for it.

And then last of all there comes the child's choice, and election to be a Christian—as to which we have already observed, that should ever the question arise in this country, we very much doubt whether the Court of Chancery would give up a Christian child to Jewish parents; and sure we are, that if it did, it would create great scandal to thousands of pious Christians in this country.

It is perhaps one of the gravest questions that can arise in any Christian system of jurisprudence, when a child, by the profession of Christianity may become so far *sui juris* as to elect Christian guardians. Reasoning by analogy, we should say that it must be at the age of seven; because, by the law of the Church and the law of the land, that is

the age at which the maxim, *malitia supplet ætatem* applies, and the child becomes to the human law, an the Divine criminally responsible. Seven is the age o mortal sin, and seven surely should be the age of Christia liberty. Access to the sacraments can scarcely, by Christian judicature, be denied to a Christian child, at an age when the law of God and the law of man equally hold it responsible for sin. This raises a most deeply interesting question of Christian ethics, to which, in any country not blinded by religious bigotry, the Mortara case would hav awakened the greatest attention and the greatest consi deration. But, alas! how much is sacrificed to a "cry; and the momentous question, which the *Register* treate of, "the liberty of a little child to become a Christian," was lost sight of, amidst the howling outcry raised against popish intolerance. Strange to say, the whole difficulty was ignored—the question was assumed—and the Pope was reviled for outraging liberty! As if a child could have no right of liberty, even on the sacred subject of religion! As if baptism imparted no freedom, or dignity or value to the soul, and left it just as it was before! Strange idea: in a country where the Bible is revered, and infant baptism is practised, and where the words are so often recalled, "suffer little children to come unto Me!"

The highest Christian authority in the world—the head of the Catholic Church—has in this case solemnly affirmed that, at all events, at the age of seven, a little child shall have liberty to worship its Saviour. And this is called tyranny! How modern enlightenment darkens the mind thus to obscure and pervert its perceptions! A certain society have memorialized the foreign secretary to remonstrate with the Pope upon the case. And they were the very same men who subscribed money to retain counsel in the case of Alice Race, to argue strenuously that at the age of seven a child should have liberty to leave its mother in order to become a Protestant! They were the men who urged most earnestly, as Lord Campbell said, the doctrine of prevenient grace, and quoted the tender text: "Suffer little children to come unto Me!" What a parent of inconsistency is bigotry! A child is to have liberty to be a Protestant, but not to be a Catholic!

It would seem as if there was no religious zeal among a certain class in this country apart from hatred to popery

,e pious feelings of this class were excited most painfully the idea of a child being in any way coerced to remain long Catholics. But they seem to have regarded with tire apathy the forcible retention of a Christian child long Jews. Their zeal is obviously not so much Christ- in as Protestant. They strenuously uphold the liberty a little child to be a Protestant. They deny him liberty be a Christian. They are regardless of the parental hts of Papists—most tenderly alive to their sacredness the case of "Jews, Turks, infidels, and Hindoos." In lia we are well aware that the judges of the courts of y constantly give up to Mahommedan or Hindoo parents ldren nominally converted to Christianity, unless they ve attained the age of fourteen, which is the age at which, the law of England, a child may elect a guardian. ut, in the first place, the age is purely arbitrary; and no e will be so absurd as to argue that there can be any- ng in it which a foreign judicature is bound to adopt. ad in the next place, as we have seen, our courts of uity disregard it, and take the more just and rational urse of looking at the actual state and capacity of the ild's mind. Thus, in the two last cases which have curred, the ages of the children were nine or ten. And others of the cases we have referred to, between seven d eight, or between eight and nine. The truth is, that e mere age is nothing. But if an age must be fixed, age fixed by the law of England, as well as the law of Church, for criminal responsibility, is that of seven. ere is, as a writer in the *Tablet* truly observed, no nciple in a particular age or number; the age of ven has been thus fixed, because all children at t age, if not before, have attained the sense of right and ong—the perceptions of conscience and the sad capacity sin. And what we have been anxious to direct atten- n is the very principle itself. Positive laws must y in different countries, and it is part of the law of all ilized countries to respect the law of any other. Even the case of Roman law we have seen this recog- ed by the House of Lords, in regard to marriage. Why ould it not be so as regards guardianship? Especially en, as we have seen, there is a general conformity in nciple between the Roman and the English doctrines the subject. That it would have been so, except for ligious bigotry, we have no doubt. The whole idea of

religion, which appears to be possessed by a large class
persons in this country is, antagonism to Rome. Th
live in a state of feverish anxiety for some new cry agai
"Babylon." And the moment anything arises which exci
their anti-papal feelings, they are absolutely blinded
bigotry, and deafened to everything but their cry.
this occasion we were told that all Europe joined in t
cry; but at last it appeared that all Europe dwindled do
to England. And even all England, perhaps, on a lit
reflection, will be found to dwindle down to Exeter Hal

ART. III.—*Sancti Patris Nostri Clementis Romani Epistolæ b
de Virginitate, Syriace*, quas ad fidem Codicis MS. Amst
damensis, additis notis criticis, philologicis, theologicis, et n
interpretatione Latina, edidit, Joannes Theodorus Beelen.
vanii, 1856.

FEW are ignorant of the coarse vituperations wh
were poured out by Luther and his brother Reform
against all who extolled in their writings or sought
realize in their lives the holy virtue of virginity;
hence, without doubt, many will be surprised that a m
ber of his spiritual family should have been the first
make known to the literary world two letters of
Clement of Rome, which are justly deemed the high
eulogy of that virtue, and at the same time the m
diffuse, the most eloquent, and in every respect the n
important treatises concerning it which have come dow
us from the apostolic age. It was in the year 1752 t
first were published by Wetstenius these two encycli
letters of St. Clement addressed "to virgins," *Ad Virgi*
The Syriac version was discovered by him in an anci
and valuable copy of the Syriac Peschito New Testam
which had been purchased a few years before at Alep
by Mr. James Porter, the British consul in Syria.
editing these letters Wetstenius presented, together wi
the Syriac text, a Latin translation, which however h
justly been deemed defective and incomplete, whilst