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Guardianship in Socage

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THESIS

GUARDIANSHIP IN SOCAGE

by

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1895.
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CHAPTER I.

INTRODUCTION

Sec. 1. Definition,— Guardianship in Socage or by common law arose when lands descended to an infant who was under fourteen years of age. In that case the next of kin who could not inherit from the infant became the guardian of the person and the property of the infant until he reached the age of fourteen. At that time the infant could choose another guardian, but if he failed to do so the guardian in socage continued to hold his position. (Math. Paris. Speed., 435; 43 E. L. Swans, cases.)

Sec. 2. Present status.— Guardianship in socage theoretically exists in England and America, but in practice it has long been generally superseded by various kinds of guardianship provided for by statute. Mr. Reeves, writing in 1819 says, "Guardianship in socage can scarcely exist in any part of the United States for it is necessary qualification that the person entitled should not be able by possibility to inherit the estate. The provision of the statute of descent is such that in most cases those that are of kin may eventually inherit the estate descended, but in some cases it is other-
Sec. 3. In a modified form it still exists in New York and some other states, but the modifications are such as to almost entirely change the nature of the guardianship. In New York, if an infant acquires land the guardianship belongs first to the father, second to the mother, and after that to the nearest and eldest relative who is of age, males being preferred to females. All these relations may possibly take the land from the infant under the statute, so that the old rule which provided that the guardian in socage must be the next of kin who could not inherit the estate, is abrogated. Moreover, the authority of the guardian in socage in New York ends with the appointment of a testamentary or general guardian. (N. Y. R. S., 8th Ed., Title III., Chap. 8, p. 2612.)

It therefore appears the guardianship in socage in New York, at present time, is hardly more than one of the varieties of guardianship which have been created by statute.
CHAPTER II.

GUARDIANSHIP IN SOCAGE AT COMMON LAW

Sec. 4. The principles of the law of guardianship in socage as laid down while that form of guardianship was of particular importance are found in Coke on Littleton, Butler & Hargreave's Notes, Vol. I., Sec. 123. Littleton says, "In such tenures in socage if the tenant have issue and die his issue being within the age of fourteen then the next friend of his heir to whom the inheritance cannot descend shall have the wardship of the land and of the heir until the age of fourteen, and such guardian is called a guardian in socage. For if the land descends to the heir of the part of the father then the mother or next cousin of the part of the mother shall have the wardship, and if the land descends to the heir of the part of the mother then the father or next friend of the part of the father shall have the wardship of such lands and tenants, and when the heir comes of the age of fourteen complete he may enter and oust the guardian in socage and occupy the land himself if he will. And such guardian in socage shall not take any issue or profits of such lands or tenements to his own use but only to the use and profit of the heir, and of
this he shall render an account to the heir when it pleases
the heir when he accomplished the age of fourteen years. But
such guardian upon his account shall have allowance for all
his reasonable costs and expenses in all things. And if
such guardian marry the heir within the age of fourteen years
he shall account to the heir or his executor for the value of
the marriage, although that he took nothing for the value of
the marriage & for it shall be accorded his error that he wu
would marry him without taking the value of the marriage, un-
less that he marryeth him to such a marriage that is as much
worth in value as the marriage of the heir."

Sec. 5. Lord Coke comments upon the above in general
as follows,:

"In such tenures in socage". If a man die seized of a
rent charge, rent seck, or common of pasturage which do not
lie in theure, his heir within the age of fourteen years may
choose his own guardian, but if he is too young to make such
choice and if the father has not provided for his custody the
next of kin to whom the inheritance cannot descend should have
the custody of him. The heir shall hold to an account whoev-
er takes the rent. But if the heir holds any lands in socage
the guardian in socage shall take into his custody the rent-
charge &c. as well as the land held in socage because he has
the custody of the heir. (2 Rolls Aprg. 40)

Sec. 6. "If the tenant have issue and die" — The law is the same if the tenant has no issue but a brother or a cousin within the age of fourteen years. The law extends to the issue female as well as to the issue male. (10 R. 2 Account, 132)

Sec. 7. "Then the next friend of that heir to whom the inheritance cannot descend." — Here friends is taken for the next of blood so that affinity without blood is excluded. (Glanvil, Liber. 7, Chap. 2; Britten, 163; Fleta, Lib. 1, Chap. 9; Stat de Hibernia, tit. Partition; Plowd, 446.)

Sec. 8. "the next" — If there are three brothers and the youngest holds lands in socage and dies leaving issue within age of fourteen, both the younger ones are of equal degree but the elder one shall be the guardian. (Vid. 30, Ass. 47.) But if lands held in socage be given to a man and his heirs of his body and he die leaving no heirs within the age of fourteen, the next cousin on the father's side shall not be preferred before the next cousin on the mother's side, but the one who first seizes the heir shall have the custody of him. (Pl. Com. Carroll's Cases.) But if lands are given in frank marriage and the donee dies leaving issue under four-
teen the next of kin on the mother's side shall have the custody because the mother was the cause of the gest. If a man is seized of land held in socage from the father's side and of other lands held in socage from the mother's side, and dies leaving issue under fourteen, the next of kin of either side who first gets possession of the body of the heir shall have him, but the next of blood on the father's side shall enter into the land from the mother's side and the next of kin on the mother's side shall enter into the land from the father's side. (45 H. 3 Gard. 146; 2 Rawle's Ap. 240) An infant who is in the guardianship of some one may be guardian in socage of another infant, for the wardship of the first infant entitles his guardian to the wardship of the second. An idiot or a lunatic or leper removed by writ de leperse amovende can not be guardian in socage. (s. n. E., 139, B. Regist.; 7 E. 3, 46; 16 E. 3, Add. 52; 21 E. 3, 8; 31 E. 3, enfant G.; 26 E. 3, 63; 10 H. 6, 14; F. N. E., 118; Bract. Lib. 2, Fol. 88.)

Sec. 9. "To whom the inheritance cannot descend" —

This excludes not only the immediate descent but all possibility of descent as if a man has two sons by different wives, and having land held in socage of the nature of borough Eng-
lish, the younger brother being under fourteen, the older brother of the half blood shall not have the custody of the land for he may possibly inherit the land. (Lib. Rub. Cap. 70 Glanv. Lib. 7 Ca. II.; P. L. Com. Carrol's Cases; 2 Rawle's Ab. 40; Cre. Eliz. 825; Swan's cases, 2 and. 171) If the judgment in Swan's cases was right the rule should be confined to all possibility of immediate descent.

Sec. 10. "Then the mother" — Although land cannot descend from the son to the mother because inheritance cannot ascend, yet if here appears by Littleton that she is next of blood because none can be guardian in socage who is not next of blood.

Sec. 11. "Then the father" — By this it appears that the father in case of the tenure in socage shall have the custody of his oldest son as guardian in socage rather than as guardian by nature, because the guardian in socage is accountable not only for the profits of the land but also for the value of the ward's marriage. But no lord or other person by reason of any tenure by knight service or otherwise shall have the custody of any child that is heir apparent to his father, but the father shall have the custody only during his life.
his life.

Sec. 12. "Only the use and profits of the heir" — Therefore a guardian in socage shall not forfeit his by outlawing or attainder of felony or treason because he holds nothing to his own use but to the use of the heir. If the mother be guardian in socage, marries and dies the husband shall not have the custody by survival because the wife had it in the right of the heir. (P.. Com. 3 Co. 39.)

Sec. 13. "He shall render an account after he accomplishes the age of fourteen" — The point was much controverted whether an action of account lay against the guardian in socage at common law when the heir reached the age of fourteen or not until he had reached the age of twenty-one, but it was adjudged in the court of common pleas (Pasch, 16 Eliz. Rot. 436) according to the opinion of Littleton, that the heir has an action of account as soon as he reaches the age of fourteen.

Sec. 14. "But such guardian, upon his account shall have allowance of all his reasonable costs and expenses in all things" — This is generally true of accountants at common law.

Sec. 15. "Allowance" — What other allowances shall the
It seems that if the guardian receives the rents and profits of the land and is robbed of them without fault on his part he shall not be liable.

Sec. 16. "And if the guardian marries the heir within the age of fourteen" — For if he marries the heir after the latter reaches the age of fourteen, he is out of the custody and the guardian, and need render no account.

Sec. 17. "He shall account to the heir." — He shall account for the marriage of the heir for as much as any man had offered for the marriage bona fide or would give in marriage to him.

Sec. 18. "Or to his executors" — Not that an infant at the age of fourteen may make his will but the meaning of Littleton is that if after his marriage he reach the age of eighteen, at which time he may make his will and appoint executor for his goods and chattels. (1 Rawle's A.Ab. 908, 910; Cre. Cha. 79.)

Sec. 19. "That he would marry him without taking the value" — So that the guardian was bound to account not only for what he actually received, but also for that which he might have received. If the heir in socage be ravished out of the custody of the guardian and the ravisher marries the
heir the guardian shall have a writ of ravishment of the ward and recover the value of the marriage and shall account to the heir for the same. (Hill 3 E. 2; Cor. Rege.; Anges. Frewicks Case, F. N. R. 139, 1; 26 E. 3 65; 1 E. 3 19,20)

Sec. 20. The guardian in socage is bound by law to see that the heir is well brought up and that his evidences are safely kept.

Sec. 21. Coke "Sec. 124". "And if any other man who is not the next friend occupies the lands or tenements of the heir as guardian in socage he shall be compelled to yield an account to the heir as well as if he had been next friend, for it is no plea for him in the writ of account to say that he is not the next friend &c., but he shall answer whether he has occupied the land or tenements as guardian in socage or not". It thus appears if a stranger enters into the land of an infant who is under the age of fourteen and takes the profits of the infant, he may be charged as guardian in socage.
CHAPTER III.

THE NEW YORK STATUTES

Sec. 22. In New York, as already stated, guardianship in socage has long been statutory. In February, 1787, a statute was passed which provided that all tenures held of the king or of any other person at any time before July 4, 1776, are turned into fee and common socage. Further that the tenures upon all gifts and grants of conveyances before made or to be made should be alodial and not feudal. (Rev. Laws, Vol. 1, 71)

Sec. 23. In January of the same year the following laws were passed:

"Sec. 1. Be it enacted by the people of the State of New York, represented in the Senate and Assembly, and it is hereby enacted by the authority of the same, that no guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, or of those things that he hath or may have in his custody, but shall safely keep up and sustain the houses, gardens and other things pertaining to the same land by and with the issues and profits thereof, and shall deliver the same to his ward when he cometh to his full age, in as good order and condition as when such guar-
dian received the same, and shall answer to such heir for the residue of the issues and profits of the same inheritance by a lawful accounting, saving to the same guardian the reasonable charges and expenses, and if any guardian shall suffer waste, sale or destruction of the inheritance, he shall lose the custody of the same and shall recompense the ward so much as the damage shall be fixed upon." (Laws of New York, Vol. 1, Chap. 6, p. 62.)

Sec. 24. The present law of guardian in socage is the same as it appeared in the first edition of the revised statutes, published in 1829 (Rev. Stat. 1st Ed. 716). It is as follows:

"Art. 1. Of the tenure of real property. sec. 3.—All lands within this state are declared to be alodial so that subject only to the liability to escheat the entire and absolute property is vested in the owners according to the nature of their respective estates, and all feudal tenures of every description, with all their incidents, are abolished."

"Sec. 4.—The abolition of tenures shall not take away or discharge any rents or services certain, which at any time heretofore have been, or hereafter may be created or reserved, nor shall it be construed to effect any change the
power or jurisdiction of any court of justice in this state."

"Sec. 5.—Where an estate in lands shall become vested in an infant, the guardianship of such infant with the rights, powers and duties of a guardian in socage shall belong 1. to the father of the infant, 2. if there be no father to the mother, 3. if there be no father or mother, to the nearest and oldest relative of full age, not being under any legal incapacity and as between relatives of the same degree of consanguinity, males shall be preferred."

"Sec. 6.—To every such guardian all statutory provisions that are or shall be in force relating to the guardian in socage shall be deemed to apply."

"Sec. 7.—The right and authority of every guardian shall be suspended in all cases where a testamentary or other guardian shall have been appointed under the provisions of the third title of the eighth chapter of this act." (N. Y. Rev. Stat., 8th Ed., Vol. 4, p. 2418)

Sec. 25. The present law in New York on the duty of guardianship in socage as well as of general guardians not to commit waste follows:—Title II. Chap. 8, p. 2312, Sec. 20.

"Every guardian in socage and every general guardian whether testamentary or appointed shall safely keep the things that
he may have in his custody belonging to his ward and the inheritance of his ward, and shall not make or suffer any
waste, sale nor destruction of such things of such inheritance, but shall keep up and sustain the houses, gardens and
other appurtenances to the lands of his ward by and with the issues and profits thereof, or with such other moneys be-
longing to his wards as shall be in his hands and shall deliver the same to his ward when he comes to his full age in
as good order and condition at least as such guardian received the same, inevitable and injury only excepted, and he
shall answer to his ward for the issues and profits of the real estate received by him by a lawful account."

"Sec. 21— If any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward he shall
lose the custody of the same and of such ward, and shall forfeit to the ward thrice the sum of which the damages shall
be taxed by the jury."
CHAPTER IV.

NEW YORK CASES.

Sec. 26. Such is the statutory law in New York, and it has remained practically unchanged since the revised statutes were enacted. There has been little occasion for legislation along this line because the guardian in socage has fallen into such general disuse, having been superseded by the general guardian. For the same reason there has been little litigation on the subject for many years and the reported cases in the early part of the century are few. Perhaps there is no better way of giving what the law is in New York, outside of the statutes, than by giving a summary of the cases.

Sec. 27. The guardian in socage has a right to the custody of the land and to receive the rents and profits and to maintain an action for trespass. In the case of Byrne & Wife, v. Von Housen, 5 John. 66, an action for trespass quari clausum fregit was brought by Byrne and wife. Her former husband was in possession of the land which he had also been possessed by his ancestors, and died living as a widow and three children, under age, and the widow entered and kept possession. It was
held that she might maintain trespass and that having again married, her husband must join with her in such an action. Where a widow enters in such a case the presumption of law is that she enters as guardian in socage to her child and is in possession by right. The guardian in socage has a right to the custody of the lands and to receive the rents and profits and to maintain an action of trespass.

Sec. 27. The father had no right by law to receive the rents and profits as a guardian by nature, nor could he be guardian in socage as late as 1846. In deciding the case of Jackson v. Combs, 7 Cow. 36. at 36, the court says— "The liability of the defendant for rents and profits before the lessor attained the age of 21 depends on the question whether the father had by law the right to receive them as guardian by nature. Blackstone says, 'He must account to his child for the profits' which implies a right to receive them (I Black. Comm. 480). Coke upon Littleton is referred to, it does not however support this proposition as applied to guardian by nature but to guardian in socage which ceases when the infant arrives at the age of fourteen, so far as to entitle the infant to enter and take the land to himself. But if no other guardian succeeds this guardianship will continue:

"The doctrine is critically examined in Butler v. Har-
greaves, Notes to Coke upon Littleton, Liber 2, p. 23. They observe it extends no further than the custody of the infant's person, a peculiarity they did not sufficiently advert to in a preceding note which was un guardedly expressed as receiving the profits of the lands, might be a part of the office of a guardian by nature. In this capacity the father had no authority to receive the rents from the tenant, by common law the guardian in socage must be a person to whom the inheritance cannot descend, as the father may inherit under our statutes the guardianship does not devolve upon him and no guardian appears to have been appointed in this case. The tenant is therefore liable in the action to pay damages during the time he occupies."

Sec. 28. Where one enters by permission of the guardian in socage and under the title of the heir at law, he cannot set up a title in a third person in opposition to the title under which he enters. The case of Jackson ex dem. Davy v. DeWalts, was an action of ejectment, 7 John. 158. At the trial the plaintiff proved that Thomas Davy purchased the lot in question in 1771 and possessed it until 1777 when he died. The lessor of the plaintiff was his only son and heir at law. His widow and a son and daughter "who was the wife of the defendant," abandoned the place after the war and afterwards the
evidenced family returned and took possession, the lessor of the plaintiff being still a minor. The widow, about nineteen years ago, gave her daughter and the defendant permission to occupy a part of this lot. They have taken possession of fifty acres, claiming to hold it under Thomas Davy's right, of the wife of the defendant, as heir. The defendant offered to prove the sale of the lot for quit rent, in 1772, and a lease to the defendant in 1809, from Joseph Winters, who claimed title under that sale. This evidence was rejected. The defendant disclaimed to hold under the lease. The judge charged the jury that, as the defendant came into possession under the title of Thomas Davy, and by permission of the widow he could not set up a title under the sale for quit rent, and the jury thereupon found a verdict for the plaintiff. The court held, "The widow must, as entering as guardian in socage to her infant son the lessor of the plaintiff. This is the legal intendment especially as there was no act or declaration of the wife inconsistent with that character. The plaintiff showed title and the defendant having entered under that title and with permission of the guardian of the plaintiff cannot be permitted to set up a title in a third person in contradiction to the title under which he entered."
Sec. 29. The case of Fonda & Hoag v. Van Horne, 15 Wend 631., held that previous to the last revision of the statutes the father could not be guardian in socage to his child. At page 633, Judge Bronson says, "The objection that Van Horne as guardian of the plaintiff was entitled to the possession of the property and that the action should have been brought by him cannot be sustained. He was not guardian in socage for two reasons, First, it does not appear that the daughter was seised of any lands held by socage tenure, and second, as in this state the inheritance may descend to his father he could not at common law be guardian in socage to his child. (Coke on Littleton, 88 b, note 67.) 7 Cowen, 36 S.C. in error; 2 Wend, 158.)

"Both of these rules of common law were modified in the late revision of the statutes. Where an estate in lands becomes vested in an infant, the guardianship of such an infant now belongs to the father with the rights, powers and duties of a guardian in socage. (1 R. S. 718, Sec. 5)."

"But it does not appear that the plaintiff has in any form an estate in lands, and consequently Van Horne had no right under the statute."

"He was guardian by nature to the plaintiff but his guard-
ian by nature to the plaintiff but his guardianship only extended to the person of his daughter and gave him no control over her property, real or personal. (Combs v. Jackson, 2 Wend. 153.) If the plaintiff owned the property the action was properly brought in her name.

Sec. 30. For intermeddling with the issues and profits of real estate belonging to the infant an action will not lie in their name. The suit must be brought in the name of the guardian in soc. are or general guardian appointed by surrogate.

In the case of Madson Beecher v. Crouse & Brase, 19 Wend. 306, the father of the plaintiff died intestate, in 1820, leaving personal property which passed into the possession of his wife. She married Petrie in 1822, and the property passed into his possession and remained with him until 1830 when it was levied upon under an execution against him. Crops which had been raised on the farm of the plaintiff the preceding harvest were also levied upon and the whole sold under an execution. No letters of administration were issued upon the estate of the plaintiff's father. In 1831 a general guardian was appointed for two of the plaintiffs, but had not acted. The suit was commenced in February, 1833. One of the questions involved was whether the plaintiff could recover the
products of the farm. In deciding this point Chief Justice Nelson said, "Equally unfounded is the action to recover the products of the farm as to rights whatever is shown to them in the plaintiffs. The mother and father are presumed to be lawfully in the possession and occupation of the products. The mother as guardian in socage and the father jure oxoris. (1 John. 163; 17 Wend, 77; 1 R. S. 718, Sec. 5) and of course the products belonged to them or rather to the husband, Petrie. On appointment of a general guardian the rights and waivers of a guardian in socage ceased; (1 R. S., 719, Sec. 7) but until he appears and asserts his right the prior guardianship necessarily continues (5 John. 67.)

"The powers and duties of a general guardian and of a guardian in socage are now declared by statute. Among other things he is safely to keep the things that he may have in his custody belonging to his ward, and the inheritance of his ward. And shall answer to his ward for the issues and profits of the real estate received by him; (2 R. S., 153)

Sec. 31. Wm. McCray v. Mary McCray, 30 Barb, 633. In an action to recover possession of a farm it was proved that a son of the plaintiff married the defendant in 1847 and had two children by her, one of whom was living; that the son in
1850 went into possession of the farm by permission of the plaintiff and occupied it until his death in 1855. The plaintiff during such occupancy by the son frequently said "the farm belongs to the son". The defendant offered to prove that her husband worked for the plaintiff about eight years after he became of age at the plaintiff's request, that in consideration thereof and of his love and affection the plaintiff gave the farm by parole to the son who in virtue of this entered on the premises, took possession, made improvements and paid taxes on it as his own, by and with the approbation of the plaintiff; that the plaintiff always treated his son as owner and on his death bed informed him and his wife that he would never disturb them. Judge Balcom says, "The defendant is guardian in socage of her infant daughter, (1 L.R.L. 718, Sec 5, 6) and if the daughter is entitled to hold the farm in question, the defendant was rightfully in possession of it as guardian in socage and this is supported by 17 Wend. 75. Besides the defendant has a dower right in the farm and is an heir to her deceased daughter. She may claim for both as heir and guardian and is therefore in a position to assert an equitable right to it if her husband had such a right at the time of his death."
Sec. 32. Where the owner of lands dies leaving a widow and infant heir, the widow becomes vested with the powers of a guardian in socage and as such was authorized and required to take the rents and profits of the land for the benefit of the heirs and the legal intendment would be that from the time of her husband's death she occupied as guardian in socage. In the case of Sylvester, v. Rolston, 31 Barb. 289, at p. 289, the court says, "The defendant was tenant to any one he was tenant to Mrs. Hall and not to the plaintiff. By the death of her first husband who died seized of the farm in question, the mother became vested with the power of guardian in socage and as such was authorized and required to take the rents and profits of the land for the benefit of the infant heirs. The legal intendment would be that from the time of her husband's death until the defendant went into possession she occupied as guardian in socage. (7 John. 157.) She was privy to the contract with the defendant and asserted it. If, therefore, the relation of landlord and tenant existed at all it must have been between Mrs. Hall and defendant, and if an action to recover rents or for use and occupation could be sustained at all it must be by her. The same would also be true in regard to trespass or any other action for injury to the possessions."
Sec. 33. A guardian in socage may lease the lands of his ward for a term as long as he continues guardian or for any number of years within the minority of the ward. The lease, however, is subject to its being defeated by the appointment of another guardian pursuant to the statute and his election to avoid it. The case of Ira Emerson et al by George Clark their guardian, respondent v. Ramis Spiecer, appellant, 46 N. Y. 594. (Reported below in 55 Barb. 428) was an action of ejectment to recover the possession of real estate claimed by the plaintiff as heir at law of James Emerson, deceased.

John Emerson died intestate on the 14th day of September, 1864 leaving the plaintiffs, Ira Emerson, Clara Emerson, Carrie Emerson and Kate B. Emerson, his only children and heirs at law. At the time of his death he was the owner of the premises in question. The said children were all infants at the time this action was commenced. George Clark was duly appointed the general guardian of the said infant plaintiffs on the 12th day of March, 1868, and on the 21st day of March 1868, the plaintiffs demanded possession of the said premises. This action was commenced on the 25th day of April, 1868. Esther B. Emerson is the mother of the infant plaintiffs and widow of the said James Emerson and she and the defendant executed a
a lease in writing of the premises in question on the 31st day of January, 1866, for three years from the first of April then next, under which the defendant entered thereon and in virtue of which he claimed the right to retain the possession thereof at the time this action was commenced. In deciding this case Judge Peckham says, "Only one question in this case had the mother of the plaintiffs as guardian in socage a right to lease the premises in question for three years so as to convey an absolute right for that time?. The general rule as declared by courts and commentators is that the guardian in socage may take the land during the guardianship. The Chancellor says 'The guardian in socage may lease it and dispose of it during his guardianship', so Lord Ellborough says 'he may dispose of it during his guardianship.' By common law neither the guardian in socage nor any other had power to lease the freehold estate of the ward for any longer time than probably during the continuance of the trust, that is in a case of guardianship in socage, until the age of fourteen. Littleton says 'when the heir cometh to the age of fourteen he may enter and oust the guardian in socage and make him account', (Comyn says, 'he may lease the infant's estate till he is of the age of fourteen.' It is probably as well for the interest of
the infant, as it seems sound law under the principles declared to hold that the guardian may lease for a time as long as he continues guardian or for any number of years within the minority of the infant, subject to being defeated by another guardian being appointed pursuant to the statute. It is urged here that these infants are under the age of fourteen when the action was commenced. Under our statutes the age of fourteen has nothing to do with the rights of guardians. They continue only until another guardian is appointed, without any reference to the ward's age of fourteen. Another guardian may be appointed as well before as after that age under our statutes (2 R. S. 151, Sec. 5). The title and interest of a guardian in socage are superseded under our statutes unlike any other guardian without any fault on his part by the appointment of another guardian at any time. I see no necessity for holding this lease void. It was voidable by the new guardian and he properly signified his intention to avoid it at the end of the year.

Sec. 34. In the case of Torrey v. Black, 58 N. Y. 185, at page 189, Judge Grover says, "A guardian in socage could maintain action for injuries to the real and personal estate of the ward." But in the case of Foley v. The Mut. Life Ins. Co. of New York, 64 Hun, 63, at p. 66, Judge O'Brien explains
this statement as follows, "We take it however, that a disti-
tinction must be made between the right to preserve property
be it real or personal, including the right to maintain an ac-
tion therefor, and conferring of the title as to infant's
property which will enable the holder thereof to legally dis-
pose of or confer title thereto upon another."

Sec. 35. The widowed mother of an infant who owns real
estate as general guardian of the infant with the rights, pow-
ers and duties of a guardian in socage (1 R. S. 718, Sec. 5)
has the right to the possession of the said real estate. This
right carries with it a corresponding duty to obtain such
possession and if wrongfully withheld, to bring suit for that
purpose. In the matter of the application of Mary R. Hynes
as general guardian for leave to sell real estate, in 105 N. Y.
560. The case was on appeal from an order directing a sale of
certain real estate belonging to W. R. and A. H. Hynes. In-
fants to pay debts. The indebtedness was a claim of Jacob L.
Brewer for compensation as attorney in prosecuting certain e-
jectment suits to recover the infant's real estate. The moth-
er made a contract with Brewer to bring these ejectment suits.
Judge Peckham says, "There can be no doubt of the authority
of a guardian in socage to make a contract such as this. By
the revised statutes under the facts in this case the mother became guardian in socage with the rights, powers and duties of such guardian in socage. Such a guardian had a right to the possession of the ward's lands and to the receipts and to the rents and profits thereof, and could maintain ejectment to recover possession of such land. The right to the possession of the real estate of the ward carries with it a corresponding duty to obtain such possession and if wrongfully withheld the guardian should sue for it. In imposing this duty upon the guardian, the law necessarily gives to him the right to employ counsel and, of course, to make a contract for his compensation."

Sec. 36. A guardian in socage in New York has no power to surrender a policy of insurance belonging to his ward. In the case of John Foley, Jr. et al v. Mut. Life Ins. Co. of N. Y., 138 N. Y. 333, reported below in 64 Hun, 63, the action was brought to have the surrender of a life insurance policy adjudged void and the policy declared to be in favor of the plaintiff. The policy was an endowment policy on the life of John Foley and was issued in 1876. It provided that the defendant would pay to John Foley or his assigns, $10,000 in 1891. In 1879, Foley assigned this policy to his wife and children. Mrs Foley died in 1879 and one child in 1885, and the plain-
tiffs are the other children named in the assignment. John Foley was never appointed guardian of the children by the court. In 1888 he took the policy to the defendant and surrendered it, receiving thereon a check for $7229. All the plaintiffs at this time were under the age of 21. John Foley Jr. became of age March 7, 1888, and Madeline in November, 1889.

From the judgment of the special term which held that the surrender of the policy by John Foley was illegal and void, an appeal was taken to the General Term which affirmed the judgment. This judgment was affirmed by the Court of Appeals in an exhaustive opinion by Judge Earl. In the course of his opinion he said, "As the common law socage tenure was swept away by the revised statutes, the statutory guardianship was constituted by those statutes to take the place of the common law guardianship in socage, and it may for convenience be called by the same name. The guardianship then constituted was like the guardianship in socage at common law, except that it continued until the infant reached the age of 21, and relatives who could inherit from the infant were not excluded. It is claimed by the plaintiff that Foley as guardian in socage, under these provisions of the revised statutes, had no power to surrender the insurance policy. The defendant, on the con-
trary claimed that he had such power and the counsel on both
sides have with great diligence and industry examined and
brought to our attention numerous authorities which are to
bear upon this controverted question. We have carefully ex-
amined them all and are satisfied that if such guardian Foley,
had no power to surrender the policy. It is claimed on the
part of the plaintiff that the guardian in socage at common
law had to do only with the real estate of their wards, and
we think that is substantially true. Such a guardian could
have no being whatever except when the infant was seized of
real estate in socage tenure, and as to that was essentially,
it may be inferred that his powers and duties related to the
real estate on account of which his guardianship was constitu-
ted. In the early history of the common law there was very
little personal property and the guardianship of the infant
and his real estate was very naturally the main object of the
law. It is probable that as the guardian in socage was enti-
tled to the possession of the real estate he also took pos-
session of the animals, implements and other personal property
connected with the real estate, and having possession he could
probably maintain an action for any interference with any such
personal property without right or authority by a mere strang-
er and that he thus had the control of such personal property as well as of all real estate. Our own researches, aided by the industry of counsel, has not brought to our attention a single case in England nor in this country where the question has directly arisen as to the power of guardianship in socage of the personal property of the ward, and it has never been decided nor intimated in any judicial opinion that such a guardian could reduce to possession the choses in action of his ward, or release discharge of dispose of them. "As before stated it is probably true that a guardian in socage having the possession of personal property of his ward, used on and connected with his land, could bring an action in reference to the same. But we do not think it is a legitimate inference from these statutes that the guardian in socage had the control at common law of all the personal property of his ward, and that he could use, manage and dispose of it like a general owner possessing the title to the same. There was no reason for giving such a power to the guardian in socage growing out of the feudal tenures or the policies of the common law, and an infant, even below the age of fourteen, possessed of personal property, could select his own guardian and the guardian of such an infant could also be appointed by the ecclesiasti-
Oal courts and by the Chancellor. If the infant possesses choses in action which he desires to reduce to possession he could bring an action in his name and have a guardian ad litem appointed for that purpose. There was therefore no occasion to vest a guardian in socage, usually a distant relative, with the power and control over the infant's personal estate. When the law makers came to deal with the subject of guardian in socage in the revised statutes, personal estates had come to be very large shares of the property of the country, and if they had intended that the guardian in socage should have control of the personal property of his ward, they would have said so in plain and unmistakable terms. If the contention of the defendant is well founded, then the personal estate of an infant who possesses real estate, however remote, will be at the absolute disposal of the near relatives who may assume to act as guardians in socage under the statute without any other grounds or the security which the law with great care and particularity surrounds the estate of an infant to protect them against the misconduct or maladministration of guardians.

Such a guardianship of the infant's personal property is against the entire policy of our law and is sanctioned by no precedent and no practice is thus stated and is we believe a-
Against the general understanding of the lawyers and judges. Therefore, without a fuller discussion and without a criticism of the authorities to be found in the brief submitted to us we have reached the conclusion that Foley had no power nor right to surrender the policy to the defendant for cancellation."