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THE RIGHTS AND LIABILITIES OF PARENTS IN RESPECT OF THEIR MINOR CHILDREN.

No. 1.—Rights.

The reciprocal rights and duties appertaining to the relation of parent and child, may justly be deemed subjects which in a civil as well as a moral point of view, deserve the highest consideration. Upon the teachings and the character of the parent, depend the principles and the conduct of the child; and on these rest the future welfare and prosperity of the State. This relation has, however, only to a limited extent, been made the subject of municipal regulation; it having been, perhaps, wisely considered, that the Creator had sufficiently guarded and protected it, by bestowing upon His creatures certain deep feelings and affections, without which, human laws would be of but little avail. Whenever the tribunals of justice have interfered, either to maintain the rights or to enforce the liabilities of parents, the rules that have influenced and governed their decisions, bear a marked resemblance to those which apply to the situation of Guardian and Ward, and of Master

and Servant, and from which, in cases of difficulty, valuable analogies are drawn.

By the customs of all civilized countries, parents have been intrusted with the care and custody of their infant children, and although Casuists are divided as to the origin of this right, it may well be sanctioned upon the ground, that they are best calculated to execute the sacred trust which nature herself has reposed in them. The innate affection which parents entertain towards those whom they have called into being, awakens a strong desire upon their part to guard, guide and to protect them, and the law looking both to the interests of the child and to the well being of society, gives them the power to do so.

In many of the nations of antiquity, the authority of a parent over his offspring was carried to a very unnatural extent. In Greece, Gaul, Persia and Egypt, the condition of a child was little better than that of a slave. A parent could throw his new-born children into the highways, and there expose them to perish, without even incurring blame for so inhuman an act. This exposition, says Gibbon, was the prevailing and stubborn vice of all antiquity.[1] The Thebans give evidence of having possessed a higher code of morality, in the fact that this desertion of infants was made by them a capital offence: and yet, even they were but a little in advance of their age, since it appears that those magistrates, to whom was given the custody of all children whose parents were poor and unable to provide for them, were entitled, when these children were grown up, to treat them as slaves, taking their services in return for the charges and trouble they had caused them. Among the Romans,[2] the father had the power even of life and death over his children, upon the principle, that he who gave had also the right to take away. The consent of the parent was necessary to enable them to acquire property, which, when acquired, was considered and called, like the property of the slaves, their *peculium*. This power, though

[1] 4 Vol. Decline and Fall of the Roman Empire, 344.

[2] "Romanorum in libros potestas neque finem habuit nec modum." Vinnius in Institut., 45.

sometimes suspended, when it conflicted with the duties of the child to the State, was never wholly extinguished during lifetime. A higher degree of civilization and refinement gradually, however, swept away all traces of customs so cruel and barbarous, and so subversive of all natural rights, and gave rise to laws more in consonance with the better feelings of human nature. The power of life and death over adult children, was extinguished under Severus Alexander; yet, although the exposing and killing of infants, the *recens natus* as they were termed, was made capital under Valentinian, Valens and Gratian, the practice can hardly be considered entirely obsolete much before the time of that distinguished ancient law-giver, Justinian.

These atrocious outrages on humanity are still practiced to an enormous extent in many of the eastern nations. A great check has, however, been put upon them in India, by the praiseworthy efforts of the English inhabitants; and we may be allowed to hope that the commerce of Christian nations, extending now over nearly all the benighted regions of the globe, carrying with it and diffusing Christian principles, will, ere long, abolish them entirely, and give rise to more humane and just rules of conduct.

This almost unlimited authority of the parent seems never for a moment to have been sanctioned by the common law of England.[1] It considers that the right of the parent to the custody of his offspring, and to superintend their education, has its foundation in his duty to them, and is subservient to that of the State; for whenever it appears that he is guilty of ill-treatment or cruelty, or of conduct that tends to debase the mind, corrupt the morals, or to injure the religious principles of his child, the law holds that he has forfeited this right; and the Courts, representing, both in this Country and in England, the government in its character of guardian for those who have no other earthly friend, will interfere and appoint a suitable person to protect the child and superintend its education.[2] They cannot, however, entirely remove the father

[1] "Parentes hujus impietatis auctores exilio perpetuo relegantur." Wilkins, Leges Anglo-Saxonicæ, 19. Note (S.)

[2] 10 Ves. 52, 2 Russ. 1. 2 Bligh. N. S. 124. 8 Johns, 328. 1 Browne, 143. 1 Mason, 71.

from the guardianship of his child, so as to leave him no *locus penitentiæ*, and render him as if having no original right, notwithstanding their undoubted right to interfere and control him.[1] Whatever may have been the origin of this jurisdiction, about which learned judges widely differ, no one can doubt the absolute necessity of its existence, since it affords the only check which can be put upon the disastrous results that would inevitably accrue, from allowing an irreligious and inhuman parent to mould the pliant mind, and direct the early morals of a child.

With truth, indeed, may it be said, that a more sacred trust has never been committed to the hands of a judge, requiring for its proper execution the most scrupulous and conscientious conviction, guided by an anxious and honest desire to act rightly. Although the common law permits a parent to inflict such necessary chastisement and correction, as the conduct of the child may require, yet in all things it regards the well-being of the one, as well as the rights of the other, and deals justice to both. There is now no mysterious connection which entitles the parent to be cruel because he is a parent, and compels the child to suffer because he is a child; and when one ceases to be a father in fact, he also ceases to be a father in law.

As between the father and mother, living apart, the former is undoubtedly in the first instance entitled to the custody and guardianship of his infant children in preference to the latter.[2] Such also was the rule of the civil law.[3] In England, before the statute of two and three Victoria, giving the custody of infants under seven years of age, to the mother, it was decided, that the father has the right to the custody of his child, though an infant at its mother's breast, if the Court sees no ground to impute any motive to the father injurious to the health or liberty of the child.[4] The current of authority in this country clearly coincides with the English decisions,[5] although the Courts have at times been inclined

[1] 15 Ves. 445. 6 Mad. 272. 2 Russ. 43.

[2] 5 East. 222. 4 Ad. & Ell. 624. 1 Dowl. P. C. 81.

[3] Code Civils, §§ 373, 379.

[4] 5 East. 221.

[5] 3 Hill. N. Y. 399. 18 Wend. 637. 4 Hump. 523. Ware, 100.

to depart from them and confine the paternal power within more narrow limits.[1] It seems that where the child is old enough to choose for himself, the law allows him to do so,[2] but when too young to give evidence of any choice, the Courts exercising a high discretionary power, although far from disregarding the abstract right of the father, compel this right to give way when the public good and the best interests of the child absolutely demand it.[3]

Upon principle it would appear that, since "the very being or legal existence of the woman is suspended during marriage, or at least incorporated into that of the husband,"[4] and since he is by law intrusted with the property from which the children are to be supported, he ought also to be entitled to their custody. There is nothing connected with the mere act of separation by mutual consent, that should deprive the father of this right, but when that separation is the result of his own criminal conduct, the same cause that would entitle the wife to a divorce, would, also, generally, give her the right to the custody of their children.

The common law not only made it an offence to entice away from the father his son and heir, but also gave him a right of action against any person who should deprive him of the custody of his other children, though it be without force and with their own consent.[5] And there would seem to be no good reason why, under such circumstances, the parent is not at least entitled to recompense for the loss of services of his child.

Parents having the right to the custody of their children, and to superintend their education themselves, have also the power to delegate this authority to another;[6] and the tutor or instructor standing then *in loco parentis*, is clothed with much the same power that belongs to the relation of parent and child, and can inflict such necessary chastisement as the due execution of his trust re-

[1] 8 Paige, Ch. 47. 5 Binney, 520.

[2] 4 Ad. & Ell. 624. 1 Strange, 444. 25 Wend, 64.

[3] 4 Ad. & Ell. 624. 18 Wend. 637. 25 Wend. 64, R. M. Charlt. 489. 3 Mason, 482. 6 Greenl. 462.

[4] 2 Kent. Com. 129.

[5] Andrews, 312. 1 Sid. 387. 4 Litt. 25. Ware, 91. 2 Root, 48. 4 Mason, 380.

[6] 2 Dev. & Batt. 365.

quires; although his authority in this, as well as in other respects, can hardly be considered as co-extensive with that of the parent.

The authority of the father, is, by law, confined to the person of the child: over his property the father, as such, possesses no control,[1] but only in his capacity of guardian or trustee. In this character, to which he is by the common law entitled, he must carefully superintend the pecuniary affairs of his child, and receive the rents and profits of his estate during minority. He can, however, receive no benefit from the use of the infant's money, and the trust cannot be made the subject of speculation. He is held to a strict account for his stewardship, and must answer to the child when he comes of age, in the same manner and to the same extent as other guardians.[2]

In the absence of any express or implied agreement to the contrary, the labor and services, and the earnings of the child, belong of right to the father in return for the care and trouble which the parent sustains in supporting him.[3] But as this privilege is founded on and springs from his obligation to maintain him,[4] if he neglects or refuses to afford this support, and turns him forth destitute in the world, such conduct calls into action the rights of the child. From that moment, he becomes, as it were, emancipated, and the law invests him with the power to claim his earnings himself; over which the parent has no longer any control.[5] The child cannot, however, take advantage of his own money, and after escaping, without just cause, from the custody of his father, resist his right to maintain an action for the resultt or product of his labor. The authority of the parent follows him wherever he goes, and becomes in many instances, a salutary check upon those evils into which the thoughtlessness and inexperience of the child would be inclined to lead him. The father may, however, either by a verbal or written agreement, give his minor child what is termed, in common parlance, "his time," and relinquish thereby all right which he has to

[1] Walker, 49. 7 Cowen, 36. 21 Verm. 539.

[2] 5 Porter, 388. 3 Pick, 213.

[3] 5 Wend. 204. 2 Mass. 113.

[4] 10 Shep. 569. 16 Verm. 428.

[5] Ware, 462. 6 Ala. 501. 7 W. & S. 362. 26 Maine, 167.

his services.[1] It seems, too, that where a minor son makes a contract for his services on his own account, and his father knows it and makes no objection, there is an implied assent that the son shall have his earnings.[2]

Baron Comyns, whose dictum is said to be law, asserts that a parent may bind his infant child as an apprentice; a proposition which from the fact that the father is himself entitled to the services of the child, would seem to have a just foundation in the law. If, however, this passage, as has been implied,[3] was intended to embrace those cases where the parent seeks to exercise this authority without the consent of the son, there is much doubt of its soundness We may well question whether in this day, the condition of a child is so far analogous to that of the slave, that the father may, for the gratification of his own mercenary motives, bind his child throughout the whole period of his minority as an apprentice to a degrading trade or occupation, upon terms injurious alike to the present welfare and the future prospects of such child. The question, although of much apparent importance, has seldom come before the Courts, but the better adjudication is decidedly in favor of confining the authority of the father in this respect within more reasonable limits, and allowing the child to exercise some choice, where his own interests are so much at stake.[4] Since the parent is entitled to the services of his child, it naturally follows, that whenever deprived of them, through the willful or malicious or the negligent conduct of a third person, he has a claim against such party for consequential damages, which the law will recognize. Lord Kenyon is reported to have decided in an action,[5] "*per quod servitium amisit,*" for beating a child, stating him as the servant of the father," "that it was sufficient to show that the son lived in, and was a part of his father's family, and that it alone would raise a service by implication, which was sufficient to support that allegation, and to maintain the action." With all deference to the high authority of that

[1] 5 Verm. 556. 12 Mass. 375. 6 Conn. 547. 1 N. H. 28.
[2] 3 Pick. 201. [3] 7 Mass. 147.
[4] 2 Dallas, 199. 1 Mason, 78. 8 Johns, 328.
[5] Peake, 233, and 1 Esp. 217.

noble Lord, whose decisions at Nisi Prius remain to this day among the proudest monuments of legal wisdom and learning, we believe the cases hardly sustain this position in its fullest extent; and upon principle it is evident, that since the loss of services is the very gist of the action, the very and the only ground on which the parent is entitled to any renumeration, some slight evidence of actual labor, or some facts or circumstances from which the law could clearly infer it, ought to be introduced before the parent could be said to have established his case. The weight of authority, both in England and in this Country, appears now to sanction this position, and to maintain, that the relation of parent and child does not *ex necessitate* imply that of master and servant,[1] and that it is incumbent upon the father to prove, not necessarily that the child had performed actual services, but that he was *capable* of so doing, and in a situation from which it might readily be supposed that he would be of some assistance.[2]

In cases where an injury is inflicted upon the person of an infant child, too young to be capable of rendering service, under such circumstances as to entitle the child to an action against the wrong doer: the father, although he has no longer any claim for the loss of service, is yet entitled to indemnity for the trouble and expense which he has sustained in the cure and care of the child.[3] The father, cannot, however, from that relation *alone*, commence, release or compromise the suit of his child; and this, as well as any action to which the infant is entitled, would be unaffected by any agreement which the parent might make.[4]

Whether this action will lie where the child has been killed by the willful or negligent conduct of a third party, remains, as yet, undetermined.[5] It has been once decided in New York, that the parent has a right, under such circumstances, to indemnification,

[1] 4 B. & C. 660. 7 S. & R. 133.

[2] 4 B. & C. 460. Ware, 75. 2 Kent. Com. 195.

[3] 2 Cush. 347.

[4] 2 C. & P. 578. 4 Barb. S. C. 453.

[5] Stat. 9 and 10 Victoria, gives a right of action in such cases. There is now a similar provision in New York, and in some of the other States.

not only for the lost services of the child, but also for the expenses attending the sickness of the wife, produced by the shock which the death occasioned to her feelings.[1] The precise question itself is however, not alluded to by counsel, and is passed over *sub silentio* by the Court. On the other hand in Massachusetts,[2] and in a later case in New York,[3] it seems that such third party is only liable to the amount of the medical charges and the funeral expenses of the child. The latter opinion would appear to coincide with the well established common law doctrine, that injuries to life in general, cannot be made the subject of a civil action;[4] the civil remedy, in such cases, being merged in the offence to the public. In an analogous case, occurring many years ago in England, the Court decided that "if one beat the servant of another, so that he die, the master has no action for the battery and loss of service, because the servant dying of the extremity of the beating, is now become an offence against the crown, and turned into felony, and this hath drowned the particular offence, and prevails over the wrong done to the master, whose action is thereby gone."[5]

By a curious fiction of the law, the deep injury and disgrace that must necessarily fall upon both the parent and daughter, in the event of her seduction, can generally be compensated for only upon the ground, that through the guilty conduct of the seducer, the father has been deprived of the services of his child. How this strange anomaly ever found its way into the law of a civilized and enlightened Country, we are at a loss to discover; but it comes down to us as part of that code which is called "the perfection of human reason," and is sanctioned by many precedents. From the earlier English cases, it would seem that it was absolutely necessary to establish between parent and child, the relation of master and servant, and the consequent loss of some actual service;[6] although when this was made to appear, the damages were measured by a more equitable rule,—the injury to honor and happiness which the

[1] 20 Wend, 210.
[2] 1 Cush. 475.
[3] 3 Comst. 489.
[4] 1 Campb. 493.
[5] Yelv. 89.
[6] 2 Chit. 260. 3 Burr. 1878. 2 T. R. 168.

parent sustained.[1] As it often happened, especially in the higher and wealthier families, that no proof of actual service could be adduced, many grievous injuries of this kind, through this fiction of the law, over which the Courts possessed no control, were wholly without redress. With justice has it been considered a matter of reproach to the common law of England, which Blackstone has extolled for "the great favor with which it views the female sex,"[2] that it affords no adequate requital for the loss of female innocence and virtue. With an honorable and praiseworthy zeal, however, judges have been gradually endeavoring to break over this barrier, and establish a rule more in accordance with natural justice and the refined feelings of humanity; until, at last, they have in a degree succeeded. By the authorities of the present day, both in England and in the United States, it appears, that while the same form of action is yet in all its purity preserved, and the loss of services still its only just and legal foundation, the rules of evidence have undergone an important change; so that now, when the relation of parent and child is once established, with a consequent right upon the father's part to the control of his daughter, the loss of services in this action becomes a *presumptio juris*, requiring no proof.[3]

The common action of trespass, has, by the ingenuity of the Courts, been so extended, as to afford to the parent, under certain circumstances, a recompense for the seduction of his daughter.[4] This can, however, only be brought in some few instances, when the seducer has illegally entered upon the father's premises, in which case, the debauching of the daughter is allowed to be proved as an agravation of the trespass.

By the common law, the consent of the parent is not necessary to the valid celebration of an infant's marriage.[5] The ecclesiastical law, however, declares the want of consent to be an *impedimentum*

[1] 11 East, 23. 3 Esp. 119. 3 Campb. 520. Peake, 55. 5 Price, 641.

[2] 1 Bl. Com. 445.

[3] 7 Car. & P. 528. 1 M. & M. 323. 4 B. & C. 102. 5 Barbour, S. C. 661. 4 Greenl. 33. 8 Serg. & R. 86. 21 Wend. 79. 1 Wend. 447.

[4] 2 T. R. 161. 4 Bl. Com. 142, (Note 14.)

[5] 11 East, 20. 10 Hump. 61.

impeditivum, an obstacle to the solemnization of the marriage, although not an *impedimentum dirimens*, an impediment which affects its validity when consummated.[1] In this respect, our laws differ from those of ancient Greece and Rome, and from the regulations existing in France, Holland and Germany, at the present day, which render the marriage absolutely void, unless made with the permission of the father, or mother, if the survivor. To prevent the evils which often resulted to parents from the premature and clandestine marriages of their children, the legislators of England adopted the policy of the civil law in this respect, to its fullest extent.[2] The hardship and injustice, however, of allowing such marriages to be declared null and void, where, as in some cases, they had existed for years, and on the legality of which, depend not only the rights, but the legitimacy of others, soon induced a change. By statutory provisions at the present time, in England, as well as in many of the States of this Country, the absence of the parents consent does not affect the validity of an infant's marriage when once solemnized,[3] but subjects the person performing the ceremony, and, in some instances; the parties themselves, to a penalty.

The laws of most countries, have, in some measure, made it incumbent upon children to protect and support their parents, when they are unable either through age, sickness or misfortune, to provide for themselves. Among the Romans and Greeks, this duty was scrupulously taught, and the neglect of it was not only believed to be surely attended by Divine vengeance, but made also the subject of civil punishment. The just indignation of our Saviour is poured forth in strong language upon the Jewish law-givers, who under the sanction of an ancient tradition, permitted children, with a false appearance of piety, to declare their property devoted to the service of God, and by that means, release themselves from the duty of maintaining their aged and needy parents.[4] By the common law, a child is under no legal, however strong may be his

[1] Bishop on Marriage and Divorce, § 174. 1 Hagg. C. R. 337, 348.

[2] 26 Geo. II. Ch. 33, § 11.

[3] 8 B. & Cress. 29. 1 Mood. C. C. 163.

[4] Matthew, 15 Ch.

moral, obligation to support his parents.[1] In return for the anxious care with which they watched over the feeble infancy of their offspring, and guided and directed their education, parents had no right to demand even a scanty pittance. The child, whatever might be his means, could close his doors upon an infirm and destitute father or mother, and nothing but the promptings of his own breast could force him to open them. So obvious a defect as this, in the laws of a civilized community, was early remedied by the well known statute of 43 Elizabeth; which has either been copied, or in effect re-enacted in most of the States of this Union.

The authority of the father, may, in one sense, be said to continue even after his death, for he has the power by a last will and testament to appoint a guardian for the person, as well as the personal and real estate of his child. Chancellor Kent says, "this power was originally given by the statute of 12 Charles II.[2] It can hardly be said, however, to have had its origin in that statute, since something analogous to its provisions existed under the common law. Lord Coke, in his "Complete Copyholder,"[3] after alluding to the marked similarity between the common and the civil law upon the subject of guardians, remarks, "where a man possessed of certain goods and chattels, deviseth these unto his child, and withal committeth the care of the child's body, and the disposition of his substance unto some friend, this committee is *tutor testamentarius*, unto whom belongeth the care and custody of the child's body until he accomplish the age of fourteen years, but his goods may be kept so long as the testator by his last will appointed;"— and again, in his "Commentaries on Littleton," speaking of a certain kind of guardianship analogous to guardianship in socage, he says, "it can only arise when the father has made no other disposition of his child."[4] It would seem, then, that the statute of Charles II, which has generally been adopted in this Country, only enlarged a power which the father had under the common law. The extent of a guardian's authority, so appointed, will depend, of course, upon

[1] 1 Stra. 190. 16 Johns, 281.

[2] 2 Kent. Com. 206.

[3] Sec. XXIII., Law Tracts. 19.

[4] Co. Litt. 87, b. Vide also, 3 Salk, 176. Cowell Inter. tit. 14.

the words of the instrument which creates him. In the absence of any limitations in the will itself, Lord Manners held, that his authority was not to be distinguished from that of the parent, but was a continuation of the same trust, under the same control and jurisdiction.[1]

During the lifetime of the father, the mother is entitled to reverence and respect from her children, but, as such, can exercise no control over their person or estate.[2] Upon his death, however, in the absence of any testamentary guardian, she becomes entitled by the law of nature, and of nurture to their care and custody;[3] and the Courts usually recognize this right, by appointing her to that trust, unless it appears that the welfare of the child requires a different course to be pursued.[4] Her authority can be hardly be considered as co-extensive with that of the father, but seems rather in most respects analogous to that of other guardians.[5] She is undoubtedly entitled to their labor and services so long as they remain with and are supported by her, but it is questionable whether she can assign these services to another.[6] The law does not permit the mother, as in case of the father, to appoint a testamentary guardian,[7] and her dominion is liable to cease upon the children arriving at the age of fourteen, when they are deemed in law to possess sufficient discretion to be able to choose a guardian for themselves.

The due fulfillment of the obligation which nature imposes upon parents of watching over and educating their offspring, requires, that children should pay implicit obedience to the dictates of parental authority. This duty was carefully taught at Greece and Rome; and Lycurges strongly urged it upon the Spartan youths to reverence their parents, and receive their reproofs with submission. It was considered a subject of such vital importance among the Jews, that disobedience was by their laws punishable with death. It occupies a conspicuous place in the teachings of the Bible, and is inculcated in the Sermon on the Mount. Even the heathen enforce implicit obedience to parents and religious teachers, and no obligation

[1] 2 Bl. N. S. 145. [2] 4 Binn. 487. [3] 15 Mass. 272. 16 Mass. 135.
[4] 4 Stew. & Port. 123. 2 Swanst. 236. [5] 1 Root, 487.
[6] 31 Maine, 240. [7] Vaugh. 180. 3 Atk. 519.