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

No. II.—Liabilities.

The Divine law and the law of nature has justly declared, that parents are under the strongest obligation to maintain, educate, and protect their infant children. And since nothing could be more destructive, both to the interests of the child and the well-being of society, than to permit a parent to disregard either of these moral precepts, the laws of all well regulated governments have endeavored in some measure to enforce them. The surest and the strongest pledge, however, which a child possesses for the due performance of a parent's duties, is to be found in the love and affection which all entertain towards their offspring, and which, it has been truly remarked, "not even the deformity of person or mind, not even the wickedness, ingratitude and rebellion of children, can totally suppress or extinguish."

The laws of Greece and Rome not only compelled a parent to support his child, but even declared that a father should not at his

death wholly disinherit him, without assigning a good and sufficient reason for so doing. By the laws of Spain, a parent is charged with providing for, supporting and educating his children; and this obligation is scrupulously enforced. Strange, in his "Elements of Hindoo law,"[1] says "that maintenance by a man of his dependents, is with the Hindoos a primary duty."

The precise question has never come before any Court, either in this country or in England, for adjudication, yet, the dicta of judges lead us at least to doubt, whether, by the common law, a parent is under any obligation to support his child. The Commentaries of Blackstone have been by some[2] supposed to sanction the position that this was a perfect common law duty; upon inspection however, we find that he bases this liability wholly on statutory provisions. He says: "It is a clear principle of law, that there is an obligation on every man to provide for those descended from his loins, and the manner in which this obligation shall be performed, is thus pointed out."[3] Here, without referring directly to the Statute of Elizabeth, he makes use in part of the very words in which it is expressed, and after alluding to the statute of 5 George III, he goes on to speak of the construction which Courts of law have put upon "these statutes." In the next section, the learned Commentator makes use of the following unequivocal language: "no person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease or accident, and then is only obliged to find them with necessaries; the penalty on refusing, being no more than twenty shillings a month."[4] This being the exact amount which a parent forfeits for neglecting to provide for his child, after being so ordered to do by the justices, in virtue of the authority conferred upon them by the Statute of Elizabeth, we must infer that Blackstone had in view only the liability which is created by statute.[5]

The first allusion that is made to this subject in any of the reports, is found in a marginal note to a case[6] which arose in the year

[1] Page 99. [2] Reeve in his Domestic Relations, 283, etc. [3] 1 Bl. Com. 448.
[4] 1 Bl. Com. 449. [5] Vide Mr. Chitty's note to page 448 of 1 Bl. Com.
[6] T. Raym. 260.

1691, and is to this effect, "it is a rule that if a statute give a remedy for any thing, it is to be presumed that there was no remedy before at the common law, the statute of 43 Elizabeth enjoins a father to provide for his child, which he was not compelled to do by the common law." At the beginning of the present century, Le Blanc, J., in giving his opinion in the case of *Cooper* vs. *Martin*,[1] says: "The only method of compelling maintenance is by the order prescribed by the statute of Elizabeth." A few years after, in the head note to *Urmston* vs. *Newcomen*,[2] although the judges *seriatim* decline expressing any opinion as to the extent of a parent's liability, we read "whether at the common law a father is bound to provide his legitimate child with the necessaries of life, so as to give a right of action against him to a stranger who supplies the child with necessaries, upon refusal of the father, *quære*." The last case,[3] in which this question is touched upon, came before the Court of Queen's Bench in 1840, when Parke, B., gives his opinion that "it is a clear principle of law, that a father is not under any obligation to pay a son's debts; except, indeed, by proceedings under the 43 Elizabeth, by which he may, under certain circumstances, be compelled to support his child according to his ability, but the mere moral obligation to do so, cannot impose upon him any legal liability." Lord Abinger makes use of language almost equally strong, and in the course of the argument of the case, interrupts the plaintiff's counsel, when citing the authority of Lord Tenterden,[4] who held that there was not only a moral, but a legal obligation on a parent to maintain his child, by saying: "That was only a Nisi Prius decision, and I cannot assent to any such doctrine." Rolfe, B. concurs.

The question involved in these cases, has generally been as to the liability of a father to recompense a person, who has furnished his infant child with necessaries; and none of these opinions, as will be seen by an examination of the authorities, have been expressly called for; nevertheless they are the dicta of men eminently

[1] 4 East. 84 [2] 6 Nev. & M. 454.

[3] Mortimore *vs.* Wright, 6 M. & W. 482. [4] Nichole *vs.* Allen, 3 C. & P. 36.

learned in the law, upon a question of no little importance, and as such, entitled to the highest consideration.

Upon the other hand, in an indictment against a master for refusing or neglecting to supply an apprentice with necessary food and clothing, as by contract he had bound himself to do, the Court express their opinion that it is an indictable offence, as a misdemeanor, to neglect to provide suitably for the necessaries of any infant of tender years, whether such infant were child, apprentice or servant, whom a man obliged by duty or contract to provide for, so as thereby thereby to injure its health.[1] Lord Hardwick[2] also recognizes this liability of the parent, and says: "Unless he is totally incapable, and under peculiar circumstances, as having a numerous family of children, the law of nature and the law of the land make it incumbent on the parent to maintain his child."

In view of the conflicting opinions that have existed among some of the most distinguished judges that have adorned the English Bench, upon this subject, we dare not take upon ourselves the unpardonable presumption of attempting to state what the law really is. We cannot but feel, however, that were this naked question, accompanied by strong equitable circumstances, even now to arise, in the absence of any statutory provisions, the Courts of England would hesitate long before declaring, that by the common law, a parent is under no obligation to afford his minor child the bare necessaries of life, and that throughout the whole extent of its jurisdiction, it no where offers protection to the feebleness and dependency of childhood.

From time to time statutes have been enacted by which this moral duty of a parent may in a measure be enforced. A father and mother, if of sufficient ability, can now be compelled to support their poor and impotent offspring;[3] and if a parent deserts his children, the churchwardens and overseers of the parish are empowered to seize his goods, rents and chattels, and dispose of them towards their relief.[4] Popish[5] and Jewish[6] parents who refuse to

[1] Russ. & R. C. C. R. 20. [2] 3 Atk. 60. 3 Atk. 399. [3] 43 Eliz. C. 2.
[4] 5 Geo. I. Ch. 8. [5] 11 and 12 Wm. III, C. 4. [6] 1 Anne St. 1, C. 30.

allow their Protestant children a fitting maintainance, with a view to induce them to change their religion, may, upon complaint to the Lord Chancellor, be enjoined to do what is reasonable.

So far as the question has been considered at all in this Country, the weight of authority decidedly sanctions the position, that this obligation of the parent is recognized by the common law. Spencer, C. J.[1] says: "The duty of a parent to maintain his offspring, is a perfect common law duty;" and Richardson, C. J.[2] asserts, that "independent of the statutes, unemancipated children are entitled, and have a perfect right to support from their parents. This is the rule of the common law." Chancellor Kent,[3] Parsons, C. J.,[4] and Reeve, C. J.,[5] express the same opinion. Redfield, J.,[6] and Hand, J.,[7] would seem, however, to deny this liability. As with the English cases these may all be said to be, to a certain extent, extra-judicial decisions; yet, in the absence of any express adjudication, they are valuable as illustrating the view which learned American jurists have taken of this subject. It is, however, to be remarked, that the legislatures of most of the States have either re-enacted the statute of Elizabeth, or made similar provisions for the maintenance of children.

Parents are, in some instances, relieved from this obligation, when their own fortune is inadequate for the proper support and education of their offspring, and that of the chiidren is ample.[8] In such cases Courts of Equity have directed a suitable allowance to be made to the parents for these purposes, out of the income of the infants property, the amount of which will be determined by the fortune, expectation, age, and circumstances of the child; and with a view to their present happiness and future welfare. This allowance has sometimes been enlarged expressly for the purpose of supporting the parents themselves, when their situation was such

[1] 16 Johns, 285. [2] 4 N. H. 95. [3] 2 Kent. Com. 191.
[4] 2 Mass. 114. [5] Domestic Relations, 283. [6] 17 Vt. 348.
[7] 10 Barbour, C. 483. Vide also, 3 Day, 37. 5 Wend. 205. 11 Paige. Ch. 185. 4 Mass. 99. 24 Maine, 532. 2 Story's Equity Jurisprudence, § 1345.
[8] 4 Sand. Ch. 568. 1 Cox, 80. 5 Ves. 194.

as to require assistance.[1] The Courts have even gone so far in their awards as to encroach upon the principal of the minor's estate, when the property itself is small,[2] deeming it of more importance that he should be properly cared for in the time of his helplessness, than in more mature life, when he has the means to provide for himself. Such an encroachment, however, can only be justified by peculiar circumstances, since it is at variance with the general rule of law "that a minor's expenditures shall be kept within the limits of his income."

For the introduction of this principle, as indeed for the incorporation of much that is valuable in the Equity system of England, into the jurispudence of this Country, we are indebted to Chancellor Kent,[3] who, in the course of a long and distinguished judicial career, by his extensive research, unwearied diligence, and profound judgement, so successfully unfolded the doctrines of Chancery, and settled them upon immovable foundations; and of whose legal labors it may appropriately be said, as my Lord Coke, in his quaint language, remarks of Littleton, he has left nothing, "but may open some window of the law to let in more light to the student, by diligent search to see the secrets of the law, and the true reason thereof."[4]

Closely connected with the question of a parent's obligation to support his child, and in fact depending upon it, arises the consideration as to the extent of his liability to third persons, who, upon his neglect, have supplied his children with necessaries; in respect to which, a singular conflict and fluctuation has existed in England,[5] from the time when Lord Kenyon[6] first intimated that a father might be liable under certain circumstances, down to the latest adjudication upon the subject. We are not called upon to follow the learned judges in their various and able decisions, since the question appears finally to be put at rest, by the carefully considered and very decided opinion of the Court, in the recent case of

[1] 3 Atk. 511. 3 Ves. 733. 2 Russ. 28.

[2] 1 Jac. & W. 253. 1 R. & My. 575. 2 P. Wm. 23. 2 Mc. C. Ch. 207. 2 Iredell, Eq. 354. [3] 4 Johns, Ch. 100. [4] 3 Co. Litt. 395, A.

[5] Chitty calls it *vexata quæstio*. Chit. Cont. 142. [6] 1 Esp. 17.

Mortimer vs. *Wright*.[1] It may now be regarded as the law of that Country, that the mere moral obligation upon the parent's part to support his offspring, can afford of itself no legal presumption of a promise to pay any debts of their contracting. "You must prove," says Lord Abinger,[1] "that the father has contracted to be bound, just in the same manner as you would prove a contract against any other person."

The question in this Country remains as yet unsettled. In one[2] of the States, it is very clear that the English rule has been adopted, while the decisions in a few others[3] are strongly inclined that way, although they can hardly be considered as recognizing it in its fullest extent. In the majority,[4] however, we should infer that the father might be held liable, under reasonable circumstances, for the necessaries furnished to his child, and that the relation existing between them would afford a strong legal presumption that the infant was authorized to bind his parent in such cases. Some of the Judges,[5] while upholding the rule laid down in the last English case, would seem to have been much influenced in their decisions, by the assumption, that a different doctrine would be productive of the most serious consequences to society, and "subject the father to the excesses and extravagances, if not the dominion of thoughtless and heartless children;" yet, we respectfully submit that this can hardly be considered a fair argument for its adoption, since no Court has ever intimated that a parent could be held liable for any thing furnished to his child, except strict necessaries. In those States where there is deemed to be a common law obligation on the part of the father to support his offspring, there is but little doubt that, in case he neglected this duty, and another performed it for him, the Courts would hold that the party had thereby conferred a benefit upon the parent, for which he would be entitled to remuneration.

[1] 6 Mee. & W. 482, [2] 17 Vt. 350.

[3] 10 Barb. Ch. 483. 3 Scam. 180. 5 Port. 435.

[4] 8 N. H. 356. 2 Mass. 143. 2 Mass. 415. 4 Mass. 97. 3 Day, 37. 13 Johns, 480. 4 W. & S. 118. 24 Maine, 531.

[5] Vide, 17 Verm. 350.

Whether the common law makes it incumbent upon the mother, after the father's death to support her legitimate children, or gives a right of action against her to a third party who supplies them with necessaries, upon her refusal, has never been fully determined.[1]

There would seem to be less reason for imposing this liability upon her, since the relation in which she stands to them can scarcely be considered analogous to that of the father, when living, and since, a general thing, they become entitled upon his death, to a portion of the property out of which he had supported them, and which can be appropriated by their guardian for their maintenance and education.

Although in the infancy of the common law, it seems, that parents were not allowed upon their death, totally to disinherit their children,[2] it is now perfectly settled, that however large may be the fortune of the father, and however strong and just his moral obligation to provide fittingly for their welfare upon his decease, he has a perfect right to make such disposal of his property as he choses, and no Court, either in this Country or in England, can restrain him.[3] 'Tis true that children cannot be disinherited by any dubious or ambiguous words of the testator, and that there must be some plain words or necessary implication in the will itself, to deprive them of property to which they would otherwise be entitled,—yet, we may well doubt whether this doctrine is so established because "children are favorites of our Courts of justice," as Blackstone implies,[4] since it appears clearly to rest upon a rule of construction, as applicable to cases where the rights of the most distant heirs, as well as where the interests of children are concerned The law, in the absence of any thing to the contrary, has marked out the channel in which the estate of every man upon his death shall flow, and it casts the *onus probandi* upon him who seeks to establish a will, to prove both its validity, and, from the interpretation of the instrument itself, the clear an obnoxious meaning of

[1] 4 Mass. 97. 16 Mass. 135. 15 Mass. 274. 2 Kent. Com. 191.
[2] Reeve's History of the English Law, 12.
[3] 5 Ves. Jr. 444.
[4] 1 Bl. Com. 450.

the terms in which it is expressed; if he fails to do this, so that there exists a legal doubt in the mind of the Court as to the intention of the testator, it is evident that they are forced to delare the *presumtio juris* not overcome, and the rights of the heir, be he child or not, remain unaffected. The natural affection which parents are accustomed to entertain for their offspring, in the great majority of cases undoubtedly, prompts them to make some provision for their children's prosperity, after they shall be unable to provide for them, yet, as great hardships and injustice may result from the abuse of the power of testamentary disposition, while we would not be considered as questioning the undoubted soundness of the general proposition, "that every man ought to have by the laws of society a power over his own property,"[1] we must acknowledge the superiority of the civil law in this respect, which would not permit a parent, without sufficient reason, to disinherit his child.

The extent of a *parent's* liability for the acts and representations of his children, which we do not find ever to have been considered, would manifestly depend upon the circumstance, whether there existed between them in each particular cause, the relation of principal and agent, and be governed by the same rules that apply in such cases. Where those acts are tortious,[2] it seems that a father is no more responsible, than a master is for the tortious conduct of his servant. The rule of law applicable in such cases has been thus concisely, yet explicitly enough for our purpose, stated by Lord Holt, whom Lord Eldon justly calls "as great a lawyer as ever sat in Westminster Hall,"[3] "generally, no master is chargeable with the acts of his servant, except when he acts in execution of the authority given him."[4]

Courts of law have never attempted to interfere with the unquestioned right of parents temperately to chastise their children, when their conduct is such as to justify it; but, when in the exercise of this power, parents exceed the bounds of reason, and inflict cruel

[1] Blackstone bases his objection to the rule of the civil law upon this ground. 1 Bl. Com., 448.

[2] 4 Denio, 175. [3] 8 Ves. Jr., 282. [4] Salk., 282.

and merciless punishment, they render themselves liable to an indictment.[1] The excess in such cases being considered the offence, not the punishment itself.

The duty which nature imposes upon a parent of defending and protecting his children, although not enforceable by law, serves as a justification for the performance of certain acts which would otherwise be deemed illegal. He may sustain them in their lawsuits without being guilty of the offence of maintenance;[2] and is permitted to make use of force in the defence of their person.[3] Blackstone[4] cites as an instance of "the indulgence which the law shows to the frailty of human nature, and the workings of parental affection," a case[5] where the father was only adjudged guilty of manslaughter, who had "run near a mile" to revenge himself upon a boy for having injured his child, and inflicted upon him a beating of which he afterwards "unfortunately died." The facts in the case would, however, seem to sanction the presumption that the decision of the Court was based upon the ground, that there was an absence of any malice *prepense* on the part of the father; since it appears that he only struck the boy once with a "little cudgel," from which blow a deliberate intent to kill could not reasonably be presumed.

The contracts and agreements which have been entered into between a parent and his child, are always viewed with a watchful and jealous eye by the Courts, and where they appear to be to the infant's disadvantage, will be set aside on more slender evidence of fraud or undue advantage than is required in other cases.[6]

The parental duty of educating children, which is so earnestly inculcated by all writers on natural law, has seldom with us been enjoined by municipal regulations. Since, however, it occupies so important a position in the relation of parent and child, commencing as it does, in one sense, when the infant is yet at its mother's

[1] Fost. 262. 1 East. P. C. 261. 1 Hale, 454. 2 Hump. 283.

[2] 2 Inst. 564. [3] 1 Hawk. P. C. 131. [4] 1 Bl. Com. 450.

[5] Godb. 182. Lord Raym. 1498.

[6] 2 Atk. 160. 2 Atk. 258. 1 Ves. 400. 12 Whea. 241. 1 P. Wms. 639. 12 Peters' S. C. 241. 2 W. C. C. R. 397.

breast, and continuing through so large a portion of his minority, it deserves our consideration.

The illustrious names that adorn the annals of Grecian and Roman History give evidence that education was not neglected in the flourishing periods of those empires. Yet it was not until the time of Lycurgus that the subject of education was brought directly under the control of the public authorities; and even then, this was in the hands of that ancient lawgiver, but an engine to produce a physical effect for a political purpose; his great object being to render his people a nation of warriors, as the surest means of attaining the supremacy in Greece. Nevertheless, that his laws were productive of beneficial results, is manifest in the fact, that Sparta which with its dependant territory, contained a population of not more than forty thousand, soon achieved for herself an honorable distinction, and long gave laws to Greece. In Persia and Crete, public institutions were established for the instruction of youth in the useful arts, and in the science of government.

In more recent times the importance of the subject has attracted the attention of most of the governments of Europe. So early as the year 1494, the principal of taxation for educational purposes, and of compelling parent either to send their children to school, or to provide for their proper instruction at home, was incorporated by Parliament into the laws of Scotland. This coercive system[1] has been adopted in Prussia, Switzerland, and in some parts of Germany; it obtained also at one time in England, Ireland, and among the earlier settlers of New England. This method has been by some condemned both in principle and practice, (with what justice it is not our province to consider,) yet, notwithstanding the objections that have been urged against it, it is certain that its adoption has been, in many instances, attended by the happiest effects.

In a form of government like our own, where the people are the supreme rulers, education becomes the main pillar of the political

[1] This is sometimes styled the "Prussian System," but improperly, since it was not adopted in that country till the year 1730.

fabric, and on it rests the social and moral condition of the nation. The remark of Aristotle, "that the fate of empires depends on the education of youth," may be applied with increased force to republics, for education affords the indispensable means of attaining all that as a nation we can anticipate, or as men can desire. The distinguished exertions that have been, and are continually being made for the diffusion of knowledge among the young throughout every portion of this country, evinces an enlightened policy of which we may well be proud. Yet the laws of the several States have rarely[1] rendered it obligatory upon parents to provide for the education of their children, trusting, perhaps, that the incalculable benefits and advantages to be derived from knowledge, present in themselves sufficient inducements to lead them earnestly to desire the instruction of their offspring. The present state of society with us may be such as to render it inexpedient, and perhaps unnecessary generally to adopt the coercive system, which has proved so efficacious in other countries. It may not be consonant in some respects to our habits and opinions; and the great interest which the subject of education awakens in the parental breast, may supercede the necessity of incorporating it into the jurisprudence of this country at the present time. If, however, it should come to pass that parents neglect this all important duty, which they owe their children and the State, there would seem to be no valid and sufficient objection to be urged against the right of government, for its own protection and welfare at least, to interfere and take suitable measures to enforce it, "education being," as Archbishop Tillotson observes, "the preventive of evil, whereas all other ways are but remedies."

The rights and liabilities which spring from the relation of parent and child, cease upon the marriage of the child with the father's consent,[2] or upon the child arriving at the age of twenty-one, "when," as Blackstone remarks, "the empire of the father gives place to the empire of reason."

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[1] Connecticut in 1849, and New York 1853, adopted in a degree, the coercive system.

[2] Otherwise when married without consent. 11 Shep. 531.