THE

AMERICAN LAW REGISTER.

AUGUST 1884.

ALLOWANCES FOR MAINTENANCE AND EDUCATION.

THERE never has been any serious doubt of the propriety of a decretal order by a court, having jurisdiction of the persons and estates of infants, directing an allowance from the separate estate of minors for their maintenance and education, wherever such minors are orphans. Even directions to accumulate income will be disregarded, or the corpus itself may be broken into, where the interests of the wards demand it. A good illustration of this well established doctrine is to be found in *Washington's Estate*, 8 Phila. Rep. 182; 75 Penn. St. 102, where many of the English cases are ably reviewed.

It is not our purpose, however, to dwell upon allowances for maintenance and education under such circumstances, but to consider how far such allowances will be directed by the courts, where the minors have parents, wholly or partially unable to support and educate them according to their stations and expectations in life. The inquiry is one of practical importance and of frequent occurrence, affecting all classes and conditions of society, and touching the interests of the State. Children are to be the future guardians, as they are the present wards of the State, and in exercising a wise discretion in regard to allowances for their proper education, the Chancellor may exert a practical statesmanship of the utmost public value.

The duties of parents to their children, at the common law, were protection, education and maintenance, the latter extending no further than a necessary support. Indeed there is authority for say-

ing that the law cannot coerce a parent to do more than to keep his or her child from becoming a charge on the town: *Rawlins* v. *Goldfrap*, 5 Ves. Jr. 444.

The statute of 43 Eliz. c. 2, amended by 5 Geo. I. c. 8, the substance of which is to be found in the statutes of many of our States, was intended for the indemnity of the public against the support of paupers. These acts provide that the father and mother of poor persons shall maintain them at their own charges, if of ability.

The civil law imposed it on the father to educate his son, according to his ability, with all those things necessary for social life: Wood's Inst., C. L. 126, and Lord KAIMS in his Principles of Equity, citing the case of *Mary Scott* v. *Mary Sharpe* to exemplify the doctrine, says that it is extended to their education to some sort of business, by which they can gain a livelihood, or in the alternative, to provide for their subsistence, even after the parents' death. Home's Principles of Equity 83: "This," said Chancellor KENT, in *Wilkes* v. *Rogers*, 6 Johns. Rep. 578, "may be the *rationale* of the relation of parent and child, in the abstract; but our law will not bear out the doctrine on so broad a scale."

The jurisdiction of chancery over infants and their estates was more liberal. Mr. Schouler, in his work on "Domestic Relations," p. *322 (citing Macpherson on Infants *145–219, and *Harland's Accounts*, 5 Rawle 323), says: "As a general rule the father must, if he can, maintain his infant children, whatever their circumstances may be; and no allowance will be made him for that purpose out of their property, however extensive, while his own means are adequate for their support. This principle is clearly established both in England and America." To this authority we may add the concise statement of a well-known English writer, who says: "Where the infant is living with his father, or, after the father's decease, with the mother, remaining unmarried, maintenance will not be allowed, if such father and mother be of ability to maintain him." Adams's Eq. *287. But where the question turns upon the father's ability, maintenance is given whenever it appears that his circumstances are such that he cannot give the child a maintenance and education suitable to the child's fortune and expectations. "The amount of such fortune as well as the situation, ability and circumstances of the father will be taken into account in all such cases." Schouler *323. Macpherson, in his work on

"Infants," p. 220, says: "Maintenance is given wherever he (the father) is not in such circumstances as to be able to give the child an education suited to the fortune which he enjoys or expects;" and again, p. 222, "the ability of the father is comparatively estimated."

Chancellor KENT, 2 Comm. *191, says: "Courts now look with great liberality to the state of facts in each particular case of this kind before them; thus there are precedents in the English courts where the father had a large income, and yet was allowed for the maintenance of his infant children, they having an income still larger." See Story's Equity Juris., sec. 1355. In general then the paternal fortune is the *primary* fund, out of which the children are to be maintained and educated. This fund is under the absolute control and direction of the father. The estates which children may have in their own right constitute a *secondary* fund. This fund is under the control of chancery, and a chancellor will not allow maintenance out of the secondary, without first inquiring into the state of the primary fund.

The English cases deserve attentive consideration.

In *Jackson* v. *Jackson*, 1 Atkyns 513, the father being competent, Lord HARDWICKE refused to give directions as to maintenance, saying that such an order depended upon all the particular circumstances of the case. In *Butler* v. *Butler*, 3 Atkyns 58, decided in 1743, the same judge used language, which, in view of other authorities, is harsh. He said: "Unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature, make it incumbent upon the parent to maintain his child." He therefore held that "unless the child from the mean circumstances of the parent is in danger of perishing from want, the court will not direct the interest that shall be made of a contingent legacy to be applied to that purpose." It is to be observed, in considering this case, that the legacy was of all "the rest and residue" of a grandfather's estate to be given to his grandson "at his age of twenty-one, and if he die before that age" then over. The chancellor held that the interest must accumulate, and that as nothing was said as to how it should be applied, the contingent legatee was not entitled as a grandson to be maintained out of the produce.

A different rule, however, was recognised by the same chancel-

lor, in the case of an eldest son, for, in *Petre* v. *Petre*, 3 Atkyns 511, he said: "Where there is a numerous family of children, who are infants, upon an application for maintenance for the eldest son, the court will make a liberal allowance to him, that he may be the better able to maintain his brothers and sisters, considering him in the light of the father of the family." In *Bradshaw* v. *Bradshaw*, 1 Jac. & W. 627, decided by Lord ELDON in 1820, it was held proper that a liberal allowance should be made to an infant heir, in consideration of the support of an infant brother, an illegitimate child of his father and mother before their marriage, who had lived with, and been provided for by the father before his death. In *Collier* v. *Collier*, 3 Ves. Jr. 33, Lord LOUGHBOROUGH, in relieving a mother from the expense of maintaining and educating her children at the schools, to enjoy which they must leave their home, said it could not be intended that "she should be laid under a temptation to spoil the boys by keeping them at home."

The rank and circumstances of the family are to be looked to in estimating the amount of a proper allowance.

In *Buckworth* v. *Buckworth*, 1 Cox 80, it was said that the ability of the father is to be considered in reference to the fortune which the child expects.

Lord Chancellor ELDON used language to the same effect in *Maberly* v. *Turton*, 14 Ves. 499. In *Cavendish* v. *Mercer*, 5 Ves. 195, n., where the father's income was considerable, but not sufficient to maintain the infants in proportion to their fortunes, the Lord Chancellor directed the master to inquire into the circumstances of the father, and whether it was proper to make any, and what allowance for the maintenance and education of the infants. So also *Aynesworth* v. *Pratchett*, 13 Ves. Jr. 320.

"Maintenance is even allowed against directions for accumulation, where the father's circumstances are such as to make it reasonable to allow maintenance for the children, and it is to their benefit to allow it, and their fortune is such as to properly admit of it." Macpherson *223 and cases cited.

In the case of *Jervoise* v. *Silk*, Cooper's Ch. C. 52, decided in 1813, by Sir WILLIAM GRANT, that great judge said: "It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman 6000*l.* a year certainly would not be thought enough to exclude him from requiring some maintenance out of his childrens' fortunes. To a private gentleman it

may be otherwise. On the outside it here would seem enough; at the same time the expenses of his establishment, and his childrens' expectations are circumstances to be looked into. It would be a harsh thing for the court to oblige the petitioner to put down his establishment in any part to educate his children where they have large fortunes of their own." The later English authorities rest upon the same basis: *Culbertson* v. *Wood*, 5 Irish Rep. Eq. 23; *In re Kerrison*, L. R., 12 Eq. 422.

The American cases very generally sustain these principles. Several cases in New York are in point.

In *In the matter of Burke*, 4 Sandf. Ch. 617, it appeared that the father and guardian of two daughters, one of thirteen years of age, the other of eleven, was unable to keep house within his own means, with the addition for board charged for his children. Their joint income was nearly $4000 per annum. The fortune of one at full age would be nearly $60,000, and of the other $30,000; their necessary annual expenses at boarding school would not exceed $1000 to $1200.

The court allowed $2500 per annum out of their income, so as to permit them to remain at home with their father, using these words: "The object is to promote the permanent interest, welfare and happiness of the children, and these are not always promoted by a rigid economy in the expenditure of their income, regardless of the habits and associations of their period of minority. It is true that these children might be kept in very good boarding schools upon the amount reported by the master, and indeed on a much less sum, and the surplus of their incomes could thus be added to their respective fortunes."

To the same effect is *Matter of Kane*, 2 Barb. Ch. 375. So also in *Harring* v. *Coles*, 2 Bradf. 349, where a father, who was the guardian of his children, and labored for their support, was allowed his children's maintenance, though he himself was not destitute, solely upon the ground that he had been put to increased expenses by the death of the mother. See also *Wilkes* v. *Rogers*, 6 Johns. Rep. 566; *Smith* v. *Geortner*, 40 How. Pr. 185; *Freeman* v. *Coit*, 27 Hun (N. Y.) 447.

The case, entitled *Matter of Marx*, Abbott's New Cases (N. Y.) vol. 5, p. 224, seems to be unsupported by any authority. It was there said by the surrogate that "it is a mistake to suppose that a parent is bound to support his minor children where they have

property that may be applied for that purpose;" and it was held that where one who had been appointed administrator of his wife's estate, applied money of the estate in good faith to the support of their children, the amount should be allowed to the administrator on a final accounting.

The Pennsylvania cases are in accord with the later English doctrine. In *Corbin* v. *Wilson*, 2 Ashm. 178, a bill was filed by infants of tender years by their father and next friend against the executors and trustees of their grandfather James Hamilton, deceased.

The legacies were held vested in present interest though postponed as to enjoyment. The father had little or no means; the will gave Mrs. Corbin an allowance of $4000 per annum for her own support and the education of her children.

The court, per KING, J., relying upon *Aynesworth* v. *Pratchett*, 13 Ves. 321, and *Stretch* v. *Watkins*, 1 Madd. R. 253, directed an allowance of $300 additional. They also permitted an allowance of $6000 for past maintenance.

A similar order was made in *Norris* v. *Fisher*, 2 Ashm. 411, and *Sharpe's Estate*, 2 Phila. 280.

In *Newport* v. *Cook*, 2 Ashm. 332, the bill was filed by the father as natural guardian of certain infants, who were devisees and legatees of David Newport, against the executors and trustees appointed under their grandfather's will, to compel them to pay and appropriate out of the income of the estate "such an allowance for their education as may be fitting their future expectations." The father was poor, infirm and unable to work, with but $800 a year, exclusive of house rent, with which to support his wife and seven children. The income of the portion of the minor's estate amounted to $1700 per annum. In holding that there should be a reference to a master to report an allowance, Judge KING, after stating the general rule, says: "Where the father is without any means or without adequate means to maintain and educate them according to their future expectations, equity will interpose and make him an allowance out of his childrens' estates for that purpose. This jurisdiction is exercised, not for the benefit of the father, but for the advantage of the children, by permitting them to anticipate a part of their ultimate means to subserve their present necessities."

These cases were reviewed and sustained in *Clark's Ex'rs.* v. *Wallace*, 12 Wright 80.

In *Harland's Accounts*, 5 Rawle 323, GIBSON, C. J., disallowed credits in a guardian's account for maintenance and education and the expenses of a voyage to Europe, on the simple ground of the admitted ability of the accountant, who was the father.

As further illustrations of the application of the doctrines just reviewed, the following cases may be referred to.

In *Pennock's Estate*, 1 W. N. C. 196, it was said that though at law a mother was not bound to support her children, and could not recover for expenditures made in maintaining her children, it being presumed that they were a gift from her, yet under the statute where a mother is able to support her children out of her own property, she will not be entitled to an allowance for sums expended in anticipation of reimbursement out of the ward's estate. In the same case, upon proof of the mother's inability, an order was made both as to past expenditures and as to future allowances: s. c. 1 W. N. C. 434; 11 Phila. Rep. 75. Similar orders were made in *Hellerman's Estate*, 3 W. N. C. 391, and in *Stanton's Estate*, 7 Id. 18.

In *Friedlinger's Estate*, 12 Phila. 80, an allowance was refused where one year had not elapsed since the decedent's death, and no account had been filed. In *Wood's Estate*, 13 Phila. 391, and in *Sober's Estate*, 39 Leg. Int. 208, it was ruled that an allowance will not be made out of a minor's property for his support, unless it appears that the father is unable to maintain him, or that the fund in question is the only means.

In *Horton's Appeal*, 94 Penn. St. 62, where a guardian, whose ward was a niece by blood of his wife, had put himself unequivocally *in loco parentis*, it was held by the Supreme Court of Pennsylvania, that he was not entitled to credit in his final account for maintenance of his ward.

In Massachusetts, it was early held in *Whipple* v. *Dow*, 2 Mass. 415, that a widow having an infant daughter, possessed in her own right of property sufficient for her support, is not compellable to maintain her, but may have an action against the daughter when she comes of age, for her board, though the court, per PARSONS, C. J., apprehended that it would be otherwise in case of a father. The same great judge in *Dawes* v. *Howard*, 4 Mass. 97, said: "Where minor children have property of their own, the father is,

notwithstanding, bound to support them, if of ability; but it is otherwise with the mother."

In New Hampshire the question has been discussed in settlement cases, where the liability arose under statutes relating to paupers. The following cases may be referred to: *Hillsborough* v. *Deering*, 4 N. H. 86; *Dover* v. *Murphy*, 4 Id. 161; *Poplin* v. *Hawke*, 8 Id. 305; *Litchfield* v. *Londonderry*, 39 Id. 247.

In Rhode Island, AMES, C. J. in *Pearce* v. *Olney*, 5 R. I. 269, in delivering the opinion of the court, said: "The obligation of a father to support his minor child, is undoubted, notwithstanding the possession by the child of property applicable to his support. Such an obligation is, however, from its very nature, limited by the ability of the father to perform it; and at all events a court of equity will not allow an infant to suffer for want of food or education, when the father is a bankrupt, on account of the formal existence of such an obligation, whilst there is trust property of the child, available to supply it with both."

In Maryland the question is discussed in *Addison* v. *Bowie*, 2 Bland. Ch. 606; *Jones* v. *Stockett*, Id. 409; *Thompson* v. *Dorsey*, 4 Md. Ch. Dec. 149, with the same results.

In South Carolina, in *Dupont* v. *Johnson*, 1 Bailey's Eq. 279, the chancellor reannounced the severe doctrine of Lord HARDWICKE, making the total inability of the father, or a numerous family of children, or a situation bordering upon necessity, the conditions of an allowance. A more liberal rule, however, was announced in the later case of *Godard* v. *Wagner*, 2 Strob. Eq. 1. See, also, *Heyward* v. *Executor of Heyward*, 4 Dessauss. 445.

No different result is reached in Alabama: *Stovall* v. *Johnson*, 17 Ala. 14; *Watts* v. *Steele*, 19 Ala. 656.

The same rule prevails in Texas, *Buckley's Adm'r.* v. *Howard*, 35 Texas 565; in Florida, *Osborne* v. *Van Horne*, 2 Fla. 360; in Georgia, *Hines et al.* v. *Mullins*, 25 Ga. 696; in Tennessee, *Trimble* v. *Dodd*, 2 Tenn. Ch. Rep. 500; in Kentucky, *Tanner* v. *Skinner*, 11 Bush (Ky.) 120; in Indiana, *Haase* v. *Roehrscheid*, 6 Ind. 66; in Missouri, *St. Ferdinand Loretto Academy* v. *Bobb*, 52 Mo. 357; *Girls' Industrial Home* v. *Fritchey*, 10 Mo. Appeal Rep. 345; and in Illinois, *Cowls* v. *Cowls*, 8 Ill. (3 Gilman) 435; *Plaster* v. *Plaster*, 47 Id. 290; *Mowbry* v. *Mowbry*, 64 Id. 383.

In the District of Columbia, a somewhat different rule has been announced. In *Holtzman* v. *Castleman et al.*, 2 MacArthur 555,

it was held that when a minor has a separate estate, the father, as natural guardian, has a right to apply so much of the income therefrom as may be necessary to defray the expense of giving his minor child a good education, and a court of equity, in stating his account, will allow him a reasonable credit for such expenditure, and will further allow him a credit for whatever portion of such income he has beneficially applied to the support of such child during his minority.

In New Jersey and North Carolina greater strictness is shown in enforcing the parent's liability than in other States of the Union.

In *McKnight's Executors* v. *Walsh*, 23 N. J. Eq. Rep. 136, it was said by the Chancellor, in disapproving of the extent to which the English cases had gone: "The dicta and authorities in the English cases are founded upon the law of primogeniture, and the established custom among the nobility and gentry, by which the heir-at-law, upon whom the family seat devolves, as well in infancy as when of age, is by their customs, bound to keep up the family mansion as a home for his sisters and younger brothers, and is allowed out of his estate sufficient for that purpose." In that case, there was a direction by a testator that his executors should invest the estate and pay over the income thereof to his daughter during her life, and after her death, expend the legal interest of said estate towards the maintenance and education of the daughter's child or children: the Chancellor held that the direction authorized only so much of the income to be expended as would maintain and educate the child in a manner proper or suitable to his condition or fortune; and that under such direction no part of the income could be appropriated to the support of the father without a special order. The court said: in general a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court, based upon his inability to support them properly." * * * "I am not willing to adopt a principle by which the fortune of infant daughters derived from their mother, shall be appropriated to maintain their father, his second wife, and their family, in a manner that his own means will not warrant, because it is suitable to the condition and prospects of the infants. They might, perhaps, be authorized to pay their proportionate part of the expense of such establishment, but the principle should go no further."

The case of *Wilkes* v. *Rogers*, 6 Johns. 566, was strongly disapproved of, and it is asserted to contain nothing to sustain its principles. Therefore it was held that as a father is not entitled to the income of his child's estate, on the ground that it was necessary to enable him to support and maintain an establishment suitable for such child as a member of his family, a payment by the executor to the father of the whole income, in such a case, will not be sustained by the court, even when made in good faith under the foregoing direction in the will. See also *Stevens* v. *Stevens*, Id. 296; *Snover* v. *Snover*, 17 N. J. Eq. 85; and *Walling's Case*, 35 Id. 105, in all of which allowances in relief of the parent's duty were refused.

In North Carolina, in *Walker* v. *Crowder*, 2 Ired. Eq. 478, it was held that the father, or his trustee, in the settlement of the account as guardian, had no right to charge his children with the amount expended for their education, he being of sufficient ability to maintain them, until ruined by a mercantile partnership. He should have applied for the sanction of the court to an application of the childrens' property to that purpose.

In the recent case of *Burke* v. *Turner*, 85 N. C. 500, this ruling was reaffirmed.

The principle common to all these cases, with but few variations, is that the minor's station in life, his expectations, the surroundings to which he has been accustomed, as well as his father's ability to sustain the same scale and degree of expenditure, are all to be considered by the court in every particular reference. An allowance, extravagant in one case may be moderate and proper in another. A just conclusion can be reached only after an attentive consideration of all the circumstances. Though the older authorities rigorously insist upon the common-law duty of the father to maintain his children exclusively out of his own means, and narrowly restrict the scale of expenditure, yet recent cases proceed upon a far more liberal principle, justly holding that the truest interests of infants, where their expectations are great, are not best served by the accumulation of dollars, but by judicious expenditures calculated to fit them to fill with decorum their proper stations in life. Sudden accessions to wealth are apt to made giddy the strongest heads, and render unstable the steadiest feet. The wisest education is that which gradually prepares a child for the duties of manhood, and though frugality may strengthen the character, as a sharp climate hardens the body, yet violent transitions are as bad in the one case as in the other.

Mr. Joseph R. Ingersoll, in the case of *Corbin* v. *Wilson*, 2 Ashm. 178, successfully urged upon the court precisely these views. He said: "The question is, shall these owners have part of their estate for subsistence and education now, or must it go on in useless accumulation? Is it not monstrous that they should be kept unfit to enjoy what must certainly come to them, if they survive to the age of twenty-one years? * * * Property is given to a child or a stranger, which is ample in dimensions and affluent in productiveness, with a limitation of expenditure to a totally inadequate amount. The child of wealth becomes a pauper, must beg or starve, go houseless, naked and untaught, with the certainty of the wealth of Ormus in the not distant future."

This is the language of an eloquent advocate, but it embodies a principle which a critical review of all the books will fully sustain. No less an authority than Chancellor KENT, speaking as chancellor, uses these words: "I think it a wise policy, and such a one as the court ought judicially to aid, to anticipate a part of the wealth of infants, to secure a good education, so amply remunerated by the value it stamps on the remainder; but the policy which dictates the allowance ought certainly to combine the precautions necessary to secure its proper application:" *Wilkes* v. *Rogers*, 6 Johns. 566.

The most common form of application for an allowance is in the nature of a bill or petition, fully stating the circumstances which, if sustained by proof, would render it proper to enter a favorable decree. This is referred to a master with power to take proofs for and against the prayer of the petition, and to fix the amount of the allowance, except in cases where the interests involved are pecuniarily so trifling that a reference would prove a hardship. In such cases it is usual for the court to act directly upon the subject-matter, if the petition be sufficiently full in its statement of facts and supported by proper affidavits.

The first point in the reference to the Master is the ability of the father. This involves an inquiry into the condition of the parent's estate, the amount and value of his interest bearing investments, the amount of his business earnings or professional income, his age and health, the number of his family, the nature of his fixed obligations and contingent liabilities, the rank, condition, circumstances and expectations of himself and his family, in short, every thing relating to his and their social environment. The

master must also inquire into the character, amount, value and title of the minor's separate estate, the probability of increase or decrease in the income thereof, the source from which it is derived, any special directions in the instrument of settlement, the character and probable expense of the education to be fitly required by the minor, his age and health and individual expectations. Upon all these points the proof ought to be full, clear, precise and satisfactory, and the Master's findings of fact and report thereon ought to be sufficient in every way to satisfy the conscience of a chancellor, whose duty it is in protecting the interests of infant wards to guard, on the one hand, against unwise and unreal economy, enriching the purse but impoverishing the mental and moral character of the minor, and, on the other hand, against well-devised schemes to evade parental duty and shift the burden of expensive tastes and luxurious habits, thus alienating by indirection a child's possessions, and stripping him of that which he himself could not part with by any personal act because of the legal disabilities arising from infancy. The substantial good of the minor, and its promotion, must be the sole objects kept steadily in view. Every decree, directing an allowance, must be based upon a conviction that the true interests of the ward demand it, uninfluenced by any considerations of benefit to the parent or to those whose interests are indirectly associated with his own. This, it is true, rests finally upon the "wise discretion" of the chancellor, but it is discretion enlightened by judicial experience, and is far from caprice or prejudice.

The question has frequently arisen how far a court will decree an allowance for past maintenance, or by an order, retroactive in effect, sanction expenditures of the ward's property made without authority. Upon this there has been some doubt, Lord THURLOW, in *Andrews* v. *Partington*, 3 Bro. C. C. 53, declaring that he did not approve of such a practice, and his doubts have been repeated once or twice by American judges. It would appear, however, from what the Solicitor General, Sir JOHN MITFORD, who was of counsel in *Andrews* v. *Partington*, said in *Hoste* v. *Pratt*, 3 Ves. Jr. 730, that Lord THURLOW subsequently changed his view. At the present time there is ample authority, both English and American, to be found in the cases reviewed in this article, to support such a decree. To these may be added, as being expressly on the point, *Reeves* v. *Brymer*, 6 Ves. Jr. 425; *Sherwood* v. *Smith*, Id. 454;