

PARENT AND CHILD.

Their effect is very well shown by Mr. Schouler, in his work on the Domestic Relations, pp. 334, *et seq.* Contests of this character generally arise between husband and wife, in the event of separation or divorce; and there appear to be but few cases upon the precise point involved in the case above considered, namely, whether a father may, *by contract*, surrender to another his parental rights over his infant child.

In an English case in point, the father of an infant daughter, the mother having died recently, had agreed to let it live with an uncle, who was to maintain and educate it until it should be able to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support; the agreement was acted upon for some months; but it was held that, notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle; and in a proceeding by *habeas corpus*, the child was delivered to the father: *Reg. v. Smith*, 16 Eng. Law and Eq. 221. But in a case in Massachusetts, where a child had been given up at its birth, the mother having then died, to its grandparents, who kept it for thirteen years at their own expense, without any demand made by the father for its restoration, the court (Shaw, Ch. J.), refused to restore the child to its father. In *Mayne v. Baldwin*, 1 Halst, Ch. 454, an infant daughter was restored to her father on *habeas corpus*, although he had committed her to the respondent, and agreed that the respondent should be her father until she should attain the age of twenty-one years. The same view was taken by the supreme court of New Hampshire in *State v. Libbey*, 44 N. H., 321, where the precise question is considered, upon a state of facts which appear from the imperfect statement in the opinion, to be very similar to the case in Canada. The Court say: "In this case the child, when about two years and five months old, was placed with respondent in February, 1859, and maintained by him until December, 1861, when this application was made; and it appeared that until December, 1861, a period of nearly three years, the father gave no notice of his wish to have the child restored to him. Upon the subject of the terms upon which the child was

taken by the respondent, the evidence is conflicting; but upon a careful consideration of it, we think that the relation is not impeached, but that the father placed the child in the custody of the respondent, with an agreement that it should be his, and be brought up by him. And the question now is, whether in the exercise of a sound discretion, the custody of the child ought to be withheld. The child had been suffered to remain with the respondent nearly four years before the application, and she is now about six and a half years old; and assuming that there is nothing in the character of the father or stepmother that renders them unsuitable to be entrusted with the nurture of the child, we can see nothing in the other circumstances that would make the change of custody sought for, hazardous to the permanent interests and welfare of the child; certainly not to such an extent as to justify a final severing of the ties which bind the parent and child together.

* * * Our opinion, therefore, is that, upon refunding the sums of money expended by the respondent, under the agreement, the father may revoke his consent, and thereupon, the custody of the child may be awarded to him." But it has been held, that where a father, whose wife had died, gave his female child, three years old, to her aunt, with whom she remained six years, the father during that time visiting her but once a year, and contributing nothing to her support, his right to her custody was gone: *Com. v. Dougherty*, 1 Pa. Legal Gazette 63.

The principle declared in the case in Canada has been carried even further. It has been held that a husband cannot, by agreement with his wife, delegate to her the care and custody of their infant children: *People v. Mercein*, 3 Hill, (N. Y.) 399, 408; *Johnson v. Terry*, 30 Conn. 259, 263; *Earl of Westmeath's case*, Jacob, 251, note (c). Although such agreement be by deed. *Jac. 251.*

And, excepting of course, those cases where the father, by reason of immoral habits, extreme poverty, or otherwise, is unfit to have the custody of his infant child; and excepting also, contests between husband and wife for the custody of their minor children, as well as cases governed by the laws relating to the apprenticeship of minors, the rule undoubtedly is as stated by Mr. Justice