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the existing mortgages were made after the marriages referred to. If they were made before marriage, of course the widow would not be dowable out of the equity of redemption, under the common law as it existed before the Act 7 Wm. IV. No. 8 : *Dixon* v. *Saville* (1). I think it only fair to deal with the matter on the lines which both parties desire; although it is to be regretted that the facts were not stated more fully in the affidavit.

Appeal dismissed, with costs.

Solicitor, for the appellants, *A. Muddle.*

Solicitors, for the respondent, *McLachlan & Murray.*

C. A. W.

Cons *C B (No1), In the matter of* [1982] VR 657 Appl *Moule* v *Moule* (1911) 13 CLR 267

[HIGH COURT OF AUSTRALIA.]

GOLDSMITH AND ANOTHER . . . APPELLANTS; DEFENDANTS,

AND

SANDS . . . . . RESPONDENT. PROSECUTOR.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *September* 18, 24, 27.

Griffith C.J., Barton, O'Connor and Higgins JJ.

Infant, custody of—Parent and child—Child in custody of others—Habeas corpus—Right of father—Abdication—Welfare of child.

The father of a child five months old, her mother being dead, gave her into the custody of her maternal grandparents, and left her in their custody until she was nine years old, and by certain acts the father, in the opinion of the

(1) 1 Bro. C.C., 326.

majority of the Court, indicated his intention to abandon his right to her custody in favour of the grandparents, but had not otherwise disentitled himself to his natural right to the custody of the child. The father, having married again shortly after his first wife's death, had by his second wife four other children. The grandparents were desirable guardians of the child, and she was happy with them :

Held (*Higgins* J. dissenting) that under the circumstances it would be injurious to the welfare of the child to make such a change of custody and, therefore, that the Court should refuse to order her to be handed over to her father.

Per Higgins J. :—There were no facts showing anything of the nature of "abdication" in the sense of *Lyons* v. *Blenkin* (Jac., 245) ; the father had merely refrained from taking legal proceedings to compel the grandparents to give up the child when he wanted her ; and unless it were proved to be essential, or clearly right, for the welfare of the child in some very serious and important respect that she should be left with the grandparents, the father was entitled to the custody.

The custody of a child is not a mere matter for the discretion of the Court, judging as to the balance of expediency on affidavits. The Court must be satisfied that to let the father have his child would involve some serious injury to the child.

Reg v. *Gyngall*, (1893) 2 Q.B., 232 ; and *In re Agar-Ellis* ; *Agar-Ellis* v. *Lascelles*, 10 Ch. D., 49, considered and applied.

Judgment of Supreme Court (*R.* v. *Goldsmith*, 29 A.L.T., 40), reversed.

Order of *Hodges* J. restored.

APPEAL from the Supreme Court of Victoria.

On the application of Alexander Sands, the prosecutor, a writ of habeas corpus was issued on the 8th May 1907, commanding Henry Goldsmith and Mary Ann Goldsmith, his wife, the defendants, to have before the Supreme Court, Gladys Ethel Sands, daughter of Alexander Sands, alleged to be in their possession. On the return of the writ the defendants objected to deliver up Gladys Ethel Sands to the prosecutor.

From the affidavits it appeared that Gladys Ethel Sands was born on the 9th July 1898, her mother being a daughter of Henry Goldsmith and his wife ; that Mrs. Sands died on the 5th December 1898, and that shortly afterwards the infant was taken to her grandparent's house, where she had continued to live ever since, with the exception of about three weeks in 1902, during which time she was on a visit to her father's home with the con-

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sent of the grandparents. Alexander Sands married again on the 22nd November 1899, and by his second wife he had four children.

The other material facts are set out in the judgments hereunder.

Hodges J. having dismissed the application by the prosecutor for the custody of Gladys Ethel Sands, an appeal was brought to the Full Court, which was allowed, and the defendants were ordered to hand over Gladys Ethel Sands to the prosecutor: *R.* v. *Goldsmith* (1).

From this order the defendants now, by special leave, appealed to the High Court.

Bryant, for the appellants. The Court should look at the position at the time the writ was issued. The child had then been in the custody of the appellants for nine years. Having regard to the evidence the Court might properly conclude that the respondent intended to abandon the custody of the child to the appellants, and that it would be a capricious exercise of the parental right to take her away from them. The welfare of the child governs the exercise by the Court of its discretion in a case like this: *R.* v. *Gyngall* (2).

[GRIFFITH C.J. referred to *Thomasset* v. *Thomasset* (3), and *In re McGrath* (4).

BARTON J. referred to *Ex parte Hopkins* (5).]

See also *In re Newton* (*Infants*) (6); *In re Ethel Brown* (7); *In re Goldsworthy* (8); *In re McDonald* (9); *Lyons* v. *Blenkin* (10); *Green* v. *Campbell* (11); *In re Fynn* (12).

Irvine K.C. (with him *Macfarlan*), for the respondent. It is a part of the doctrine of the Courts of Chancery that, having regard to the welfare of a child, it is best for the child that it should be in the custody of its father. That is a presumption of which it is very difficult to get rid. The right of the father to

(1) 29 A.L.T., 40.
(2) (1893) 2 Q.B., 232.
(3) (1894) P., 295.
(4) (1893) 1 Ch., 143.
(5) 3 P.Wms., 151.
(6) (1896) 1 Ch., 740.
(7) 13 Q.B.D., 614.
(8) 2 Q.B.D., 75.
(9) 6 A.L.R., 187.
(10) Jac., 245.
(11) 29 Amer. St. R., 843.
(12) 2 DeG. & S., 457.

the custody of his child arises out of the fact that he is the only person who has obligations towards his child. That right can only be displaced upon definite grounds. The Court will not deprive the father of the custody of his child because the child will be happier with others, and that is so whether the child is at the time in its father's custody or in the custody of those others: *R.* v. *Gyngall* (1). There is no case in which the parental right has been interfered with without definite and serious reasons. The fact that the respondent has left his daughter with her grandparents until she is nine years old does not indicate any intention to abandon her custody. Even then he may change his mind at any time.

[HIGGINS J. referred to *R.* v. *Smith*; *In re Boreham* (2); *R.* v. *New* (3).

GRIFFITH C.J. referred to *Smart* v. *Smart* (4).]

See also *R.* v. *Nash*; *In re Carey* (5); *In re Elderton* (6); *Barnardo* v. *McHugh* (7). Whether the application is to take a child out of its father's custody or is by the father to take his child out of the custody of others, the principles applicable are the same: *In re Newton* (8). The Court must be satisfied "that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with." Per *Knight Bruce* V.C. in *In re Fynn* (9). See also *In re Curtis* (10); *In re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (11); *Daniel* v. *Daniel* (12).

[HIGGINS J. referred to *Eversley on Domestic Relations*, p. 522.]

Bryant in reply. The case where it is sought to take a child out of its father's custody is quite distinct from the case where the child is in the custody of some one else and the father is

(1) (1893) 2 Q.B., 232.
(2) 22 L.J.Q.B., 116.
(3) 20 T.L.R., 515, 583.
(4) (1892) A.C., 425.
(5) 10 Q.B.D., 454.
(6) 25 Ch. D., 220.
(7) (1891) A.C., 388.
(8) (1896) 1 Ch., 740, at p. 750.
(9) 2 DeG. & S., 457, at p. 474.
(10) 28 L.J. Ch., 458.
(11) 24 Ch. D. 317, at p. 335.
(12) 4 C.L.R., 563, at p. 568.

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trying to get it into his custody. In the latter case the only question is what is for the welfare of the child?

[He referred to *In re Ullee* (1).]

Cur. adv. vult.

GRIFFITH C.J. In this case leave to appeal was given on the suggestion that the Supreme Court of Victoria had not given due weight to the welfare of the infant in contradistinction to the natural rights of the father. The child in question is now nine years of age, and has from her earliest infancy been in the custody of her grandparents, the appellants, with whom she was left by her father, the respondent, on his wife's death in 1898, five months after the child's birth.

The law on the subject of the father's rights is well settled. It is thus stated by *James* L.J. in the case *In re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (2), (quoted by *Kay* L.J. in *In re Newton* (3)):— "It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with." The part of this passage material to the present case is contained in the words "or he may have abdicated such

(1) 53 L.T., 711.

(2) 10 Ch. D., 49, at p. 71.

(3) (1896) 1 Ch., 740, at p. 749.

right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children." The word "abdicate" is, perhaps, not strictly accurate, but it is commonly used in this connection, and its meaning is sufficiently apparent.

It is also settled law that in the exercise of the paternal jurisdiction of the Court of Chancery the dominant matter for the consideration of the Court is the welfare of the child. In *R.* v. *Gyngall*, *Kay* L.J., said (1):—"The term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the Court in the exercise of this jurisdiction." The Court must however act judicially, and not as if it were a private person having an unfettered authority over his child (2).

Now, since every circumstance must be taken into consideration, it follows that there may be a great difference between a case in which the child is in the custody of its natural guardian and it is sought to take it from that custody, and a case in which the natural guardian has for a long period of years relinquished the custody. It was strenuously contended for the respondent that there was no substantial difference between the two cases so far as regards the principles on which the judicial discretion of the Court is to be exercised. The distinction was, however, very clearly pointed out both by Lord *Esher* M.R., and by *Kay* L.J. in *Gyngall's Case*. Lord *Esher* said (3):—"It is argued that in the exercise of that jurisdiction the Court of Chancery was bound to give the custody of the child to the parent, unless the parent had been guilty of misconduct to the extent which would in a Common Law Court have destroyed the *primâ facie* absolute right of the parent. The fallacy of this argument appears to me to consist in mixing up the two jurisdictions, and extending to one of them considerations which appertain solely

(1) (1894) 2 Q.B., 232, at p. 248. Lord *Esher* M.R.
(2) (1893) 2 Q.B., 232, at p. 242, *per*
(3) (1893) 2 Q.B., 232, at p. 240.

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to the other." *Kay* L.J. said (1):—"The second question, which is one of importance and some difficulty, is whether the facts of this case did justify the High Court in refusing the application of the mother. I agree with what the Master of the Rolls has said to the effect that it would be a different question where the attempt is to take the child away from the custody of the father or mother, and a very strong case would have to be made out to deprive the parent of the custody of a child which had up to that time been in the custody of the parent. Here we have not to deal with that case. It is very different where, as here, the mother has at two separate times voluntarily placed the child in the institution where it now is and is seeking the assistance of the Court in removing the child from that institution against the wish of the child."

The learned Judges in the Supreme Court appear to have, in effect, accepted the argument the fallacy of which is pointed out by Lord *Esher*. It is true that they went on to consider whether the facts of the case showed that the father had abdicated his rights, but it is evident from the reasons given by *Madden* C.J. that the natural rights of the father were regarded as raising an almost irresistible presumption that, in the absence of misconduct, it was for the welfare of the child that it should be in the custody of the father. In my opinion this is an erroneous view. When the case made in opposition to a father's application to take his child out of its existing custody after a lapse of many years is that it would be contrary to the child's welfare to do so, I think that his natural right is only one of many circumstances to be taken into consideration. It throws the burden of proof on the other side, but it cannot be regarded as raising anything more than a rebuttable presumption, which may be rebutted in the same way as any other such presumption.

Applying these principles to the present case, it is clearly established to my mind upon the evidence that the happiness of the child would be greatly interfered with by the proposed change. It would be removed from a happy home, where it is loved and well cared for, to another home, where it would be a stranger, and would probably be regarded with feelings of jealousy

(1) (1893) 2 Q.B., 232, at p. 251.

and as an intruder. It was boldly argued before us that we have nothing to do with mere questions of happiness, and that there is no reported case in which effect has been given to such a consideration unless some question of money or religion or social station was also involved. Perhaps not. But to me it seems a strange notion that the Court, when inquiring what is for the welfare of a child, should be asked to disregard what is generally regarded as an essential element of human welfare, namely, happiness. If, however, the father had not by his course of conduct "abdicated" or disentitled himself to assert his natural right, I should hesitate to give effect to this consideration alone. Regarding the present case from the point of view of the child, I think that a resumption of the father's authority would, in the words of *James* L.J., be "capricious and cruel" towards the child. I have no doubt upon the evidence that he deliberately, so far as he could, abandoned the custody of the child to its grandparents in July 1900. The episode of the return of the child's mother's wedding presents at that time, concurrently with a return of the child to its grandmother, who had brought it to the father with the intention of giving it up, conclusively establishes the fact to my mind. The long delay that has since elapsed, whether satisfactorily accounted for or not from the father's point of view, has not the less weight from the child's point of view, which should also be that of the Court.

The learned Judge of first instance before whom the respondent was cross-examined did not form a favourable opinion of him.

If I were called upon to form an independent conclusion upon the evidence, I should arrive at the same conclusion that he did. But, whether I should or not, I think that no reason has been shown for disturbing it.

The appeal to the Full Court should therefore have been dismissed, and this appeal should be allowed.

BARTON J. I have had the opportunity of reading the judgments of the learned Chief Justice and my brother *O'Connor*, with which I concur.

O'CONNOR J. (read by BARTON J.). The child, the subject of this

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appeal, is now over 9 years of age. Her mother died when the child was five months old. A few days afterwards with her father's consent, the appellants, her late mother's parents, took her to their home, and have since brought her up in their household. About 5 years ago, with the appellants' consent, she stayed 3 weeks on a visit to her father's house. With that exception she has not been there since she went to live with her grandparents over 8½ years ago. Her father, the respondent, now claims that she should be restored to his custody. The grandparents resist the claim on two grounds; first, that it is not in the interest of the child nor for her welfare that she should be removed from her present surroundings, custody and control and handed over to her father; secondly, that on the death of her mother the child, being then about five months old, was handed over by the father to their care and custody, and that after his re-marriage in November 1889 he had wholly abandoned her and left her wholly in their care and custody.

The evidence is in many respects conflicting as to the circumstances under which the child has been allowed by her father for so many years to remain with the grandparents, and as to the incidents upon which the appellants rely in support of their answer to the application. Mr. Justice *Hodges*, who had the advantage of seeing the parties and of hearing the cross-examination of the respondent, has, in his finding, taken the appellants' version to be true. In my view the evidence amply supports that conclusion, and I entirely adopt His Honor's findings on the facts. There is no need to repeat or to quote them. The effect of them, so far as is material to this inquiry upon which the case turns, is this. When the father had been five months married to his second wife and all reason for the child remaining with her grandparents was at an end, she was returned to him by the grandparents at his request with the understanding on the part of all parties that she was thenceforth to be brought up by them. His second wife was present with him. They kept the child for a few hours and then the father returned her under circumstances which indicated plainly to the grandparents his desire to abandon any claim to the custody of the child from that time out, and his desire that she should be brought up entirely by her grandparents.

In confirmation of that abandonment, her mother's wedding presents were shortly afterwards handed over to the grandparents in trust for the child. Two years afterwards she went for her first and only visit to her father's house since she had been taken from it as an infant. She was to have remained a month. In three weeks he brought her back with a clear intimation to the grandparents that her presence in his house was a cause of jealousy, and that he saw that the two families in the one house could not agree. From that time the child has remained a member of the grandparents' household where she has apparently been happy and well cared for. Before discussing the principles upon which the Court should exercise jurisdiction in cases of this kind it is important to note that the application here is not to take the child out of the father's possession or custody. That is a feature of the case to which due weight must be given. Lord *Esher* M.R., in *R.* v. *Gyngall* (1), says:—"Again, it is not a case of attempting to take away a child from its mother; it is a question whether a child who has been away from her mother for a long period shall be forced to go back to her. If a child is living with its parents it may be a very serious dislocation of an existing tie to remove the child from the custody of the parent."

In the same case, *Kay* L.J. (2) says:—"I agree with what the Master of the Rolls has said to the effect that it would be a different question where the attempt is to take the child away from the custody of the father or mother, and a very strong case would have to be made out to deprive the parent of the custody of a child which had up to that time been in the custody of the parent."

We have here to deal with a case in which the father, instead of taking back his child to his new household, as he had the opportunity of doing when she was a mere infant, and allowing the second wife to bring her up from infancy with the second family, has deliberately permitted her to grow up from infancy in her grandparents' household, to form ties of affection there, and to remain until she was old enough to feel the unhappiness of the jealousy and bitterness which her presence would cause in her stepmother's household. The present application is to inter-

(1) (1893) 2 Q.B., 232, at p. 243. (2) (1893) 2 Q.B., 232, at p. 251.

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fere with the existing conditions which the father himself has deliberately created, and to interfere in a way which the appellants allege is contrary to the child's welfare. I have carefully considered all the cases which have been cited, and I do not think it possible to obtain from any of them a clearer statement of the principles by which the Court must be guided than is to be found in the judgment of Lord *Esher* M.R. in *Gyngall's Case* (1) and in Lord Justice *James's* judgment in *In re Agar-Ellis* (2), which was afterwards adopted by *Lindley* L.J. in *In re Newton* (3) as being a correct statement of the law. Lord *Esher* M.R. in *Gyngall's Case*, after referring to the enforcement of the parent's right to the custody of his children at common law by habeas corpus, and the exercise of that jurisdiction by Chancery Judges, says (4): —" But this has nothing to do with the jurisdiction proper to the Court of Chancery, which is what we are dealing with now. How is that jurisdiction to be exercised ? The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not do what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. As *Knight Bruce* V.C. said in *Re Fynn* (5) the Court must not act as if it were a private person acting with regard to his child. It must act judicially in the exercise of its power. That its jurisdiction to interfere with the parental right is not confined, as was argued, to cases where there has been misconduct on the part of the parent seems to me clear from many cases. In the case of *In re Fynn* (5), *Knight Bruce*, V.C., said :—'Before

(1) (1893) 2 Q.B., 232.
(2) 10 Ch. D., 49.
(3) (1896) 1 Ch., 740.
(4) (1893) 2 Q.B., 232, at p. 241.
(5) 2 DeG. & S., 457.

this jurisdiction can be called into action . . . it' (*i.e.*, the Court) 'must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is *placed in such a position*, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word "essential" is too strong an expression, it is not much too strong.' That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shown that either the conduct of the parent, or the description of the person he is, or the position in which he is placed, is such as to render it not merely better, but—I will not say 'essential,' but—clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but that, where it is so shown, the Court will exercise its jurisdiction accordingly."

In re Newton (*Infants*) (1), *Kay* L.J. says:—"Now what is the law applicable in such a case? I take the law from the judgment of *James* L.J. (than whom no Judge ever placed the rights of a father higher) in the case of *In re Agar-Ellis* (2), he says:—'It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property, or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdica-

(1) (1896) 1 Ch., 740, at p. 749. (2) 10 Ch. D., 71.

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tion, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with.'"

As further illustrating what may amount to a capricious exercise of authority against the child's welfare a passage in the judgment of Lord *Esher* M.R. (then *Sir William Baliol Brett* M.R.) in *In re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (1), may well be cited:—"And so, if the father has allowed certain things to be done, and then, out of mere caprice, has counter-ordered them, so as, in the eyes of everybody, to cause an injury to the child, then the Court will not allow the capricious change of mind, although if the thing had been done originally the Court could not have interfered."

Applying now these principles to the facts before us. The father has in my opinion abdicated his parental right by a course of conduct which would make the resumption of his authority "capricious and cruel" towards the child in the sense in which the words are used by *James* L.J. There is, of course, no fault to be found with his character or with the conduct of his household, and if the child were now living there, living there unhappily, and an application to remove her from his custody were made by her grandparents, the Court would not, in my opinion, be justified in interfering. But this case is quite different. The father has deliberately placed the child in her present position and allowed her to remain there for many years under circumstances which would render the change of home now proposed a very unhappy change for her, and one therefore which affects her welfare in a serious and important respect. In my view the happiness of a child's daily life is certainly a serious and important matter in the consideration of her welfare. This change on his part, which appears to be justifiable on no consideration of the child's welfare, is, in my opinion, a capricious change of intention which the Court ought not to assist by the exercise of its jurisdiction. For these reasons I think that Mr. Justice *Hodges*' judgment is right, and the appeal against the decision of the Supreme Court must

(1) 24 Ch. D., 317, at p. 328.

be allowed. I may add that I entirely concur in the judgment of my learned brother the Chief Justice which I have had the opportunity of reading.

HIGGINS J. In my opinion, the judgment of the Full Court of Victoria ought to be affirmed. Such difference of opinion as arises in this case is owing, I think, to a confusion as to the proper form of the question to be asked in such cases. Mr. Justice *Hodges* asked himself: "Which residence would be the better for the infant on the materials before me?" The Full Court asked itself: "What proof is there that to permit the father to have his child would involve any serious injury to the child?" I think that the form of the question put by the Full Court is right. The Courts of Equity never have taken on themselves to interfere with parental rights on a mere balance of expediency. The Courts have useful functions of their own, but they certainly have never asserted that they are entitled or competent to substitute their discretion for the discretion of a father, so long as the father is not abusing his power in such a way as to do some obvious, substantial injury to the child. The Courts are not fitted to enter into the niceties of character and of temper of a child's relations, or to estimate the comparative chances of happiness with each claimant, on the strength of affidavits, even if prepared by a solicitor and settled by counsel.

The material facts of this case are few. The child was born on the 9th July 1898; the mother died on the 5th December 1898. The grandmother Goldsmith came to the house of the father, Sands, to look after the baby; but, as it got ill, Sands drove Mrs. Goldsmith and the baby to a doctor, and thence to the Goldsmiths'; where he stayed till the child got better. Nothing could be more natural than to leave a child so young where it could get a woman's tender care. Sands called frequently to see the baby, as Mrs. Goldsmith admits. On 24th November 1899 Sands married again. On the eve of the marriage he told the Goldsmiths that he would take his child home after the marriage; but, at Mrs. Goldsmith's request, he consented to wait till he got well settled. Mrs. Goldsmith promised to send the child when he was settled, but she did not do so. In March 1900 Sands asked

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Mrs. Goldsmith to give him the child; and she brought the child to a picnic, and gave her up to him. Here there is a conflict of evidence. Sands says he gave the child back because of Mrs. Goldsmith's tears. She does not deny the tears; but says that Sands said: "Mam, take her, I'll never take her from you, but rear her up to know that I am her dad." Sands alleges—and it is not denied—that on several occasions subsequently he asked for the child, but was put off for various reasons. I did think at first that the incident of sending the first wife's wedding presents to the Goldsmiths in July 1900 was significant against Sands. But it turns out, on examination of the affidavits, that the sending back of the presents did not originate with Sands. He came back to his house to find that Mrs. Goldsmith had had them packed up; and, for reasons that are easily to be understood, he raised no objections, and allowed the packages to be carried off in his waggon. He did not return the presents to his wife's people. He merely raised no protest against Mrs. Goldsmith taking them. In October 1902 he called with his wife for the child, and Mrs. Goldsmith so far relented as to allow the child to go on a promise that she should be returned in a month. Here is another conflict of evidence. Mrs. Goldsmith says that Sands brought the child back in three weeks' time, explaining that she caused jealousy in the house, and that two families would not agree in one house. Sands denies having said anything of the sort, and he swears—and it is not denied—that the child was quite happy when at his house, and showed no desire to return to her grandparents. Soon afterwards, in December 1902, Sands had to move far away into Gippsland because of the drought, and he did not return to his old district till April 1904. In February 1905 Sands wrote saying that he was coming for his child, and came on the 8th March, but the Goldsmiths were out. He met Mr. Goldsmith, who explicitly stated that his wife would not give up the child. This was the first definite refusal. A few weeks afterwards Sands tried to get the child from the State school, but two Goldsmiths got before him, and took the child to their mother. The writ of habeas was issued on the 8th May 1907; but there was correspondence between solicitors from the 18th February onwards. There is certainly nothing to show any voluntary

abandonment of his child by Sands, whatever we may think about the statements which Mrs. Goldsmith alleges and Sands denies. All that can be said is that Sands did not go to the unpleasant extreme of legal proceedings against the parents of his deceased wife. He seems to have grudgingly submitted to their wishes, for considerable periods, rather than break off peaceful relations. If there was not a continual claim in respect of the child, there was certainly no willing or continuous acquiescence on his part. *Hodges* J. refused to enforce the father's rights on the grounds—

(1) That there was a step-mother in the father's house.

(2) That the father had "practically abdicated his rights."

(3) That he "feared" that the child, now 9 years old, would be made use of in the house.

But His Honor, though he did not in giving judgment express his full reasons, has added that he thought the proceedings were taken only to spite the grandparents, because Mr. Goldsmith had compelled Sands to pay a debt. The debt was paid in 1904.

The Full Court has reversed the decision of *Hodges* J. on the ground that there does not appear to be any definite important reason, looking at the interests of the infant, why the father should not have the custody of his child. The Full Court does not say that misconduct of the father must be proved; nor does it fail to recognize the fact that in this case the application is made, not to take the child from the father, but to restore the child to the father.

It is to be noticed that *Hodges* J. does not say that he believes the Goldsmiths, and does not believe Sands. Sands was cross-examined, but not the Goldsmiths. The learned Judge relies on facts which are common ground between the parties; except that he draws the inference that the step-mother will not give the same consideration to this child as to her own children; and the inference that the father's intention is to make use of the child in the house; and the inference that the proceedings were taken to spite the grandparents. I cannot find any evidence on which to base the two latter inferences; and as for the former, it is not a sufficient ground for refusing to the father his rights. There is nothing whatever against the second wife; and there is

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no denial of the allegation that she always has been and is willing to keep the child.

The legal position seems to be reasonably clear. A father is entitled to the custody of his child, as against grandparents and all others, unless it be, for some definite, important reason, essential in the child's interests that he shall not have the custody. It must be shown that to take away the child from the grandparents, and to give her to the father, will involve some serious injury to the child. The true question for the Court in these cases is, not which course is more advisable for the child on the balance of convenience or probability, but it is this: Will the child be seriously prejudiced by the giving of effect to the father's claim?

This view of the law is clearly accepted in the case of *Reg.* v. *Gyngall* (1) on which the appellants chiefly rely. Lord *Esher* M.R. quotes with approval the words of *Knight Bruce* V.C. in *In re Fynn* (2):—"Before this jurisdiction can be called into action . . . it (*i.e.*, the Court) must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is *placed in such a position* as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong." The Master of the Rolls repeats this statement almost verbatim, as his own, substituting the words "clearly right for the welfare of the child in some very serious and important respect." In that case the girl was 15; and the Court refused to take her away *against her wish* from her comfortable surroundings at a convalescent home at Weymouth, because (1) the mother was struggling with adversity, eked out a precarious subsistence as a lady's maid or as dressmaker in various countries, and would probably have to put the child away again; (2) the child had, with the mother's acquiescence, imbibed Protestant sympathies from Protestant surroundings—and the mother, a Catholic, wanted to hand the child over to Catholics; and (3) the child

(1) (1893) 2 Q.B., 232, at p. 242. (2) 2 De G. & S., 457.

was being trained as a pupil teacher, and would shortly be able to earn her own living, and to act as she pleased. These were strong, substantial, solid grounds for the Court's refusal to disturb the girl in her habits; and yet the Court came to its conclusion after much hesitation. The case of *In re McGrath* (1) was similar in principle. The Court did not sanction the violent moral wrench which the removal from certain religious surroundings to religious surroundings of an opposite character would have entailed; and in that case the application was, not to enforce a father's legal rights to his child, but to remove a properly constituted guardian, and the Court refused to do so. *Lindley* L.J. (2) said:—"The dominant matter for the consideration of the Court is the welfare of the child." No doubt it is; and I have not heard any argument to the effect that the welfare or happiness of the child is not to be considered, and the main thing to be considered. But the Lord Justice used these words, not to show that the matter was one of mere discretion of the Court, but, in relation to the question: What "is the duty of the Court towards a penniless child under the care of a legal guardian who is able to maintain and educate the child at his own expense" (3). In *In re Goldsworthy* (4), the child was out of the father's possession, as in this case; and the Court, following *In re Fynn* (5), easily found in the facts of the case, that it was essential to the welfare of the child in some very serious and important respect to interfere with the father; for the father was so habitually drunken, and so habitually filthy in language, that the moral safety and welfare of the child were in serious danger. In *In re Curtis* (6), *Kindersley* V.C. adopts the words of *In re Fynn* (5), and repudiates the idea that he was to inquire into the comparative advantages of being with the father or with strangers. Such an inquiry, as he says, would involve the peace of multitudes of families. In *In re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (7), the Court of Appeal attempts to classify the cases in which the law refuses to a father of a ward of Court his control of his child: (1) immoral conduct rendering him unfit to perform

(1) (1893) 1 Ch., 143.
(2) (1893) 1 Ch., 143, at p. 148.
(3) (1893) 1 Ch., 143, at p. 147.
(4) 2 Q.B.D., 75.
(5) 2 DeG. & S., 457.
(6) 28 L.J. Ch., 458.
(7) 24 Ch. D., 317, at p. 328.

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his duties to his child; (2) "if the father has allowed certain things to be done, and then, out of mere caprice, has counter-ordered them, so as, in the eyes of everybody, to cause an injury to the child, then the Court will not allow the capricious change of mind"; (3) great cruelty or pitiless spitefulness—perhaps—but only in an extreme case. "*It is not*," says *Bowen* L.J. (1), "*the benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.*" The learned Judges show clearly that those who claim adversely to the father have the burden of proving that the father's rights are being abused "to the detriment of the interests of the infant." "It is not mere disagreement with the view taken by the father of his rights and the interests of his infant that can justify the Court in interfering" (2).

A good deal has been said with regard to "abdication" on the part of the father. The word is apparently applied in this case to the almost continuous absence of the child from her father's home, since she was a baby in arms. But this is not "abdication" in the sense of the text books and cases. The leading case on the subject is *Lyons* v. *Blenkin* (3), where a grandmother, with the consent of the father, maintained infants, and provided by will for their maintenance, and enabled them to be brought up on a higher social scale than their father's means allowed, and the father was not allowed to interfere with their habits and expectations by capriciously breaking in on their happiness. Lord *Eldon* treated the grandmother as having purchased the power of educating the children as she did. Here, there has been no such purchase, no provision made by the Goldsmiths, no bargain binding the Goldsmiths, no difference of social status, no difference of religion. As for the alleged statement of Sands, in March 1900, that he would never take the child again from the grandmother, the learned Judge has not found the allegation proved or not proved. But even if it is to be treated as proved, it amounts to no more than a promise; and the father can change his mind. This

(1) 24 Ch. D., 317, at pp. 337, 338. (2) 24 Ch. D., 317, at p. 338.
(3) Jac., 245.

is clear even where the promise involves what would ordinarily be a binding agreement for value: see *Barnardo* v. *McHugh* (1). For in that case, a mother of an illegitimate child, aged 10, agreed with Dr. Barnardo to leave the child with him for 12 years, on condition that he should maintain and educate the child in his Protestant institution. The mother was a Catholic. She, after some eighteen months, demanded the child, to train him up in the Catholic faith; and she was held entitled to do so, as the change could not be shown to be "detrimental to the interests of the child" (2). In the present case the father is of unimpeached character and in comfortable circumstances. The long-continued absence of the child is fully explained, at first by her ill health and extreme infancy, and the need for a woman's care; and subsequently by the stubborn resistance of the Goldsmiths on one side, and a proper reluctance to go to extreme measures on the other side. To say that there is any caprice or cruelty towards the infant, under such circumstances, in bringing her to his own society, and the society of children of nearly her own age, is surely an abuse of language. Finally, there is no allegation in the affidavits that the child would be less happy with the father than with the grandparents; and no one has been able to point out any definite injury that would result to this child from going back to her father's home, or any material or moral or social advantages that would be lost thereby.

Appeal allowed. Order appealed from discharged. Order of Hodges J. restored.

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B. L.

(1) (1891) 1 Q.B., 194; (1891) A.C., 388. (2) (1891) A.C., 388, at pp. 399, 400.