ing the time of conveyance and until delivered to the consignee," would seem to require the feeding and watering after the stock left Texas and until delivered by the carrier at destination. This would be beyond the power of the legislature, for its law could not be effective beyond the state line. The language, "or disposed of as provided in this title," seems to limit the law to state shipments; for when we examine the provisions of title 13 of the Revised Statutes, of which said article 284 is a part, we find that article 288 of said title provides that, "should any live stock remain unclaimed for the space of forty-eight hours after its arrival at the place of its destination, the carrier may sell the same," and then proceeds to provide the manner of sale and disposition of proceeds. The "place of its destination," where the sale is provided for, must be some point in Texas, for we could not suppose the legislature would undertake to authorize and provide for the manner of sale of property at a point outside of the state. Considering the policy of our legislature, the fact that the regulation of interstate shipments is peculiarly within the province of congressional legislation, and that congress did make full and apparently complete regulations on the subject, the fact that there was no apparent demand for state regulation of interstate shipments, and that there was a demand for such regulation of shipments entirely within the state, and that after congress acted the state legislature enacted said law, which on its face bears strong evidence of a purpose to apply its provisions only to shipments entirely within the state, we feel that it would be doing violence to the intention of the legislature to extend by construction the provisions of said article 284 to the interstate shipment in question, and thereby bring it into possible conflict with the acts of congress. We are of opinion that said article 284 has no application to the shipment in this case, and that plaintiffs have no cause of action to recover a penalty against defendant. The judgment is affirmed in so far as is was against plaintiffs on their claim for damages, and is reversed in so far as plaintiffs recovered penalty against defendant, and the cause seeking to recover the penalty is dismissed.

(87 Tex. 248)

LEGATE v LEGATE.

(Supreme Court of Texas. Oct. 29, 1894.)

HABEAS CORPUS PROCEEDINGS—SUIT FOR CUSTODY OF CHILD—JURISDICTION—COURT OF CIVIL APPEALS—DISTRICT COURT.

1. Const. 1876, art. 5, § 8, giving district courts power to issue writs of "habeas corpus in felony cases, mandamus, injunction, certiorari and all other writs necessary to enforce their jurisdiction," as amended by striking out the words "in felony cases," confers jurisdiction to issue the writ of habeas corpus, at the instance of parents, to determine their right to the custody of their minor child, which they had previously relinquished to another.

2. A proceeding by habeas corpus to determine a parent's right to the custody of her minor child is a civil action, of which the court of civil appeals has jurisdiction.

3. Where parents voluntarily relinquished the right to the custody of their child to others, who thereafter formally adopted him, and both its parents and its foster parents are fully capable of providing for it, the court will not, on habeas corpus, return it to its parents, unless it appears that the change of custody would benefit the child.

Certified questions from court of civil appeals of Fifth supreme judicial district.

Habeas corpus by Hattie Legate, by her next friend, against R. S. Legate, for the custody of plaintiff's minor child. Judgment for defendant, and plaintiff appealed to the court of civil appeals, which certified certain questions to the supreme court.

H. P. Teague, for appellant. Decker & Harris, for appellee.

DENMAN, J. In this cause the court of civil appeals, Fifth supreme judicial district, has certified to this court for decision the following questions, to wit: (1) "Where the father and mother have voluntarily relinquished the custody of their infant daughter to another, and desire to resume the custody of the child, has the district court, under our amended constitution, upon the application of the father, as next friend of the child, jurisdiction to issue the writ of habeas corpus, and to determine in that proceeding to whom the custody of the child rightfully belongs?" (2) "Is such proceeding by habeas corpus a civil case, within the meaning of the constitution and statute conferring jurisdiction upon this court, of which this court can take jurisdiction on appeal?" (3) "Where the father and mother have, by written agreement, fully and finally relinquished their right to the custody of their infant daughter, three months old, in favor of another, at a time when the mother was unable to give proper attention to the child, on account of illness from which she was expected to die, and the child has been formally adopted by the person to whom such custody was given, and where, on habeas corpus trial, it is shown that the person having custody of the child is in every respect qualified to care for the child and provide for it, and it is also shown that the father and mother are also qualified in every way to care for and raise the child, should the child, after it had been cared for tenderly and lovingly for nearly two years by its foster parents, be taken from their custody, and given over to the custody of the natural father and mother?"

The constitution of 1876, art. 5, § 8, declared that the district "courts and the judges thereof shall have power to issue writs of habeas corpus in felony cases, mandamus, injunction, certiorari and all other writs necessary to enforce their ju-

risdiction." This clause expressly conferred and impliedly limited the jurisdiction of the district court, in the issuance of original writs of habeas corpus, to felony cases, such limitation resulting from the use of the words "in felony cases." Said section of the constitution, as amended and now in force, uses the exact language above quoted, with the exception of the words "in felony cases," which are omitted. This omission evidences a purpose of conferring upon the district court jurisdiction to issue original writs of habeas corpus in all cases where such writs are proper remedies under the established rules of law, whether such cases be of a civil or criminal nature. The writ of habeas corpus has long been resorted to as the proper proceeding in order to determine whether a minor is unlawfully restrained of his liberty; and when, by means of such writ, a minor of such tender years as to be lacking in discretion has been brought before the court, it has not only inquired into and relieved against the unlawful restraint, if any, but has, in addition, or perhaps as a necessary incident, determined to whom the custody of the minor rightfully belonged. We therefore answer in the affirmative both propositions involved in the first question above.

Under the present constitution and laws, appeals from the district court lie, in civil cases, to the court of civil appeals, and in criminal cases to the court of criminal appeals. It is therefore important, in case of appeal from a judgment of a district court in a habeas corpus proceeding, to determine whether the case be of a criminal or civil nature, in order to make the appeal returnable to the proper court. The purpose of the writ of habeas corpus is to inquire into and remove any unlawful restraint upon the liberty of a person. If, in this proceeding, it appears that such person is restrained by reason of his supposed violation of some criminal law or quasi criminal law, as an offense against the person, or contempt of court, then the proceeding must be classed as a criminal case, although upon the whole case the court should be of opinion that the act for which such person is detained does not constitute a violation of such law, or that the evidence is totally insufficient to establish the act, or that the supposed law does not exist, or is void; but, if such person is not restrained by reason of some supposed violation of law, then the proceeding must be classed as a civil case. It is the cause of restraint which determines whether the proceeding to remove the restraint be a criminal or a civil case. It results from the above that we must answer in the affirmative the second question of law above propounded.

The law recognizes the parent as the natural guardian of, and entitled to the custody of, his minor child, so long as he discharges the obligation imposed upon him by social and civil law, of protecting and maintaining his offspring. It does not, however, recognize in him any property interest in his child, but merely accords to him the benefits resulting from the child's services during minority, and such probable benefits as may result to him thereafter, in return for the tender care, the anxious solicitude, and the physical, mental, and moral training bestowed by the parent, as well as the pecuniary and social benefits derived by the child from the parent. The state, as the protector and promoter of the peace and prosperity of organized society, is interested in the proper education and maintenance of the child, to the end that it may become a useful instead of a vicious citizen; and while, as a general rule, it recognizes the fact that the interest of the child and of society is best promoted by leaving its education and maintenance during minority to the promptings of paternal affection, untrammeled by the surveillance of government, still it has the right, in proper cases, to deprive the parent of the custody of his child, when demanded by the interests of the child and society. The one most vitally interested, however, in its custody, during the formative period of its character, is the one whose present and future happiness and tendencies towards good or evil will be most affected by its early environments, and its physical, mental, and moral training,—the child itself. The right of the parent or the state to surround the child with proper influences is of a governmental nature, while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived. Ordinarily, the law presumes that the best interest of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another. Where, however, a parent, by writing or otherwise, has voluntarily transferred and delivered his minor child into the custody and under the control of another, as in the case at bar, and then seeks to recover possession of the child by writ of habeas corpus, such parent is invoking the exercise of the equitable discretion of the court to disrupt private domestic relations which he has voluntarily brought about, and the court will not grant the relief unless, upon a hearing of all the facts, it is of opinion that the best interest of the child would be promoted thereby. It is sometimes said that such a voluntary transfer is "void," or that it is "contrary to public policy"; but the cases using such language show that it is not used in an absolute sense, but in the sense that such transfer is no impediment to the action of the court in determining what is best for the interest of the child. The law does not

prohibit such a transfer, but, on the contrary, allows the child to reap the benefit thereof when it is to its interest so to do. The attempted transfer is not a contract, and cannot be enforced as such, because neither the child nor its custody was a subject-matter of contract. The fact that in pursuance of this attempted contract the parents delivered the child to appellee, and appellee received the same for a lawful purpose, new domestic relations thereby being formed for the child, renders the possession by appellee of the child prima facie lawful. The parents, on the one hand, offer to take back their child to the family circle, from whence they voluntarily allowed it to be taken nearly two years since, at the tender age of three months; and, on the other hand, its foster parents insist upon its remaining, with all the privileges of an adopted child, in the home where it has been tenderly and lovingly cared for through the critical period of infancy. Two homes are thus offered the child, who is in no wise responsible for this unfortunate controversy, and has not sufficient discretion to select. We hold, as a matter of law, that it is entitled to the benefit of that home and environments which will probably best promote the interest of the infant. The question as to whose custody will be most beneficial to the infant is one of fact, of which this court has no jurisdiction, but which is to be determined in the first instance by the district court, upon hearing all the evidence tending to shed any light upon these two homes, and the people inhabiting them, including their entire connection with, affection for, and present and future ability to care and provide for this little girl, in order that the court may be enabled to determine, upon the whole case, the difficult question of the fact above stated. Since the third question above propounded by the court of civil appeals does not find or state the question of fact as to whose custody would be to the best interest of the infant, under all the evidence, we cannot answer the question either in the affirmative or in the negative. The following authorities discuss the rules applicable to cases of this nature: Wood, Mand. (2d Ed., 1891) pp. 134, 135, and cases cited; Church, Hab. Corp. (1884) c. 31, p. 57 et seq.; Byrne v. Love, 14 Tex. 81; Cook v. Bybee, 24 Tex. 278; Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008; Washaw v. Gimble (Ark., 1888) 7 S. W. 389; Mercein v. People, 35 Am. Dec. 664; State v. Smith, 20 Am. Dec. 329; State v. Baird, 18 N. J. Eq. 194; Weir v. Marley (Mo. Sup., 1890) 12 S. W. 798; Chapsky v. Wood, 40 Am. Rep. 321; Moore v. Christian, 31 Am. Rep. 376; Kerwin v. Wright (1877) 59 Ind. 369; In re McDowle (1811) 8 Johns. 253; In re Scarritt (1882) 76 Mo. 565.

BROWN, J., not sitting.

(87 Tex. 303)

INTERNATIONAL & G. N. R. CO. et al. v. NEFF et al. (No. 198).

(Supreme Court of Texas. Nov. 19, 1894.)

ACTION AGAINST RAILROAD COMPANY — ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. In an action against a railroad company for wrongful death, where the evidence raised the question of contributory negligence on deceased's part, a charge defining deceased's duty as to exercising care, but not stating what effect his failure to observe such duty would have on plaintiff's rights, was defective, and did not supply the place of an instruction fairly presenting the question of contributory negligence and its effects.

2. On an issue as to the negligence of one killed at defendant's railroad crossing, it was proper to refuse a charge that it was the duty of deceased to "look and listen for engines and trains before crossing the track."

3. Where one attempting to drive across a railroad crossing was struck by an engine, of the approach of which no warning was given, and which he could not see until he was on the track, the railroad company is not relieved from liability by the fact that, in trying to escape, he rashly jumped from the wagon, by remaining in which he would have escaped uninjured.

Error from court of civil appeals of Fourth supreme judicial district.

Action by Sallie Neff and others against the International & Great Northern Railroad Company and T. M. Campbell for damages. A judgment for plaintiffs was affirmed by the court of civil appeals (26 S. W. 784), and defendants bring error. Reversed.

John M. Duncan and Barnard & McGown, for plaintiffs in error. Wright & Summerlin, for defendants in error.

BROWN, J. In the city of San Antonio the railroad of the plaintiff in error crosses West Commerce street at right angles, the line of the railroad running north and south at that point. There were a number of tracks at this point, and between two of them there was erected, near the crossing of the street, on the north side of it, a switchman's house, and some ties piled, so that, by these obstructions, one who approached the main track from the west could not see an approaching engine and tender, until upon, or nearly upon, the track. David Neff and Louis Sein were traveling east upon Commerce street in a one-horse wagon, and when arrived near the crossing, seeing a freight train coming down the track, they halted for it to cross. An engine and tender, with the tender in front, was following the freight train at a distance of about 30 feet. No bell was rung or whistle blown upon the engine, nor any signal given of its approach; and, it being hidden from the view of the men in the wagon, they were not apprised of its approach, and, immediately after the freight train passed, they started to cross the track. Just about the time they got upon the track, they discovered the engine and tender coming down upon them, and so near that they became alarmed, and jumped from the wagon in the rear. From some cause they