1961 *Present :* **Sansoni, J.**

A. D. WERAGODA, Petitioner, *and* R. WERAGODA and another, Respondents

S. C. 320/60—In the matter of an Application for a writ of Habeas Corpus to produce the body of Master Veraj Sharm Weragoda

Habeas corpus—*Custody of infant—Rights of mother as against father—Courts Ordinance s. 45 (a) (b)—Effect of words " the body of any person to be dealt with according to law ".*

In an application for a writ of *habeas corpus* made by a mother for the custody of her 9½ year old son who was, at the time of the application, in the custody of his father—

Held, (i) that the mere fact that, at the time of the application, the boy was in the custody of his natural guardian was not a bar to the application. In such a case, section 45 (*a*) of the Courts Ordinance is applicable.

(ii) that, in a case like the present one, " the Court will decide who is to have the custody of the child after taking into account all the factors affecting the case and after giving due effect to all presumptions and counter-presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the Court is there to safeguard. The rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for a petitioner who seeks to displace those rights must make out his or her case ".

[1] *(1948) 50 N. L. R. 25 at 37.*

APPLICATION for a writ of *habeas corpus.*

Colvin R. de Silva, with *H. D. Tambiah* and *K. Palakidnar*, for the Petitioner.

H. W. Jayewardene, Q.C., with *R. de Silva* and *L. C. Seneviratne*, for the 1st Respondent.

Cur. adv. vult.

March 29, 1961. SANSONI, J.—

This is a petition by a mother in which she asks for the custody of her son who is now 9½ years old. The boy is now with his father, the 1st respondent. The parties were married on 19th October, 1951, and the child was born on 11th September, 1952. The Magistrate who was asked to inquire into the petition and report to this Court has recommended that the petitioner should be given the custody of the child.

Mr. Jayewardene, who appeared for the 1st respondent, took the objection that no writ of habeas corpus lies in this case because the father is entitled to the custody of his child, and the child being therefore in lawful custody the writ cannot be issued, since the writ only lies where a person is " illegally or improperly detained in public or private custody." Those are words taken from section 45 (*b*) of the Courts Ordinance (Cap. 6); but section 45(*a*) is in much wider terms, and enables the writ to be issued to bring up " the body of any person to be dealt with according to law". Since the matter was argued at some length, I think I ought to deal with this question first.

It was decided in *Gooneratnayaka v. Clayton* [1] that the principles upon which such a writ should be issued should be the same as those which regulate the issue of the writ in England. Upon looking into the history of the matter in England, I find that prior to the Judicature Act of 1873 the writ was issued either by the Court of King's Bench, where the common law was applied, or by the Court of Chancery, which exercised equity jurisdiction. Speaking of the latter jurisdiction, Lord Cottenham L.C. in the case of *In re Spence* [2] said: "Courts of law interfere by a habeas for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal."

After the Judicature Act, proceedings were instituted in the Queen's Bench Division, and the Judges exercised the paternal jurisdiction which was vested in the Court of Chancery as being the guardian of all infants. The Court had the power in that capacity to supersede the natural guardianship of a parent. In *R. v. Gyngall* [3] Lord Esher M.R. explaining

[1] *(1929) 31 N. L. R. 132.*
[2] *2 Phillips 247.*
[3] *(1893) 2 Q. B. 232.*

how the Chancery jurisdiction was exercised said: "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 be doing 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 a child which a wise, affectionate, and careful parent would not do." The jurisdiction, however, must be exercised judicially and with caution before the parental right is interfered with, though its exercise "is not confined to cases where there has been misconduct on the part of the parent." He cited the case of *In re Fynn*[1], where Knight Bruce V.C. said: "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 right 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."

In the case of *In re Agar Ellis*[2], Brett M.R. after pointing out that the question before the Court upon habeas corpus is whether the person is in illegal custody without that person's consent, said that up to a certain age children cannot consent or withhold consent and the Court does not inquire in such cases whether the child consents to be where it is. (The age is now accepted as 14 in the case of boys and 16 in the case of girls.) The principles upon which the Court acts were also stated by Coleridge J. in *R. v. Greenhill*[3] where in dealing with a case such as the present one he said: "Where the person is too young to have a choice we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is no restraint exists; and where the child is in the hands of a third person that presumption is in favour of the father." The learned Judge, however, added "but, although the first presumption is that the right custody according to law is also the free custody, yet, if it be shown that cruelty or corruption is to be apprehended from the father a counter presumption arises." It has been pointed out over and over again that the writ has always been used with respect to the custody of infants in order to decide whether the person in whose custody they are should continue to have them. "In such cases it is not a question of liberty but of nurture, control, and education"—per Lord Esher. M.R. in *R. v. Barnado, Jones's case*[4].

[1] *2 D. G. & S. 457.*
[2] *(1883)24 Ch. D. 317.*
[3] *4 A. & E. 624.*
[4] *(1891) 1 Q. B. 194.*

I do not think it necessary to go into this aspect of the matter any further. The authorities I have cited appear to me to answer sufficiently the objection taken by Mr. Jayewardene and I think that section 45 (*a*) covers those cases where the writ is used with respect to the custody of infants. In those cases the writ is issued not in order to enquire whether the infant's liberty is restrained but in order that the Supreme Court may decide what order should be made, after inquiry, as to the child's custody, in the interests of the child. This question is quite distinct from the question as to who should be appointed a curator of the property and a guardian of the person of a minor, under Chap. 40 of the Civil Procedure Code, and the two should not be confused.

The next matter I have to consider is whether the petitioner's application should be granted or not. In *McKee v. McKee*[1] Lord Simonds, delivering the judgment of the Privy Council, said that in questions of custody "the welfare and happiness of the infant is the paramount consideration. . . . to this paramount consideration all others yield." It is true that he was there dealing with a case from Canada, but he said that the same principle applied in England. I have no doubt that this is the principle that should guide me in the present application also. Although in England the principle applies because, I suppose, the Court is the guardian of all infants, in Roman-Dutch Law the State is regarded as the upper guardian of all minors. I do not think there is any material difference in the two concepts. In deciding what is best for the child, the Court will have regard to the rights of either parent, their character, and any other factors which the Court thinks ought to be weighed.

Much stress was laid by Mr. Jayewardene on the Roman-Dutch Law principle enunciated in *Calitz v. Calitz*[2] that the rights of the father are superior to those of the mother in regard to the custody of the children of the marriage, and where no divorce or separation has been granted, the Court has no jurisdiction to deprive the father of his custody "except under the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such for example as danger to the child's life, health or morals." I think that danger to the child's life, health or morals is only an example of the special grounds which would justify the interference of the Court. As I see it, the Court will decide who is to have the custody of the child after taking into account all the factors affecting the case and after giving due effect to all presumptions and counter-presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the Court is there to safeguard. The rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for a petitioner who seeks to displace those rights must make out his or her case.

[1] *(1951) A. C. 352.*

[2] *(1939) A. D. 56.*

I have before me a careful and well-considered report made by the learned Magistrate before whom both parents gave evidence. He has formed a most unfavourable impression of the character of the 1st respondent, and has disbelieved him wherever his evidence came into conflict with that of the petitioner. According to his findings, the 1st respondent left the matrimonial home on 26th February, 1960 and returned to it on 1st April 1960, only to leave it again on the following day. On 8th April, the day before the Easter holidays were to begin, he went to the school where the child was and removed the child, after giving the Headmaster a false excuse. There is no doubt that he acted callously, without any regard for his wife's feelings; and it is probably true that he is using the child to bring pressure on his wife to make her more submissive to him, so that she and her mother might provide him with more money, as they had been doing all along.

The 1st respondent has also been guilty of making entirely unfounded suggestions of immoral conduct against the petitioner in respect of two men. There is a possibility that the child's mind might be poisoned and turned against his mother if he were to remain with his father. The 1st respondent's departure from the matrimonial home appears to be unjustifiable, while the petitioner has behaved quite properly throughout. The learned Magistrate also found that the 1st respondent assaulted his wife when his demands for money were not met.

I do not think it is necessary to discuss the evidence at any length because I am in agreement with the view which the learned Magistrate formed of the parties, and his opinion as to what would be in the best interests of the child. I would not like it to be thought that the mother is being preferred because she is wealthier than the father or can give the child a more comfortable home; such a consideration would not disable him in any way from having the child's custody. But he does seem to be lacking in a due sense of responsibility when he allows himself to be arrested for non-payment of a sum of Rs. 169/- due as income tax. The child, if left where he is, would be brought up by his father and two or three servants, and I think it is better in all the circumstances that his mother should have the custody. I direct, however, that the father should have the right to visit the child once a week at the petitioner's residence, or any other place to be agreed upon between the parties, or to be decided on by the Magistrate if the parties cannot agree.

Application allowed.