1929.

Present : Fisher C.J., and Drieberg and Akbar JJ.

In the Matter of an Application for a Writ of *Habeas Corpus*.

GOONERATNAYAKA *v.* CLAYTON.

Habeas corpus—*Custody of girl over sixteen years—Right of parents—Wishes of girl—Age of discretion.*

Where a father seeks to resume control of the custody of a girl of over sixteen years by a writ of *habeas corpus*.

Held, that it was competent to the Court to take into consideration the wishes of the girl, in determining the question of custody.

THIS was an application for a writ of *habeas corpus* by the petitioners, the parents of the second respondent, for the production of the body of their daughter, the second respondent, who was placed by the petitioners in the custody of the first respondent for education at a boarding school, of which the first respondent was the principal.

The second respondent was seventeen years of age. The question referred to a Bench of three Judges was whether the Court should take into consideration the wishes of the second respondent in determining the question of custody.

F. de Zoysa, K.C. (with *W. M. de Silva*), in support.—Under the Roman-Dutch law parental power only ceases when the child attains full age (Lee's Roman-Dutch law, p. 33).

Full age is now fixed by law at twenty-one. Until the child attains full age it is under the natural guardian, the father or the mother (*17 Hals.* 109). A father, whose infant child is not in his custody, and a mother, when she is entitled to the custody, may, in the absence of good reason to the contrary, obtain the custody of the child by a writ of *habeas corpus*.

If the child be not of age to exercise discretion the Court must make an order for its being placed in proper custody, and that custody is undoubtedly that of the father. *In the matter of Saithri*.[1]

Garvin, for respondent.—When the minor has attained the age of discretion her wishes must be consulted (17 Hals. 106, 113 (*Agar Ellis v. Lascelles*)[2]). As to what is the age of discretion *vide* 1 P. and D. 221 (*Mallison v. Mallison*). The power of choice depends upon age (*Queen v. Jayakody* [3]). The English law should be applied.

The writ of *habeas corpus* is not known to the Roman-Dutch law. It was extended to Ceylon by the Charter of 1801 and 1833. The basis of the application is that the custody is illegal. If a person, having the capacity to make a choice has done so, the Courts will not interfere.

[1] *16 Bombay 311.*

[2] *(1883) L. R. 24, Ch. D 317.*

[3] *9 S. C. C. 148.*

September 27, 1929. FISHER C.J.—

In this case the petitioners, who are the parents of the second respondent, prayed this Court " to issue a writ in the nature of *habeas corpus* " for the production of their daughter who " was placed by the petitioners in the custody of the first respondent for her education at Clodagh Mount Boarding School, Matale, of which the first respondent is the principal," and the question referred to us for decision is whether the wishes of the second respondent who is seventeen years of age can be taken into consideration in deciding whether a mandate in the nature of a writ of *habeas corpus* shall issue or not.

The first point argued before us was whether the Roman-Dutch law or English law is applicable. Jurisdiction to issue " mandates in the nature of writs of *habeas corpus* " originally conferred on the Supreme Court by section 49 of the Charter of 1833 is now vested in the Supreme Court by section 49 of the Courts Ordinance, 1889, which enacts that " The Supreme Court or any Judge thereof . . . . . shall be and is hereby authorized to grant and issue mandates in the nature of writs of *habeas corpus* to bring up before such Court or Judge—

" (*a*) The body of any person to be dealt with according to law;

" (*b*) The body of any person illegally or improperly detained in public or private custody;

and to discharge or remand any person so brought up, or otherwise deal with such person according to law. . . . . "

There is a proviso that the Court or Judge may require the person in question to be brought up in the nearest District Court, Court of Requests, or Police Court in order that the Judge, Commissioner, or Magistrate of the Court may " inquire into and report upon the cause of the alleged imprisonment or detention to such Court or Judge."

It is clear that the mandate referred to is equivalent to a writ of *habeas corpus*, and I think that the principles which regulate the issue of such a mandate should be the same as those which regulate the issue of a writ of *habeas corpus* in England. We should therefore, in my opinion, apply English law in considering the question which has been submitted to us. Dealing with the present case on that footing we have to consider whether the person whose custody is in question is illegally or improperly detained, that is to say, is there detention involving constraint in the sense that she is in the custody of the first respondent against her will and consent?

According to decisions which have been accepted and acted upon as authoritative for many years the age of consent in such cases is not the same as the age of legal capacity or the age at which an infant in the eyes of the law becomes entirely independent of parental control, but in the case of girls sixteen is the age when they reach an

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age of discretion at which their choice and wishes can be taken into consideration. In the case of *re Agar Ellis* [1] Brett M.R. says:—"It is the universal law of England that if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus* and thereupon the person under whose supposed control, or in whose custody the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages—as to boys the age of fourteen and as to girls the age of sixteen—up to which, as a general rule, the Court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of fourteen in the case of a boy and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away. I say if it is the father who applies for the *habeas corpus* the *habeas corpus* is not granted. That seems to me to have been the rule, whether the *habeas corpus* was applied for to a Judge of the Court of Equity or to a Judge of a Court of Common law. . . . . ."; and in the case of *R. v. Howes* [2] Cockburn C.J. says:—"Now the cases which have been decided on this subject show that although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a *habeas corpus* to hand a child which is below that age over to its father provided it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests." The English law on the subject is summarized in Halsbury's Laws of England, Vol. XVII., pp. 109, 110, as follows:—"Where an infant who has passed tender years and is of a reasonable age, is out of a parent's custody and desires to remain out of it, he will not be compelled to return to it, if his welfare does not so require," and in Eversley's "The Law of Domestic Relations," 3rd Ed., at page 517, it is stated that "where the children are not in the custody of their father or guardian, and he seeks to resume his control by *habeas corpus* in cases where they are arrived at the age of discretion, and are capable of exercising a choice they will be permitted to elect whether or not to return to their father's or guardian's control, but their choice must be a wise one and for their own interests,"

[1] *(1883) L. R. 24 Ch. D. at page 326.*

[2] *(1800) 3 E. & E. 336.*

and an instance is given indicating that where the surroundings in which a girl was living were undesirable her consent to remain there would not be attended to.

The principles regulating the issue of a writ of *habeas corpus* in cases such as the present case are therefore clear, and it is also clear that they are applied irrespective of the strict legal rights of a father with regard to the custody of his child. Applying these principles to the question before us, I am of opinion that the wishes of the second respondent can be taken into consideration in the inquiry which is being held. In arriving at this conclusion it would seem that we are endorsing the practice which has prevailed in this Court in similar cases for a very long period. In Thomson's Institutes of the Laws of Ceylon, Vol. I., at page 214, after stating that most of the civil cases of *habeas corpus* in Ceylon arise upon the right to the custody of children, the law is stated to be as follows:—

> "If the Court is convinced that the child is of an age and intelligence to choose for itself with whom it will live, and if that person is respectable and able to maintain the child, it will leave the choice to the child." (*Re Mastan.*[1])

And in the case of *The Queen v. Jayakodi*,[2] in which the custody of a girl under sixteen years of age was in question, Clarence A.C.J. held that inasmuch as she had not attained the age of sixteen he could not take her wishes into consideration.

The question submitted to us should therefore, in my opinion, be answered as set out above, and the costs of this reference should be dealt with by the learned Judge who is holding the inquiry.

DRIEBERG J.—

I agree with the judgment of my Lord the Chief Justice.

It was contended for the petitioner that the parties being Low-country Sinhalese and the question of the nature and extent of the petitioner's right being a matter of personal law, the Roman-Dutch law was applicable. It was said that the right of a father under the Roman-Dutch law to the custody of his child while a minor was absolute and that it was not open to a Court to take into consideration the wishes of the child in such a case as this, and that the Court had no option but to compel the return of the child to its father.

But it appears from the authorities available to us that Courts under the Roman-Dutch law had the same power as the Courts of England to consider and give effect to the wishes of a minor who has attained years of discretion. In the case of *Grant v. Dunbar and others*,[3] a South African case, it was held that the Court had no power derived from the interdict *de liberis exhibendis* or elsewhere

[1] *Nov. 16, 1854.*

[2] *(1890) 9 S. C. Circular 148.*

[3] *(1917) W. L. D. 17.*

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to order the production of a minor child of years of discretion who leaves its parents' home against their wishes and remains voluntarily with others unless persuaded by "artifice, seduction, or solicitation." The report is not available, but this is the note of the case in Vol. VII. of *Bisset & Smith's Digest of South African Case Law* (1917 and 1918), p. 316.

The right which a minor child has under Ordinance No. 19 of 1907 of appealing to the Court for sanction when the consent of the parents to its marriage is unreasonably withheld existed under the Roman-Dutch law (*Van der Keessel* paragraph *76*, *Lorenz's* translation).

The Courts also had the power to discharge "honest and prudent youths" from tutelage without their being obliged to obtain *venia aetatis*.

While this Court will have regard to the personal law applicable to the parties before it, it has the right, both under our Common law and the law of England applicable to writs of *habeas corpus*, of taking into consideration the wishes of a minor who has attained an age of discretion when it is sought to compel the return of the minor to his or her parent.

AKBAR J.—I agree.