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Parent and Child--Custody--Religion of Parent--Habeas Corpus (People ex rel. Blanche Sisson v. Howard Sisson, 271 N.Y. 285 (1936))

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insured. If not brought in as a party defendant, any later contest against her may be barred by the contestability period in the contract.[9]

Co-makers of a note,[10] partners as to a firm note,[11] and insured and beneficiary of a life policy,[12] have been held united in interest, while connecting carriers in interstate commerce,[13] the owner of premises and a sub-contractor,[14] and the vendor and vendee in an executory contract for the sale of a lot [15] have been held not to be united in interest in cases where, one of the parties not having been served, the Statute of Limitations was interposed as a complete bar to the action.[16]

J. K.

PARENT AND CHILD — CUSTODY — RELIGION OF PARENT — HABEAS CORPUS.—Relator is the bedridden mother of a ten-year-old child, whose custody she seeks as against the father, with whom they both reside. The mother claims that the child is taken by the father to a religious sect,[1] of which he is a member, remote from their place of residence, thereby depriving her of her legal right to joint custody, and impairing the physical and moral well being of the child. The

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[9] Equitable Life Assurance Society v. Patterson, 1 Fed. 126 (D. Mass. 1880). In Shaw v. Cock, 78 N. Y. 194 (1879), where by order amending the summons a new party defendant was brought in, the court held that the suit was only commenced as to him when thus brought in and if between the time of the commencement of the action as to the original parties, and the time when the new defendant was brought in the period of limitation had expired, a plea of the statute in bar of his liability is good.

[10] Davison v. Budlong, 40 Hun 245 (N. Y. 1886).

[11] Howell v. Dimock, 15 App. Div. 102, 44 N. Y. Supp. 271 (2d Dept. 1897).

[12] Metropolitan Life Ins. Co. v. Di Novi, 139 Misc. 1, 247 N. Y. Supp. 578 (1931) (Summons served upon beneficiary within contestability period, held to be effective service upon the incompetent insured and the beneficiary).

[13] Germini v. Southern Pacific Co., 209 App. Div. 442, 204 N. Y. Supp. 603 (1st Dept. 1924).

[14] Martens v. O'Neill, 131 App. Div. 123, 115 N. Y. Supp. 260 (2d Dept. 1909).

[15] Moore v. McLaughlin, 11 App. Div. 477, 42 N. Y. Supp. 256 (3d Dept. 1896) (Action brought against both to foreclose a mechanic's lien on a building erected by the purchaser will not be deemed to have been commenced against the purchaser by service of the summons on his co-defendant.).

[16] 1 WAIT'S NEW YORK PRACTICE (3d ed. 1930) 88: If one of the parties united in interest in an action on a promissory note "was not served in the original action, a subsequent action under section 1185 of the Civil Practice Act to charge him as a joint debtor would not be a continuation of the former action but an entirely new action, and would be barred by the statute of limitations ten years after the former judgment was obtained."

[1] The Megiddo, of Christian persuasion, whose beliefs are not contrary to law.

father claims the court has no jurisdiction since the proceeding was initiated by *habeas corpus;* and welfare of the child should be the sole consideration, irrespective of the religious views of either parent. *Held,* order of the Special Term [2] and Appellate Division [3] reversed, and the writ of *habeas corpus* dismissed on the grounds that a dispute between parents, about care of the child, when it does not involve anything immoral or harmful to the welfare of the child, is beyond the reach of the law. Proceeding by *habeas corpus* was just as proper as petition and order. *People ex rel. Blanche Sisson* v. *Howard Sisson,* 271 N. Y. 285, 2 N. E. (2d) 660 (1936).

Habeas corpus was originally limited to restraint cases.[4] This has been modified both by decisions [5] and statute,[6] making it applicable to custody of child cases, on the broad principle that the welfare of the child should be the paramount consideration.[7] Because of this

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[2] Instant case, 156 Misc. 236, 281 N. Y. Supp. 59 (1935) (Special term gave exclusive custody and control to the mother on the grounds it was not for the best interests of the child "to mature in this atmosphere counseled one way and then another, bewildered, called upon in her immaturity to determine questions beyond most adults, her pleasures and recreations circumscribed, developing not in normal ways, but quite to the contrary.").

[3] Instant case, 246 App. Div. 151, 285 N. Y. Supp. 41 (3d Dept. 1936) (special term order affirmed and modified granting joint guardianship to both parents with heavy restrictions on the father, namely—father shall not take the child from her home town without the relator's consent; nor take said infant from relator's home for more than two hours at any time, and then only after personal notice to the relator of the intended absence and purpose and place of any proposed visitation).

[4] People *ex rel.* Hubert v. Kaiser, 150 App. Div. 541, 135 N. Y. Supp. 274 (1st Dept. 1912), *aff'd,* 206 N. Y. 46, 99 N. E. 195 (1912) ("The sole purpose of a writ of habeas corpus is to relieve from unlawful imprisonment."); People *ex rel.* Klee v. Klee, 202 App. Div. 592, 195 N. Y. Supp. 778 (4th Dept. 1922); People *ex rel.* Hower v. Foote, 130 Misc. 224, 223 N. Y. Supp. 681 (1927).

[5] In case at bar, *habeas corpus* was sufficient since the rights of parties were regarded, evidence heard and proceeding determined in same way as if initiated by petition; N. Y. Foundling Hospital v. Gatti, 203 U. S. 429, 27 Sup. Ct. 53 (1906) ("In such case the question of freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint."); Matter of Standish, 233 N. Y. 689, 135 N. E. 972 (1922); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624, 40 A. L. R. 937 (1925) (the custody of children, except when adjudged as an incident to an action for divorce or separation, is to be determined in a *habeas corpus* proceeding); People ex rel. Multer v. Multer, 107 Misc. 58, 175 N. Y. Supp. 526 (1919) (the special term entertained a *habeas corpus* proceeding initiated by the husband, where he and his wife were temporarily living together); People *ex rel.* Spreckels v. De Ruyter, 150 Misc. 323, 325, 269 N. Y. Supp. 100, 103 (1934) (the concern of equity is not for the parents, but for the children).

[6] N. Y. DOM. REL. LAW § 70 gives the right to parents living apart. This, however, does not abrogate the common-law rights where the parents are living together, and the welfare of an infant is involved.

[7] Campbell v. Sewell, 159 So. 813 (Ala. 1935); see 1 SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) §§ 743, 744. *Accord:* Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892 (1913); *In re* Pryse, 85 Kan. 556, 118 Pac. 56 (1911). *Contra:* Eaton v. Eaton (N. J. Eq. 1936), N. Y. Times, Jan. 30, 1936,

underlying theory, it has been found best to change the common law [8] by statute [9] giving the parents equal rights in respect to control over and custody of their children.

The Court of Appeals, in dismissing the *habeas corpus* petition, has given the claimants a free hand to settle their own domestic difficulties in the education of their child, according to their own conscience, patience, and self-restraint. This follows the weight of authority [10] in that a parent's views, unless affecting the health or morals of the child, should not be regulated by the court. The danger is that a court may be led to adopt a principle, due to equitable consideration in some particular case, which when carried to logical application to other facts, would lead to unfortunate and unjust results.[11] It is not the province of a court to smoothe domestic difficulties where legal rights are not invaded. Such problems are ethical in nature.

The case presents no question of the father's lack of right to have joint custody of the child with his wife, since there is no evidence that he was unkind, immoral or not competent,[12] except for his religious views—which the law does not attempt to regulate unless they are contrary to positive law, or injure another in his legal rights.[13] The lower court [14] has apparently based its decision on their disagreement with appellant's religious views. This appears because of the fact that though granted joint custody, the father was, in practical effect,[15] pro-

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P. 1; 49 HARV. L. REV. 831; Lester v. Lester, 222 N. Y. 546, 118 N. E. 1065 (1917); People *ex rel.* McCanliss v. McCanliss, 255 N. Y. 456, 175 N. E. 129 (1931); People *ex rel.* Woolston v. Woolston, 135 Misc. 320, 239 N. Y. Supp. 185 (1929); People *ex rel.* Roberts v. Kidder, 137 Misc. 347, 242 N. Y. Supp. 108 (1929); People *ex rel.* Glendening v. Glendening, 159 Misc. 215 (1936); Pappas v. Pappas, 208 N. C. 220, 179 S. E. 661 (1935); Wanner v. Williams, 117 Pa. Super. 59, 177 Atl. 329 (1935); Commonwealth *ex rel.* Trott v. Wilcox, 118 Pa. Super. 363, 179 Atl. 808 (1935).

[8] People *ex rel.* Barry v. Mercein, 3 Hill 399 (N. Y. 1842); Hernandez v. Thomas, 50 Fla. 522, 39 So. 641 (1905); State *ex rel.* Weaver v. Hamans, 159 So. 31 (Fla. 1935); Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243 (1913); State v. Giroux, 19 Mont. 149, 47 Pac. 798 (1897); People v. Sinclair, 91 App. Div. 322, 86 N. Y. Supp. 539 (1st Dept. 1904); 2 STORY, EQUITY JURISPRUDENCE §§ 1341, 1342.

[9] N. Y. DOM. REL. LAW § 81: "A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." Haskell v. Haskell, 201 App. Div. 414, 194 N. Y. Supp. 28 (1st Dept. 1922), *aff'd*, 236 N. Y. 635, 142 N. E. 314 (1923).

[10] Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892 (1913); State v. Traharn, 125 La. 312, 51 So. 216 (1910); *In re* Vanderbilt, 245 App. Div. 211, 281 N. Y. Supp. 171 (1st Dept. 1935); *In re* Samuels, 245 App. Div. 902, 282 N. Y. Supp. 353 (3d Dept. 1935); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); see note 7, *supra*.

[11] Mirizio v. Mirizio, 242 N. Y. 74, 84, 150 N. E. 605, 609 (1926).

[12] See Weinberger v. Van Hessen, 260 N. Y. 294, 183 N. E. 429 (1932); People *ex rel.* Sisson v. Sisson, 246 App. Div. 151, 285 N. Y. Supp. 41 (3d Dept. 1936).

[13] Johanson v. Borders, 155 Ark. 218, 244 S. W. 30 (1922); Hernandez v. Thomas, 50 Fla. 522, 39 So. 641 (1905).

[14] See notes 2, 3, *supra*.

[15] See note 3, *supra*.

hibited from taking his child to the Megiddo center in Rochester. If this is so,[16] the court virtually would have the power to grant custody of the child to whomsoever it pleased, depending on the political, social, or religious views of the presiding justices, basing its decision on the infringement of the rights of the opposing claimant.[17]

S. S.

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR FALSE REPRESENTATIONS OF AGENT—NOTICE OF AGENT'S LIMITATIONS.—Plaintiff commenced this action for rescission of the written contract, wherein defendant corporation agreed to sell its wall texture products to the plaintiff corporation, on the ground of fraudulent misrepresentations by defendant's sales agent that Duratint had not been sold in plaintiff's distribution territory and that plaintiff would be sole distributor in the city of Buffalo. Testimony discloses that the plaintiff's officers were fully aware of defendant's agent's limitation of authority to make any representations of this sort and furthermore two clauses in the contract read that "the company" (defendant) "makes no representation regarding previous sales in distributor's territory" and "no representation or warranty of any kind shall be binding upon either the Duralith Corp. or the dealer unless it has been incorporated in this agreement." Plaintiff's contention that one cannot exempt himself from liability for fraud by inserting in his contract a shielding or blanket clause was sustained by the Court of Appeals but, *held,* the judgment in favor of the plaintiff reversed on the ground that a principal cannot be made liable for the false representations of his agent where the party dealing with the agent has specific notice that he is acting beyond the limitation of his authority. *Ernst Iron Works, Inc.* v. *Duralith Corporation,* 270 N. Y. 165, 200 N. E. 683 (1936).

A principal is not liable for loss caused to a third person by reason of his reliance upon a fraudulent representation of an agent unless the representation was authorized either expressly, impliedly, or apparently, or unless it was subsequently ratified.[1] When dealing with a special agent, known to be such, a third person is charge-

[16] The dissenting opinion of the Appellate Division of the case at bar held that the modification of the special term order gave the father exclusive control, where, as a matter of fact, its effect was just the opposite.

[17] In case at bar the prolonged religious trips were held to be a violation of the relator's rights.

[1] Smith v. Tracy, 36 N. Y. 79 (1867); Forster v. Wilhusen, 14 Misc. 520, 35 N. Y. Supp. 1083 (1895); MATHESON, LAW OF AGENCY (6th ed. 1935) 104.