H. C. J 125/49

JULIETTE COLETTE AMADO

v.

1. DIRECTOR OF THE IMMIGRANTS' CAMP, PARDESS HANNA

2. YOSEF AMADO

In the Supreme Court sitting as the High Court of Justice.
[April 16, 1950]
Before: Smoira P., Dunkelblum J., Assaf J., Cheshin J., and Agranat J.

Habeas Corpus - Order for custody of children by foreign court - Enforcement of order by High Court - Recognition of foreign judgment - Family Law - Interests of children paramount consideration.

Subject to the paramount consideration of the interests of the children concerned, where a competent foreign court has granted a right of custody to husband or wife, the High Court will issue an order of habeas corpus to enforce that right.

Radoyevitch v. Radoyevitch (1930 *Sess. Cas.* 619) *referred to.*

A Civil Court in Paris granted a decree of divorce to the petitioner and second respondent (being respectively the wife and the husband), who were French nationals domiciled in France, and declared that the petitioner was entitled to the custody of the children, a girl aged seven years and a boy aged four and a half years at the time of the application, but ordered that the second respondent have access to them at stated times. On one of these occasions the second respondent smuggled the children out of France and brought them to Israel, where they were living with him in an immigrants' camp. The Paris Court reaffirmed the petitioner's right to custody and annulled the second respondent's right of access. The petitioner applied for an order in the nature of habeas corpus against the second respondent. It was her intention to take the children back to France; the second respondent declared that he would bring up and educate the children in Israel.

Held: making absolute an order to deliver the children to the petitioner,

1. If the actual right to custody was the subject of a *bona fide* dispute, petitioner's claim would be a matter of personal status which must be brought before the District Court or the Rabbinical Court. But here the question of custody had already been determined, and since the application was to enforce a right already judically recognised, the High Court had jurisdiction to grant an order in the nature of habeas corpus.

2. A foreign judgment given by a competent court which determined the right to custody of the children of a marriage as a matter incidental to a decree of divorce, is a judgment in rem binding on all the world, and will be recognized in Israel, subject to the question of the welfare of the children.

3. A foreign judgment validly pronounced is presumed to be free of error both as to fact and as to law, and it is immaterial, from the point of view of its recognition in Israel, that it may be subject to appeal.

4. The fact that the parties, who bad been married in Paris both by civil process and before a Rabbi, had not been divorced in accordance with Rabbinical Law, might render invalid a second marriage contracted by either of them, but it could not affect the question of custody of the children.

5. In the circumstances of this case, and for the reasons set out in the several judgments of the court, the interests of the children were not such as would require the court to decline to give effect to the foreign judgment.

Palestine cases referred to :

(1) *H.C.* 24/40; *Morris Louis Silverman (Caspi) v. Pearl Buxenbaum (Harubi), and others;* (1940), 1 *S.C.J.* 95.

(2) *H.C.* 118/43; *Joseph Flint v. E. Jones and another;* (1944), 1 *A.L..R. 4.*

(3) *H.C.* 45/43; *Levana Bar-Emun v. Moshe Bar-Emun;* (1944), 1 *A.L.R.* 34.

(4) *C.A.* 85/40; *Jamil Abyad v. Isaac Ancona and another;* (1944), 1 *A.L.R.* 34.

English cases referred to:

(5) *The Queen v. Maria Clarke;* (1857), 119 E.R. 1217.

(6) *Antoniye M. Radoyevitch v. Florence M. Webb of Radoyevitch;* 1930 *S.C.* 619.

(7) *Salvesen of Von Lorang v. Administraton of Austrian Pro*perty; (1927) *A.C.* 641.

(8) *Stuart v. Moore;* (1861) 9 *H. L. Cas.* 439.

American cases referred to:

(9) *Halvey v. Halvey; 67 S. Ct.* 903.

Stoyanovsky for the petitioner.

Michaeli for the second respondent.

Glucksmann, Deputy State Attorney, for the Attorney-General.

SMOIRA P. The petitioner, the mother of two children, applied to this court for an order in the nature of habeas corpus against their father, the respondent, directing him to deliver their two children into her care. She also asked for an interim order pending a final order. Both the father and the mother are French nationals.

An affidavit submitted to us by the petitioner in support of her application contained the following allegations.

The petitioner is the mother of the two infants, Jules Regine Amado, born on March 28, 1943, and Gilles Henri Amado, born on July 16, 1945. On June 2, 1949, the Civil Court in Paris granted a decree of divorce in favour of the petitioner against her husband, Yosef Amado. According to the decree, the custody of the children was granted to the petitioner, and their father was ordered to pay the petitioner the sum of 8,000 Francs a month for the maintenance of each of the children. The father was permitted to see the children twice a month and to have them with him during the second half of the school vacations. In accordance therewith, the petitioner handed the children over to the father on September 1, 1949, and the father was to have returned them to the mother on October 2; but the father failed to do so. The father, moreover, did not pay the mother the children's maintenance from June 1949 onwards, and on October 98, 1949, on a charge of "neglect of family" he was sentenced *in absentia* to four month's imprisonment, and ordered to pay the mother 20,000 Francs and the costs of the case. Since the mother could not find the children, she applied to the court in Paris. and on December 12, 1949, obtained a further judgment putting an end to the father's right to see the children or to have them with him. The petitioner attached to her petition a certified copy of that decision, which may be translated as follows:

"Session of the Court (référé) of December 12, 1949, before the Deputy President and his assistant, the Registrar, undersigned, hearing the case in the absence of the President.

"Whereas according to the judgment given in the presence of the parties by Tribunal No. 4 of this Court on June 2, 1949, a decree of divorce was made in favour of the wife,

"And whereas that judgment granted to Mme. Amado the custody of the two children, Jules Régine, born on March 28, 1948, and Gilles Henri, born on July 16, 1945, and ordered the terms of that judgment to be carried out for the time being (exécution provisoire),

"And whereas it has been proved that Amado was sentenced by Tribunal No. 14 of this Court to four months' imprisonment for neglect of family,

"And whereas, on the other hand, it has been proved that Amado, into whose care the children were committed during the second half of the long vacation, has disappeared with them and has not returned to his place of abode,

"And whereas in view of the gravity of that act, Mme. Amado ought to be allowed to seize the two children committed to her custody in any place where they may be found and that any right of M. Amado to access to the children ought to be ended completely,

"And whereas the matter is urgent,

"Therefore, on the grounds aforesaid, we decide in the absence of Amado, who did not appear in the case although he was lawfully summoned, that as regards the substantive matter the parties must apply to the Court, but from now on and for the time being in view of the

urgency, we authorise Mme. Amado to seize the infants Jules Régine and Gilles Henri Amado, the custody of whom was granted to her by this Court, in any place where they may be found, with the assistance of the Police Commandant and, if need be, with the assistance of the armed forces;

"Finally terminate the right of M. Amado to access to the children,

"Order the execution of this order for the time being and immediately, and even before its registration, because of its urgency,

"Appoint M. Statte to deliver this order to the defendant who has not appeared and to preserve this order.

"Given in Paris on the 12th day of December, 1949."

(Signatures and certifications)

When the mother discovered that the father had left France with the children and was keeping them in an immigrants' camp in Pardess Hanna in Israel, she, too, left France in the footsteps of the father and the children, and she also is at present in Israel. While she was trying in France to discover the whereabouts of her children, she says that she learned from her friends that the father had threatened to take revenge if they tried to take his children away from him, and for that reason did not turn directly to him and demand the return of the children to her. According to her, she even feared for the lives and safety of her children when the father should find out about her applying to this court. The petitioner is a teacher in a secondary school in Paris, and earns her own and her children's upkeep, and her parents in Paris have supported her whenever her husband has refused to carry out his obligations towards the family.

Relying on this affidavit, this court issued an order nisi against the first respondent, the director of the immigrants' camp, Pardess Hanna, and against the father, the second respondent, to appear and show cause why they should not bring the said minor children

before this court, and why they should not be delivered to the petitioner, and an interim order was further made directing the father to deliver the children to the first respondent, to remain in his care and control until the final hearing of the matter, and ordering the said director, for the well-being and safety of the children, not to permit the father to be in the company of the children unless a responsible person is also present and in charge.

An affidavit in opposition that was filed by the father in reply to the order of habeas corpus did not, in fact, deny the main facts set out by the petitioner in her petition, save that the father states that he has never said that he would kill the children, their mother and himself if they tried to take the children from him. Tie describes this as a pure fabrication and the product of the petitioner's diseased imagination and as an illegitimate means of influencing the courts. As for the decree of divorce made against him on June 2, 1949, he argued that the judgment is not final and absolute, that he, the husband. has lodged an appeal against it, through the offices of his lawyer, to the Court of Appeals in Paris, and that the appeal has not yet reached its turn for hearing. According to him, the petitioner deliberately refrained from producing to this court a copy of the decree of divorce, since from its contents one might learn the nature of the proceedings before the court in Paris, the petitioner's character and the background to the family dispute. Dr. Stoyanovsky, counsel for petitioner, in reply to a question put to him by the court, confirmed that an appeal against the decree of divorce of June 2, 1949, was lodged before the respondent left France.

The respondent devoted a large part of his reply to the order nisi to allegations against his wife, the petitioner, allegations that he also brought before the court in Paris in the divorce case. According to him, his wife does not attend to the running of the household or to the care of the children. She left their home because a man of no principles, a trickster from Bulgaria. by the name of Michael Ibenoff, who purported to found a special mystic sect at Sévres in France, introduced his wife into the sect together with many other women. At one time, this matter caused a considerable scandal in France, and Ibenoff was sentenced by a French court to four years' imprisonment and deportation from the country. The respondent sought to prove his allegations in the French court, in particular that his wife was suffering from mental disease as a result of Ibenof's influence, and that she was incapable of looking after the children; and he complains that the French court granted a

decree of divorce against him without referring to his defence and found that the substance of his allegations were a ground for a religious divorce. He fears that his children will not receive a Hebrew and Jewish upbringing if they remain in the custody of the petitioner, especially in France or some similar place, and even fears that the mother will convert them to the Christian faith, or to the sect of that same Bulgarian who still has his followers in France amongst the women believers. He says that whenever he met his children, they were very depressed and would tearfully recount to him that their mother was not in fact looking after them, and they besought him to save them. Accordingly, out of concern for the fate of the children and in order to enable them to live traditional Jewish lives, to which he had always been devoted despite his living in the Diaspora, and in order to put at the disposal of his people the benefit of his skill and knowledge as a doctor, he decided to immigrate to Israel with his children. The father states that the children have been happy since they have been with him in Paris and in Israel. He has made endeavours to place the children in a suitable educational institution or in Youth Aliya [1)]

These are the main outlines of the story which was presented to as in the affidavits of the mother and the father.

The examination of the mother and the father by counsel for the parties revealed the following additional facts :

Dr. Amado was born in Izmir and went to France at about the age of 14 where he received his education. He is a doctor and is now 43 years of age. His wife, a native of France, is a teacher in a secondary school in Paris, and she is 30 years old. The couple were married in 1942, both according to civil law and Jewish law, before a rabbi in France. According to the petitioner it was her parents, and not her husband, who insisted that the marriage be solemnized before a rabbi. No steps have yet been taken towards obtaining a divorce according to Jewish law. She is ready to receive a religious divorce after the civil decree of divorce becomes final.

At first the mother educated the children herself, and later entered them in a kindergarten conducted in accordance with the Montesori system, and if the children are

1) An organisation for the general, agricultural and vocational training of immigrant youth in Israel.

committed into her hands by this court, she will take them to France and bring them up as heretofore. The mother confirmed, in answer to a question by the father's counsel, that the director of the kindergarten is a Jewess who has been converted to the Christian faith, and added that in the institution there are also two Israeli girls who are learning the Montesori system. She denied that the director of the institution asked her to send her children to take lessons in the Catholic catechism and she said that, if the latter were to do so, she would immediately withdraw the children from the institution. She further testified that her hus band had never objected to the children being educated in a Montesori institution. She describes her husband's fear lest she introduce her children into the Christian faith or Ibenoff's sect as a pure fabrication. Her husband contended in the divorce case that she belonged to the Ibenoff sect and that her state of mind had been influenced by Ibenoff. She had, indeed, on the advice of one of her teachers at the University, once taken an interest in Ibenoff's books, but had at no time belonged to that sect. She received a letter from Ibenoff dated March 31, 1945, and a photostat copy of it was produced to the court by counsel for the respondent. In that letter, Ibenoff invited her to go one morning to Sevres in order to participate in the prayers and exercises at break of day. In response to that letter, the petitioner visited Sevres, and on one or two later occasions visited Ibenoff's home together with her husband and children. According to her, Ibenoff's sect appeared to be a philosophical sect. Her husband also went to meetings of the sect, and at no time did he say to her that it was a sect of madmen, and that contact with members should be avoided. The petitioner knows that Ibenoff was sentenced in 1948 to four years' imprisonment for offences of inciting children to acts of indecency and immorality. She had indeed been impressed, at first, by the theories of Ibenoff, the central theme of which was the bringing closer together of the spirit of the East to the spirit of the West, but when she saw that his acts bore no relation to his preaching, she became confused. When she heard of the charges against Ibenoff, she said to one of her acquaintances that she was about to lose a good friend who had guided her with his advice. But the case affected her relationship with Ibenoff and his sect. She had taken an intellectual interest in the sect, and now all that was over for her. She had discovered that his ideas are also to be found in another philosophy, in a less complex form. The petitioner denied in her evidence any connection between the Ibenoff affair and her divorce petition.

In reply to the respondent's contention that she is not capable, mentally or emotionally, of looking after the children, the petitioner testified that at the time of her studies she interested herself in the humanities, French literature, Latin, Greek and philology in general. She holds the degree of *licencie (agrege) es. letters.* At the secondary school in Paris she serves in the dual capacity of French teacher and secretary to the management. The number of pupils at the school is 1,100, between the ages of 11 and 19. There are at least eighty teachers engaged in teaching there; there is an assistant mistress in the school who deals with medico-social problems, and the petitioner has to examine all the social cases and the question of giving scholarships, which calls for the examination of the cases and of the family background of the pupils.

As for the children's state of mind, she testified that from time to time, when the children returned from their visits to their father, they related to her what the father had said about her, and were very irritable and upset.

The father gave evidence, inter alia, that he received no official notice of the decree of divorce of June 2, 1949. He saw an unconfirmed summary of the divorce decree in July, 1949, in his lawyer's file, and it may be that the decree was also delivered to tile latter. He presumes that an appeal was lodged on September 7, 1949; on September 14 he left France. He has not received to this day any news of the lodging of the appeal. He was present with his wife at the time of the first "reconciliation" hearing on April 14, 1948. In the first "no-reconciliation" order, the custody of the children was provisionally granted to his wife, and he was given access to them once a fortnight. On July 16, 1948, a second hearing took place for the purpose of reconciliation. Then, too, he was present with his wife. The existing order regarding the custody of the children was confirmed. He appealed against both the orders relating to the right to the children's custody. The appeal was heard on February 17, 1949, and he did not succeed in his appeal. On March 28, 1949, he filed a petition with the court known as *référés,* asked that they return his children to him, and set out his grounds for the petition. As a result of that petition, the court appointed a lawyer to examine the children's condition. According to the witness, the lawyer did not carry out his task properly. Instead of visiting the children at their place of residence with the petitioner's father, they were brought to the lawyer's offices, and the latter stated in his report that the children were in a normal state of health, and that they were being well looked after.

The father knew that he had to return the children to their another on October 2, 1949, but, he states, he took them with him in order to save them. He has never said that his wife was out of her mind, but said that she showed signs of mental instability. He is still of that opinion after hearing her in this court.

According to him, he did not live specifically in accordance with Jewish tradition, but he has been a Zionist for some time and his family is Zionist. He holds a number of invitations to Zionist meetings from the year 1947. He was a member of the Zionist Doctors' Association in Paris.

There are three main legal questions which arise from the petition under consideration.

(a) If the petitioner should have filed an action in the district court for custody of the children, is she nevertheless entitled to apply to this court for a. writ in the nature of habeas corpus?

(b) If a petition for habeas corpus is a proper remedy, will this court recognise the decisions of the court in France, which granted the petitioner the custody of her children, as a basis for its decision on such a petition?

This second question gives rise to two subsidiary questions:-

(1) Does the fact that the French decree of divorce is still subject to appeal affect the petitioner's present right to the custody of her children?

(2) Does the fact that the couple are not as yet divorced according to Jewish law prevent or delay the recognition of the decisions of the court in France relating to the right of custody?

(c) If the answer to the last question is in the negative, does the rule that the benefit of the children is the real test justify this court in the present case in altering the decisions of the court in France regarding the right to the custody of the children?

The first of these three questions is one of the jurisdiction of this court in the hierarchy of courts in Israel. The father's counsel, Mr. Michaeli, argued that the matter in question is

not in the nature of habeas corpus, which is included within the jurisdiction of the High Court of Justice by section 7(a) of the Courts Ordinance, but is a case between parents over the right to the custody of the children, and is therefore one of the matters of personal status of foreigners and within the jurisdiction of the District Court (Article 64 and Article 51 of the Palestine Order in Council, 1922).

On the other hand, the petitioner's counsel, Dr. Stoyanovsky, emphasized at the outset of his argument what he is *not* asking of this court. He stated that he is not asking for execution of the divorce decree granted by the Tribunal in Paris on June 2, 1949, or of the order made by the same court on December 12, 1949. He is not, moreover, asking for guardianship of the children for the mother. He is not even claiming the right to custody of the children, for he says that the mother is legally entitled to the custody of the children by virtue of the judgment and the orders made in France in favour of the mother. He is no longer in need of a determination of the right of custody in favour of the mother by this court. His application is for recovery of the custody and possession of the children of which the father has deprived the mother in an unlawful manner, and accordingly the children are in the unlawful custody of the father. For that reason, he contends, the matter falls within the scope of section 7 of the Courts Ordinance and the jurisdiction of the High Court.

Before I consider the authorities, let me examine the two provisions of the law on which each one of the opposing parties relies. The definition of matters of personal status in Article 51 of the Order in Council speaks of "suits regarding marriage or divorce. . . guardianship" and others. Section 7(a) of the Courts Ordinance, which provides for the exclusive jurisdiction of the High Court of Justice, speaks of "Applications (in nature of *habeas corpus* proceedings) for orders of release of persons unlawfully detained in custody."

In the present case, the divorce proceedings have already taken place in France, and it has been decided in favour of the petitioner that *sh*e is entitled to the custody of the children. There is no disputing the fact that the respondent took the children into his custody in breach of what was decided by the courts in France and brought them to Israel. Indeed, he contends that there were grounds and reasons for his doing so. But the fact remains that he is the one who had defied the courts in France.

Counsel for the mother once more emphasizes that she is not asking for her right to the custody of the children to be determined. That right has been determined for her abroad, and therefore there is no case here in a matter of personal status. In bringing her petition in the nature of habeas corpus before this court, she relied on decisions made in her favour abroad in order to found her contention, which is the basis of her petition, that the children are in the hands of the father in unlawful custody, and therefore she claims their release. I do not hesitate to say that this contention seems to me to be sound.

To start with, I shall consider the question as if the decisions in the mother's favour had been made here in Israel. The question as to what is the binding force of decisions made abroad (the second of the three questions above mentioned) is a problem of private international law, which I shall consider later. In order to make absolutely plain the question of jurisdiction and the definition of the border-line between a claim for custody and a petition for habeas corpus, it would be better to regard the matter separately from any problem of private international law. In this respect, the two parties were right in citing as authorities on the question of jurisdiction the judgments of the Supreme Court (during the period of the Mandate) which were delivered in cases in which no question arose as to the effect of a foreign judgment in this country, for the question of jurisdiction and the definition of the border-line between a case concerning the right to custody and a petition for habeas corpus is a question that arises, as I have already mentioned, from the provisions relating to the jurisdiction of the different courts in Israel.

Counsel for the respondent cites as authority *Silverman v. Buxenbaum and others* (1). The truth of the matter is that that authority is not on all fours with the present case. That judgment contains only a few lines, and one gathers that the case concerned a family dispute which broke out over the question whether a child that was staying with relatives of his deceased mother should remain with them in accordance with his mother's will, as it was alleged, or should return to his father, and the father filed a, petition for habeas corpus. No judgment had been given in that matter before it came before the High Court. During the course of the hearing, the father undertook "to apply to the appropriate court to have these matters settled", and all that the court decided was that the child would remain with the mother's relatives until a decision was given on the part of the competent court. It is

difficult to see how counsel for the respondent can rely on that judgment. On the other hand, counsel for the petitioner cited in support of the jurisdiction of this court authority from the following two judgments : *Flint v. Jones and another* (2); *Bar-Emun v. Bar-Emun* (3).

The first judgment, *Flint v. Jones* (9), was delivered in a case based on a petition of *habeas corpus.* The petitioner, the father, demanded the handing-over to himself of his son from his divorced mother and her second husband. The petition was founded on a judgment of the Principal Rabbinical Court of Jaffa and Tel Aviv, according to which the custody of the child had been given to the mother until he reached seven years of age, and thereafter to his father. The mother, apparently, refused to obey the judgment of the Rabbinical Court, although at first the child had been handed over to the father but had been taken away from school after that by the mother's second husband without the knowledge of the father. The court acceded to the father's petition, issued an order nisi in the nature of *habeas corpus* against the mother and her second husband and, in the absence of an affidavit by the respondents, made it absolute.

In the second case, *Bar-Emun v. Bar-Emun* (8), the petitioner (the mother) obtained a judgment of the Rabbinical Court against her husband, and this ordered the child to be delivered to the mother, but the Execution Office refused to execute the judgment, on the ground that the child was in the hands of her father-in-law, and the latter had not been a party to the case. Later, the mother sought the execution of a second judgment of the Rabbinical Court, which had been given in the absence of the father-in-law, for the delivery of the child to her. The Chief Execution Officer refused to execute that judgment also, since the child's grandfather had never consented to the jurisdiction of the Rabbinical Court, whereupon the mother applied to the High Court of Justice on a petition of *habeas corpus,* and won her case.

The common denominator in the two cases - *Clint* 6. *Jones* (2), and *Bar-Emun v. Bar-Emun* (3) - is that the right to the custody of the children had been considered and determined by a competent court before the matter came before the High Court, and this court, relying in each case upon the decision previously given by such competent court, issued the order of *habeas corpus.* Admittedly, neither of those two judgments is of much

value in deciding the problem that we are considering, for the first one was given without any reply on the part of the respondent, and neither of them defined the borderline between a case based on the right to custody and a petition for *habeas corpus.* But the judgments were given on the assumption that *habeas corpus* is the remedy wherever it is preceded by a decision of a competent court as regards the right of custody. That assumption is, indeed, correct.

The rule may be expressed in this manner : so long as the right to the custody of the child has not yet been determined by the competent court, and the very right itself is the subject of a *bona fide* dispute, this right can only be determined by the court. A claim of this kind is a matter of personal status which, in accordance with Articles 47, 51-54, and 64 of the Palestine Order in Council, 1922, is within the jurisdiction of the District Court both as regards Israel nationals and as regards foreigners or, under certain conditions, is within the jurisdiction of the religious courts. Where the right has been determined by a competent court in favour of one of the parents, and the parent acts in breach thereof, and takes the child out of its lawful custody or continues to detain it unlawfully, then the remedy is the filing of a petition in the nature of *habeas corpus.*

If it be said that a petition to take a child out of the hands of a person unlawfully detaining it is indeed a form of petition of *habeas corpus,* because you are demanding to put an end to the detention, but that the demand to deliver the child to whomsoever is entitled to possession of it is a claim to the right of custody, the judgment in *Queen v. Clarke* (5), decided in 1857, shows us that the two demands cannot be separated, for they are linked to one another.

In that judgment, Lord Campbell C.J. said :-

> "The question then arises, whether a habeas corpus be the proper remedy for the guardian to *recover* the custody of the child, of which he has been improperly deprived. Certainly the great use of this writ, the boast of English jurisprudence, is to set at liberty any of the Queen's subjects unlawfully imprisoned; and, when an adult is brought up under a habeas corpus, and found to be unlawfully imprisoned, he is to have

> his unfettered choice to go where he pleases. But, with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned ashen unlawfully detained from the custody of the guardian; and when delivered to him he child is supposed to be set at liberty."

The rule is thus summed up in Halsbury, Hailsham Edition, Vol. 9, page 717, article 1219:-

> "A parent, guardian, or other person who is legally entitled to the custody of a child can regain such custody when wrongfully deprived of it by means of the writ of *habeas corpus.* The unlawful detention of a child from the person who is legally entitled to its custody is, for the purpose of the issue of the writ, regarded as equivalent to an unlawful imprisonment of the child."
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> (Compare also, Halsbury, Vol. 17, p. 666, article1383.)

As is well known, the institution of *Habeas corpus* is likewise one of the corner-stones of the Constitution of the United States, and therefore it may be worth mentioning that there, too, it serves as an appropriate remedy for carrying into effect a decision which has been given on the question of the right to custody of the children in a previous divorce case.

See the Corpus Juris Secundum, Vol. 89, Title "Habeas Corpus", section 46, p. 586, and the judgment of the United States Supreme Court of the 3lst March, 1947, in the case of *Halvey v. Halvey* (9). As regards the value of American judgments on questions of the kind under discussion here, see Dicey, Conflict of Laws**,** 6th Edition, pp. 10, 11 (note 16).

I have dwelt at some length on the first question although I have no doubt as to the true position. A number of cases have recently come before this court in the form of habeas corpus in matters concerning the right to the custody of children, and this is the first case in which we have been called upon to give judgment upon it : and I hope that my expanding on the subject here at some length will enable future cases to be dealt with more briefly.

The second question that arises here is, what is the force of the judgments and orders made in France in relation to the courts of our country? Must this court recognize those decisions as a basis for its decision in the case under consideration? That is, as stated, a problem of private international law.

Authority for that may be found in *Abyad v. Ancona* (4), in which the Supreme Court confirmed what had been decided in the Haifa District Court by Evans, R.P., in these words:-

> "The defendant argues that the Order in Bankruptcy made in Egypt must come within the Ordinance Cap. 75 or else is of no effect. Similarly he argues that all international law is founded in treaties and that before the Courts could give any effect to this order there must be some agreement or treaty on the matter between the Palestine and Egyptian Governments. We do not agree with either proposition. It is true that agreements have been made regarding reciprocal enforcement of judgments, but these are largely matters of procedure. The Courts had to consider the weight and effect to be attached to foreign judgments long before. The Defendant says we are not bound by what is called Private International Law. We think we are. Those Rules (i.e. the rules of private international law) enforced in the English Courts are part of the English Law to which we must have recourse in the absence, as admittedly here, of any local provisions on the matter in question. Rules 124 and 125 of Dicey's Conflict of Laws show clearly that an order, such as that of the Egyptian Court... would be effective in England... and must therefore be treated as effective here for the same purpose."

Now let us examine the English rules of private international law in this field as applied to the present case. A first general principle is to be found in Dicey's book on the Conflict of Laws (6th Edition, 1949, p. 11) :-

> "Any right which has been acquired under the law of any civilised country which is applicable according to the English rules of the conflict of laws is recognised and, in general, enforced by English courts, and no right which has not been acquired in virtue of an English rule of the conflict of laws is enforced or, in general, recognised by English courts."

In explanation of that rule, it is stated there (p. 11) :-

> "Their object and result is to render effective in one country, *e.g.*, England, rights acquired in every other civilised country, *e.g.*, France or Italy, the law of which (of France or of Italy) is applicable according to the English rules of the conflict of laws."

That is the general rule; and what are the particular rules touching the present case ? Rule 71 in Dicey's book (p. 868) says: -

> "The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce. This Rule applies to - (1) an English marriage; (2) a foreign marriage."

Rule 83 (p. 400):-

> "Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid. "

Rule 84 (p. 401):-

> "A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either)(1) of fact; or (2) of law "

Rule 93 (p. 430):-

> "A valid foreign judgment... of divorce... has in England the same effect as a decree of divorce...granted by the Court in England, as regards the status of the parties to the marriage which is dissolved..."

As to the particular item in the matter under consideration, the right to the custody of the children, an incidental remedy generally given in a divorce case, the following is to be found in the commentary in Dicey to Rule 71, p. 878 :-

> "There is also a lack of *ad hoc* authority as to the extent to which English Courts will recognise the power of foreign Courts to exercise control in matters of the property and parental rights of the persons whose marriage is affected by their decrees similar to that exercised by English Courts when granting ancillary relief in matrimonial causes. But the principle that similar authority should be conceded to foreign Courts is implicit in the cases which decide that the ancillary decrees of foreign Courts will not be recognised if the principal decree cannot be recognised in England."

In illustration 5 (ibid., p. 878) :-

> "H and W are divorced by a Court in France, where they are domiciled, and the custody of the child is given to the father. W takes the child to England. He claims the custody of the child, and is entitled to the aid of the English Courts, which will, however, have regard to the welfare of the child."

In the commentary to the aforementioned Rule 93 (ibid., p. 431) :-

> "Subject to the paramount consideration of the welfare of the children, effect would presumably be given in England to a foreign

decree dealing with custody of children in connection with matrimonial questions, as a similar power belongs to English Courts."

As authority for that, the judgment in *Radoyevitch v. Radoyevitch* (6), is cited (note 64).

The considerable importance attached to that judgment for the problem with which we are dealing immediately becomes apparent, and so I propose to quote at length from the judgment of Lord President Clyde:-

"The petitioner was at the date of his marriage to the respondent and is still a domiciled Jugoslavian, resident in Belgrade. The respondent was at the date of the marriage a Scotswoman, and the marriage took place in 1921 in London. The parties lived together in Belgrade until after the birth of their only child, a daughter, in 1922. Thereafter the respondent, taking the child with her, came back to this country, where she and the child have since remained. In 1928 the petitioner raised an action before the Spiritual Court of the Archbishopric of Belgrade against the respondent for divorce on the ground of desertion, and for custody of the child of the marriage... the Spiritual Court granted decree of divorce, and ordered the child to be delivered to the petitioner... The Supreme Spiritual Court (in Jugoslavia) approved of it subject to certain modifications, one of which was to give the respondent right of access... The respondent refuses to obtemper the order of the Spiritual Courts, and the present petition is brought in order to invoke the aid of this Court (in Scotland) in making it effective.

"The important point in the case is raised by...the respondent's contention... namely, 'that, it being highly prejudicial to the health, welfare, and interests of the child that her custody should be awarded to the petitioner, the petition should be refused.' It will be - observed that this contention assumes that the question of awarding the custody of the child to one or other of the parties is an open question in this Court, notwithstanding the foreign judgment; and the assumption may be at

first sight warranted by the fact that the prayer of the petition includes a crave that the petitioner should be found entitled to the custody. But, as appears from the averments in the petition, the petitioner's real case is that the foreign judgment already entitles him to the custody; and therefore any finding of the kind prayed for can only refer to a finding that the petitioner is - in respect of the foreign judgment - so entitled. Nevertheless, the respondent argued that the circumstances alleged by her provide sufficient grounds on which this Court should refuse its aid in making the foreign judgment effective. The petitioner's answer was two-fold; he maintained that this Court has no jurisdiction to review or alter what has been judicially done by the competent Court of the domicile, but is bound to give effect to its judgment. ...It is to be observed that... none of the allegations made by the respondent... relate to circumstances which were not extant and fully known to the respondent prior to the proceedings in Belgrade, and therefore pleadable by her - *quantum valuerint*- in those proceedings. It is also to be observed that there is nothing in the proceedings before the foreign Court, as far as appears from the pleadings in the present petition or from the documents before us, which is inconsistent with our Scottish notions of substantial justice.

"The unlimited scope attributed in *Administrator of Austrian Property v. Von Lorang*, (1997) *A.C.* 641, to the doctrine of the universally binding effect of foreign judgments in rens goes to support the petitioner's argument. The custody of a child, like its tutory (which may or may not include the right of custody), is clearly a question of status; and proceedings for the disposal or regulation of the custody must therefore be regarded as proceedings in rens. The foreign judgment was pronounced in an undefended action, and was thus a decree in absence, although preceded by inquiry. In a case *not* dealing with status this might perhaps be enough to prevent the judgment from being *res judicata* between the petitioner and the respondent...; but the specialty of a foreign judgment *in rem* is that, so long as it is pronounced by the

competent Court of the domicile, it is binding (alike as between the parties themselves and in questions with third parties) upon the Courts of this country without further inquiry. Accordingly, the petitioner's argument is that the status rights of the parents to the custody of the child of their marriage (which status rights constitute the *res*) have been conclusively adjudicated upon by the competent court of their foreign domicile that is, of the husband's domicile, which is also the domicile of the child - and that this Court is precluded from inquiring into any of the matters with which the respondent's answers are concerned. The fact that the child is for the time being resident in this country and within the jurisdiction of this Court has no importance, according to the petitioner's argument, except as calling for the aid of this Court in giving executive effect to a judgment which is conclusively binding upon it.

"But, after all, an appeal to this Court for that purpose is an appeal to its jurisdiction for aid in carrying out the foreign judgment, and necessarily assumes that the jurisdiction can be legitimately used for that purpose, in some way or other, over both the respondent and the child, notwithstanding that both the child in particular - are of foreign domicile. The assumption is of course well founded. In the case of *Stuart v. Moore* (9 H.L.C. 439; 11 E.R. 799), (in which the guardians in England claimed the handing over of an infant who was in Scotland) Lord Chancellor Campbell said this :- 'The Court of Session had undoubted jurisdiction over the case. By their *nobile officiunt* conferred upon them by their Sovereign as *parens patriae* it is their duty to take care of all infants who require their protection, whether domiciled in Scotland or not. But I venture to repeat what I laid down for law in this House near twenty years ago, 'that the benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise'."

"In considering the benefit of the child, it must be kept in mind that neither in such a case as *Stuart v. Moore*, nor in the present case, are we concerned with any question about the choice between two claimants or

candidates for the child's tutory or custody. There is already a tutor or custodier duly appointed by the Court of the foreign domicile; and the benefit of the child is relevant only to the question whether we should lend our aid by ordering delivery of the child to that tutor or custodier".

Lord Sands, concurring in the judgment of the Lord President, said :-

"The question before us is whether this child falls to be handed over to the custody of her father in Belgrade, or to be allowed to remain with her mother in Scotland. We are bound to regard that question in the same impartial manner us would the Court of a third country - say France - if the child were found temporarily there, and a competition arose in a French Court between the father and the mother. When the matter is so regarded, I think the law is clear.

"As your Lordship in the chair points out, this application is not in substance an application to us to determine a question of custody. It is an application to us to give effect to a judgment upon that matter which has already been pronounced by a Court of competent jurisdiction."

The Court of Session examined only the terms of transfer of the child from Scotland to Belgrade and the terms of her reception there in surroundings that were unfamiliar to her. After tile court had received satisfactory answers it decided that the mother should deliver her daughter to the petitioner.

I have quoted that Scottish judgment in detail, because it is the only one which deals exactly with the question before us in this case, and both in the actual facts and in the arguments, there is great similarity between the two cases. In the same way that counsel for the petitioner repeatedly emphasized before us that he is not asking us to determine the mother's right to the custody of her children, but for the recovery of the custody established in her favour by a competent foreign court, so that approach is prominent also in the *Radoyevitch* case (6) and was accepted there. As for private international law, the principle was unhesitatingly established in that judgment, that a foreign judgment, which determines

incidentally to a divorce the right of one of the parents to the custody of the children, will be recognised. The importance of that judgment is the emphasis therein that the decision concerning the right to custody of children is in the nature of a decision *in rem*, with all the wide implications inherent in such a decision, binding as it does the whole world.

We shall have no difficulty in arriving at a conclusion, on the basis of the rules that we have quoted from Dicey's book and of what we have quoted from the judgment in *Radoyevitch (6)*, that we must recognise the decisions of the French Court that determined the right to the custody of the children in favour of the mother, the petitioner.

There is no disputing the fact that the court in France was the competent court to try and to decide the question of the divorce between the parties. The father was present at the trial, and was represented by a lawyer. His argument that, since he was no longer in France when the court delivered its further decision of December 12, 1949, the court had no jurisdiction to make it, is an absurd argument. Here is a father who has flouted and defied the court's decision and has smuggled the children away from their mother, and yet argues that he was tried in his absence. In fact, the petitioner was entitled to found her petition to us on the main divorce decree which was granted on June 2, 1949, and which gave her the right to the custody of her children.

The respondent had no real argument to raise against the content of the decree and the decisions that came after it, and, furthermore, could hardly have done so, seeing that according to the rules that we quoted above, there can be no appeal here against a foreign judgment, which is presumed to be extant and effective, on account of an error in the facts or the law. In so holding, it must be said at the same time, that the respondent did not succeed in showing us any error whatsoever in the law or on the facts in the proceedings in France.

Counsel for the respondent tried indeed to argue even before us that, in any event, we should not recognise the decisions made in France on two grounds : (a) because the divorce decree is still appealable, and the rule is that foreign judgments are recognised only when they are final; (b) this court, he contends, will not regard the divorce decree as binding so long as the husband and wife have not become divorced by a religious divorce according to

Jewish law, and if the actual divorce itself cannot be recognised, then the incidental decisions of the question of the right of custody cannot be recognised.

Both arguments are untenable.

Admittedly, it is right that, according to the rules of private international law, a foreign judgment is recognised only when it is final and conclusive. As regards a judgment in *personam*, the matter is covered by Rule 86 (see p. 403 in Dicey's Conflict of Laws). Moreover, as regards a decree of divorce, the question of "finality" is mentioned in the commentary to Rule 93 (p. 431). But in the same place, in Rule 86, it is laid down that a foreign judgment can be final and conclusive even when it is subject to appeal and notwithstanding that an appeal against it is pending abroad where it was given. (Compare also Martin Wolff, Private International Law, paragraph 242, p. 266.)

In fact, the opposite view for which counsel for the respondent contended before us would put at nought the intention of the foreign court. For the French court held, even before it gave its judgment on the actual divorce, in its previous decisions, where the father himself gave evidence, that the mother was entitled to the custody of the children; and the judgment of June 2, 1949, it held that the orders concerning the handing over of the custody of the children to the mother were to be executed for the time being, notwithstanding any appeal and without giving security. It is clear that the intention of the court there was not to retract from the weight of its decision by the use of the word "provisoire", and to say that the handing-over of the right of custody was only for the time being. On the contrary, it regarded as urgent the arrangement of the right of custody in favour of the mother, and so, as can be seen from the insertion of the words "notwithstanding any appeal and without giving security", it provided for the immediate execution of its orders concerning the right of custody.

As for the second argument concerning the absence of a religious divorce according to Jewish law, counsel for the petitioner was right in saying that we are not dealing with the question of the possibility of a second marriage on his part or on hers. It is clear that, according to Jewish law, such second marriage is forbidden, in spite of the civil divorce, unless preceded by a religious divorce. But, as stated, that question does not arise here. We

are here dealing with the question of the effect of the decisions in France relating to the right of custody. The divorce decree, as a civil divorce, is effective according to French law, which applies to the parties according to Israel law (Article 64 of the Order in Council, 1922)[1)], and therefore the same part dealing with the right to the custody of the children is also effective. (Incidentally, the question of the right to the custody of the children can also arise, according to Jewish law, even while the marriage still subsists though the parents are separated.)

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The result is that neither the appeal lodged in France nor the absence of a religious divorce, will entitle us to defer the recognition of the decisions made in France concerning the right to the custody of the children.

That brings us to the last point, and that is whether the benefit of the children requires us to alter the decision of the French court. It is agreed that the established rule, and the one which most appeals to the intelligence, is that the benefit of the children must be decisive in exercising judicial discretion, even in cases of habeas corpus. But what are the factors to be taken into account in such judicial discretion? The opinion of the children themselves as to whom they want to go to cannot be sought when they are of such a tender age as are the

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1) Palestine Order in Council, 1922, article 64:

Matters of personal status than (as amended in 1939):

(i) Subject to the provisions of Article 54 of this Order, matters of personal status affecting foreigners other Moslems in respect of whom Moslem Religious Courts have exclusive jurisdiction under Article 52 of this Order, shall be decided by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may from time to time be made by the High Commissioner:
Provided that the District Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage except in accordance with any Ordinance conferring such jurisdiction.

(ii) The personal law of the foreigner concerned shall be the law of his nationality unless that law imports the law of his domicile, in which case the latter shall be applied.

(iii) The District Court, in trying matters of personal status affecting foreigners, shall be constituted by the British President or British Relieving President sitting alone. In trying matters of personal status affecting foreigners other than British subjects, the President or Relieving President, as the case may be, may invite the Consul or a representative of the Consulate of the foreigner concerned to sit as an assessor for the purpose of advising upon the personal law concerned. In case of an appeal from a judgment in such a case the Consul or a representative of the Consulate of the foreigner concerned shall be entitled to sit as an assessor in the Court of Appeal.

children in the present case, in particular in habeas corpus proceedings. If authority is required for that, it may be found in the above-mentioned judgment of *Queen v. Clarke* (5), and in Eversley on Domestic Relations, (pp. 418-423). The parents' opinions are completely at variance. The father contends that the children are depressed when they return from a visit to the mother, and the mother contends that they are irritable when they return from their visit to the father. Their views, therefore, are of no assistance.

Even taking into account the requirement of the benefit of the children, the court will not readily alter the decision of the court abroad concerning the right of custody. It is clear that each case has to be considered according to its special nature, and no hard and fast rule can be laid down here. But it may generally be assumed that before the court abroad there were more data to assist in weighing the matter than before the tribunal which is called upon afterwards in another country to recognise the former judgment. There is also special significance in the length of time that has elapsed between the decision of the original court and the decision required from the court in the other country on the strength of the judgment given abroad. In the present case, the court in France, before which all the data were available, including an examination of the state of the children, decided a short while ago in favour of the mother.

What in essence did the father contend before us in order to move us to alter the decision of the court in France regarding the custody of the children? Mainly the Ibenoff affair, that I mentioned in some detail in setting out the facts. I assume that for a certain period, the mother (petitioner) was influenced by that person and his opinions, until he turned out to be a criminal. But there is no ground for not believing her, that since then, the man and his system mean nothing to her. There is no foundation for assuming, on the basis of what we heard in evidence from the two parties, that that affair influenced or will influence in any way her capacity as educator of her children.

Furthermore, there is no argument here that the husband could not have put forward in the French court, and now he comes before us and claims a new factor in deciding the question of the custody of the children. We know from his evidence and from the divorce decree that the respondent certainly argued the matter of Ibenoff, and not only did the court not accept his argument, but viewed the very fact of his making allegations against his wife

arising out of the Ibenoff affair as a serious insult and a grave reflection on her, and as a sufficient ground for divorce. If the French court, which was so close to the "atmosphere", held thus, are we here going to differ from it on that point? He further argued, that his wife lacks the necessary mental stability, and therefore her influence is harmful to the children. That argument, too, was submitted to the French court at various stages in the proceedings, was heard and rejected outright. Now the petitioner has given evidence before us, was examined by counsel for the respondent, and by her own counsel. Her replies were completely balanced and she gave the impression of a restrained person, despite the difficulties she has been through. We have heard about her position in the secondary school in Paris in which there are 1100 children. There, she is not only a teacher, but also assistant to the Board of Directors in dealing with medico-social questions. We have no reason for dismissing the petitioner as not being a satisfactory mother and educator, or for departing for that reason from the decisions of the court in France.

Lastly, the respondent father appealed to this court saying that the custody and education of the children should be committed into his hands, contrary to what was decided in France, in view of the fact that he wishes to give them here a national-Jewish upbringing that they cannot receive in France. His counsel added that the rule of public policy calls for such a decision by us. I have the feeling that there is a lack of sincerity in the father's statements in this connection. We have not heard that before the divorce he objected to the method of education given to the children in the school in France, or that he did anything in order to give his children a Hebrew or Jewish education. According to the evidence before us, it is to be assumed that if there remained a spark of Jewish tradition in the Amado family, that spark was rather to be found in the mother's family. The suspicion which the husband projected into the atmosphere of the court, that the mother was likely to convert the children to another religion, was rejected by the mother with disgust, and I have no reason to doubt the sincerity of her words. As for public policy, this court and every judge in Israel would obviously be pleased if every Jewish child that immigrates into the country were to receive his education in Israel. But this is not the way to encourage the immigration of Jews to the Land of Israel. Heaven forbid that we should turn our country into a refuge for people who, during the course of quarrels in their married lives, smuggle their children away in contravention of the law and of justice. That way brings no blessing either to the country or to the children.

My conclusion is that, from the point of view of the benefit of the children also, there is no ground for altering the decision of the court in France which gave the mother the right to the custody of her children.

Accordingly, the order nisi should be made absolute as against the second respondent.

DUNKELBLUM J.: I agree with the judgment of the learned President, and with its reasoning and conclusions.

AGRANAT J.: I concur in the opinion of the learned President both as to the result at which he arrived and as to the grounds upon which he relied.

CHESHIN J.: I concur without hesitation in the learned President's opinion, insofar as it relates to the first two questions raised in his judgment, namely, that the matter in question was rightly brought by way of petition in the nature of "habeas corpus", and that in the light of the principles of private international law, this court is required to regard the decision of the French court, which entitled the mother to the custody of the children, us the basis for its own decision. The third question however - and it is, in the opinion of all the authorities, the decisive question - namely, whether the benefit of the children requires that that decision be maintained or altered - this question, I must confess, gave me much ground for thought both while the parties and their counsel argued their case before us and when examining the great and varied mass of authorities which were brought to our attention. which the learned President dwelt at some length in his judgment, the father demanded, on the strength of a Jugoslav judgment, to have their eight-year-old daughter, born to them in Jugoslavia and taken by the wife to Scotland when she was a few months old, removed from the custody of his wife and handed over to him. Lord Sands, one of the three judges who composed the court, asked himself the question in this form : is the Scottish court bound to commit the child into her father's custody in Belgrade, or to permit her to remain with her mother in Scotland? The learned judge came to the conclusion that the court should examine the matter from an objective point of view, in the way that, say, a French court might have done, if the child had found her way temporarily to France and her father and mother were carrying on a legal battle in the same court over the right to have

the child with them. "When the matter is so regarded," concludes Lord Sands, "I think the law is clear."

The Lord President of the Court of Session, Lord Clyde, says in the same case :-

> "It is quite impossible for us to make up our minds on the balance of advantages and disadvantages ...attendant on Jugoslavian or on Scottish nationality, or on the social or educational associations of either country, and I do not conceive that such a balance could be reasonably or fairly applied to the problem of the child's welfare, even if we thought ourselves able to make it." (p. 627).

I dare to express a doubt whether those considerations that were in the mind of the Scottish court, and those only, must be in our minds when we come to deal with a problem of the kind that arises in the present case. An Israel court, in determining the fate of a Jewish child within its jurisdiction, is not entitled to ignore the special position of the Jewish people or of the individual Jew among the nations of the world, and to say to itself, in the words of Lord Clyde, or by way of the illustration that Lord Sands brought : "Let us assume that we are sitting as an English Court in England or an American Court in America." This court and its members are not sitting in *vacuo,* cut off from reality and from the people among whom they work and create, sharing their ambitions, experiences and desires, and they are not always required to confine themselves within the four corners of a rule and to see everything from the aspect of the letter of the law applicable in other countries. In this respect, one might say that Israel is not like all other nations, and a Jugoslav child whose Scottish mother has brought him with her from Belgrade to Scotland is not the same us a Jewish child whose Jewish father has brought him to Israel from the lands of the Diaspora.

The vast majority of the Scottish people resides in its own homeland, and the dangers of becoming assimilated and vanishing do not face them. In the last war, it was not bereaved of a third of its people on account of their being Scottish, and the people of Scotland living in other parts of the world are not subject to perpetual persecution and discrimination on account of their race, and the stock from which they spring. The same

applies to the English, to Americans and to Jugoslavs. The Israel nation, alone of all the nations, during all the long years of its exile and through all the lands of the dispersion, almost without exception, has been wantonly persecuted for its religion, its race, its customs, its culture. Whole communities of Jews have been condemned to physical and spiritual destruction and have been utterly destroyed, and others are fighting a desperate struggle for their religion, their culture and their very existence. So well known is it that it requires no proof, that millions of our brethren, among them children of tender years, and youngsters who had hardly left their nurseries and whose parents had at one time taken them with them from the Land of Israel and brought them to the lands of the Diaspora, have been wiped out in our days and before our very eyes and the eyes of the whole world, by one of the "advanced" nations of civilisation, thinking up methods of killing which the Devil himself could scarcely have conceived, contrary to the law of nations and humanity. Can a court in Israel forget this story of annihilation, when it comes to consider the question of removing one of its children from Israel? And are we required to shut our eyes to the reestablishment of Israel in its own land, and the consequences involved for every Jew because of his being a Jew in the achievement of the hope of generations for the return of its people to its own country? The ingathering of the exiles is not just an empty phrase, and each one of us here today, and each one who is not with us today, is fully and clearly cognisant of the fact, that every Jew who immigrates to Israel aids not only the restoration of the nation and the building of the land, but also ensures his own security and future and the security and future of his children and family. A child from Israel who becomes rooted in the land of his forefathers has been freed from the dangers of assimilation and annihilation.

The benefit and security of the children whose fate this court has been called upon to settle have to be seen in the light of these and similar considerations.

Furthermore, in the case of *Radoyevitch* (6), the Scottish mother objected to the handing over of her daughter to the Jugoslav father, and gave her reasons for so doing in a long series of arguments and replies; but it was apparent there - and the Lord President, Clyde, comments thereon - that none of the mother's arguments were new, and that she could have submitted them to the Spiritual Court in Jugoslavia before the latter decided on the matter of the right of custody. She did not do so, and was therefore out of time. That,

however, is not the position in the present case. Here there has been a change, an enormous change, since the day on which the French court gave its judgment. The father has opened a new chapter in his life. He has decided to settle among his own people, and to bring his children up in the spirit of Israel. I was not particularly impressed with the argument of counsel for the mother, that the father immigrated to Israel because he had kidnapped his children from their mother's home, and because he could find no other place to which to take them. The opposite is true : he took his children with him because he had made up his mind to abandon the life of exile and to live a Jewish life in his own land. It is true that he grew up and was educated in foreign surroundings, and that national values were not of particular importance to him, and that his children have been brought up in that spirit, too. But his intentions are not to be dismissed on account of his past. An enormous change of values has taken place in the outlook and inclinations of many Jews of the Diaspora since the last World War, and in particular after the establishment of the State of Israel. The fact is that he has immigrated to Israel and has brought his children with him. The fact is that, in court, he expressed his desire once more to live with his wife a normal family life, forgetting the past, should she desire to settle in Israel, but she persists in her refusal and she is content with life in the Diaspora. The fact is that, when the children were transferred to a hospital at the commencement of the Festival of Passover, he would not rest until he had succeeded in moving this court to order the children's transfer to a Jewish institution until after the Festival had ended. On the other hand, although she gave her consent to that transfer, the actual entering of the children into a non-Jewish institution was done at the mother's request, and she was not troubled by the fact that the children would be during the Festival and the intermediate days in non-Jewish surroundings. In those circumstances, I am prepared to believe the father when he declares on oath that "out of concern for the fate of the children and a desire to give them traditional Jewish lives... I decided to immigrate to Israel and to live here a quiet, Jewish life, to devote my life to bringing up my children and together with that to put my skill and knowledge in the science of medicine at my people's disposal."

I weigh against that the personality of the petitioner - the mother - with her emotional tendencies, to the extent that they were revealed to us in these proceedings. I stated at the outset of my remarks that I am in full agreement with the learned President, that since the French court has committed into her hands the custody of the children, the right to custody

is hers. But since the benefit of the children *as at today* is the true test which must apply, in view of the above stated considerations, me are not free to overlook any of the facts. The words of Lord Sands in the *Radoyevitch* case (6) are enlightening, when he declares in this connection :-

> "It is the duty of this Court to extend protection to every child found within its jurisdiction, and it may in certain cases be our duty to extend such protection even against a claim based upon a legal award of custody. The Court will not *de plano* in every case order delivery to the legal custodian." (p. 628).

In other words, it is one thing to treat a judgment of a foreign court with the respect which is its due, and in certain cases also to recognise it, particularly in the light of the principles of private international law, it is quite another matter to consider the benefit of the child. The latter is settled according to the outlook and discretion of the judges who are called upon to determine it in each and every case according to its particular circumstances. There they are not tied to universal principles. You cannot draw an analogy in this type of case from the rules of private international law, nor will such rules be in any way affected even if the court does not uphold to the letter the judgment of the foreign court.

From that point of view, considerable importance attaches to the character and capabilities of the mother, who demands for herself the upbringing of her children and the whole of their future. It must be mentioned at the outset that she gave me the impression of being a somewhat fanciful spirit, who has not yet found the way of life suitable to her. In her adolescent years, she engaged in the science of philosophy, and under the guidance of one of her teachers at the University, the Greek teacher, a near and enchanting world was opened before her in the theory of a certain Bulgarian named Michael Ibenoff. For a number of years she studied this theory, and even began to correspond, after her marriage, with Ibenoff, the creator of this theory. I did not succeed in understanding the niceties of this theory, but I heard from the petitioner that it discloses the ways of the East to the peoples of the West, that is to say, a sort of harmonious intermingling of the two differing worlds. While she is engaged in this study, Ibenoff invites her to his home, and somewhat surprisingly she becomes involved, at her very first meeting, in a conversation about her

marriage to her husband. Afterwards, Ibenoff invites her - and she accepts his invitation to be present at a ceremony of "breathing exercises of the Yogi kind", "accompanied by beautiful Bulgarian songs", conducted at the first rays of dawn by men and women in the fields near the town of Sevres in France. We were given no explanation, and we do not know to this day, how this idolatry, carried on at an hour which is neither day nor night and when the whole world is fast asleep, is designed to bring the East closer to the West, but we do know that Ibenoff also founded a mystic sect, and that it was his wont to work up women and virgins from among the female followers of his sect into a frenzy, and to incite youngsters to acts of indecency and immorality. We further know that this Ibenoff, who was once given the name of the Bulgarian Rasputin by the French press, was finally caught red-handed and sentenced by a French court to four years' imprisonment. The petitioner served as a disciple to this charlatan, she participated several times in meetings of members of his mystic sect (according to her, together with her husband), and the petitioner was invited to send her children to the school that was about to be founded by the followers of that same sect. In this school, the petitioner explains and declares, it was proposed to introduce the theories of Ibenoff. When Ibenoff was put on trial, the petitioner was at a complete loss and said to one of her acquaintances, as she herself admits in her evidence : "I am utterly confused because I am about to lose a dear friend who has guided me with his advice and led me in the paths of life." In her evidence, she indeed declares that she has drawn away from Ibenoff's sect and today she no longer interests herself in it, "because it is possible to find it (that is, the philosophy of life that Ibenoff preached) in any other philosophy without complications", and she sends her children to a State school, of which by coincidence - or perhaps not by a coincidence - the headmistress, as teacher and principal, is a converted Jewess.

The story of the petitioner's relations with Ibenoff and his mystic sect was indeed recounted to the French court, and from the fact that the children were eventually placed in the hands of the petitioner, it is plain that that court found nothing objectionable in her and her character; but the Ibenoff affair is not at an end, since the second respondent - the husband - has lodged an appeal against the judgment, and we do not know what will be the result of that appeal. However, more important than that is that there were not before the French court - nor could there be - the facts that came into existence, as stated, after the giving of the judgment; and it is all the more obvious that it did not take into account those

considerations with which we are faced. That court regarded the children as it would regard French children, whereas we regard them as we would regard Israel children, whose father seeks to have them regarded as attached to the body of their resurrected nation.

The revival of a nation in its land means the revival of every member of the House of Israel, and the benefit of an Israel child requires that he be formed in the likeness of his people, on the soil of his homeland, and that he should grow and be educated a free person among his brothers, the children of his people, without the marks of a bowed head and an inferiority complex so characteristic of the Jew in the Diaspora in his relations with the people among whom he lives, even though he be born there. From that point of view, that is, from the long-term and final point of view, I do not hesitate to express the opinion that the benefit of the children requires a decision that their place is here in Israel, amongst their people, and by the side of their father.

We have, however, still not exhausted the problem, for there is another side to the coin which is no less important : that is the short-term aspect of the matter, the prosaic question as to what the children will eat today and what they will wear tomorrow. The petitioner, in her affidavit, speaks of herself as being a secondary school teacher in France, and earning enough for her own and her children's upkeep. Moreover, she says, her parents have supported her in the past, whenever the second respondent has refused to carry out his obligations towards his family. It seems that those parents are good Jews, and at least in their home they carry on the tradition and customs of Israel. The petitioner even mentioned in her evidence that her mother bad at the time objected to her grandchildren, the children of the petitioner and the second respondent, learning Christian religious studies in the school in which they were being educated, and this objection fell on willing ears so far as the petitioner was concerned. Those statements, whether in writing or made orally, were not denied by the second respondent. On the other hand, it appears that the material position of the second respondent is by no means bright. In his affidavit, he speaks of "prospects of getting settled in his profession in Israel" (paragraph 19), of prospects "of entering my children into a suitable educational institution or into Youth Aliya ...with the assistance of one of the social workers ...in Pardess Hanna" (paragraph 13). But all that is, at the very best, no more than a sort of good hope for the future, and it has not got beyond the stage of prospects. There is nothing positive. At the moment, the children are running

around in an immigrants' camp, without supervision and without the presence of relatives which are so necessary to children of tender age (the girl is about seven and the boy about four-and-a-half), subject to the kindness of good people and living on a pittance. When the children became ill on the eve of Passover (and it turns out that their illness was not so dangerous), they had to be transferred to hospital, where they could receive the necessary treatment. We do not know what will happen to them tomorrow, or how the father proposes to supply his children with their most vital needs. At the moment, their sustenance is poor. They have no corner of their own, and even the roof above their heads is not permanent.

In the *Radoyetvitch* case (6) also, in which the Court of Session held that, from the legal point of view, the father was entitled to have the child in his possession, the court was not in a hurry to hold in favour of the father, but demanded satisfactory guarantees to ensure that the child would take root in the land to which the father proposed to take her, taking into account her age, her sex and the fact that she had grown up without any knowledge of her country's language. In this respect, the words of the Lord President, Clyde, are enlightening. The learned judge puts it this way :-

> "We must in the first place, be fully informed of the petitioner's plans for taking delivery of the child and for its safe conduct to Belgrade, ...and we must be satisfied that he is at the present time in a position to carry those plans out. In the second place, we must be fully informed of the arrangements made by him for the proper reception in Belgrade (with a view to education and upbringing) of this girl of eight years of age, who when she first comes under his care) will be unable to communicate her needs or wishes to those around her, unless they have some knowledge of English. We must also be satisfied that he is at the present time in a position to carry out whatever arrangements for these purposes he may have made."

If such is the position of a father, claiming his right on the decision of a court which has already decided in the matter, how much more so in the case of a father whose actual right is still in dispute.

When I weigh that short-term view in my mind, it seems to me - and not without considerable hesitation - that despite the long-term view, and notwithstanding the father's good intentions, it would not be right to leave the children's fate hanging on a thread.

For that reason, and that reason alone, I, too, think that the order should be made absolute.

ASSAF J.: I concur with the learned President on the question of this court's jurisdiction to try the matter before us, brought by way of a petition in the nature of habeas corpus, and also on the question of giving recognition to the judgment of the court in France. In relation to the question whether the benefit of the children requires us to alter the decision of the French court, I admit to considerable hesitation and heartsearchings, similar to those which my learned colleague, Cheshin J., has discussed at some length, although I do not feel the same certainty that he has as to the sincerity of the respondent's statements in relation to the upbringing of the children - that he wants to educate them in a traditional Jewish spirit - seeing that they were made after domestic peace had been shattered, and strife had come in its stead. Further, from the evidence of the respondent in court, it is clear that he was not one of those people who maintain the Jewish tradition, and before the divorce case did not object to the method of education that the children received in France. In his affidavit, the respondent states that, in order that domestic peace be restored, he is prepared to forgive his wife her past offences and to live with her a normal family life, but the serious allegations he has made against her throw doubt on whether he feels the same way as he declares.

Counsel for the respondent contended that, if the petitioner were to decide to remain in Israel and leave the children, who are still very young and in need of a mother's care, with her, he would have nothing left to argue; but since she does not propose to do so, and since she is still not divorced from her husband according to Jewish law, he relies on the express passage in the Mishnah [1] that "a man may compel all his household to go up with him to the Land of Israel, but none may be compelled to leave it" (Ketuboth, 110b; Shulhan Aruh, Even Ha'Ezer, 75), and accordingly a husband is entitled to demand of his wife that she, too, immigrate to the Land of Israel. But it seems to me that that rule cannot be relied upon

1) A codification of the Jewish law made seventeen centuries ago.

in the present instance. It is obvious that the rule was intended for normal cases, where the husband and wife are living together in the customary way and in the manner of Jewish people, and the husband proposes to immigrate to the Land of Israel while the wife is opposed to immigration, on the ground that it involves the giving up of their established home, the ardours of travel and the liky, or out of lack of desire to leave their former place of residence, where her father's household, her relatives and friends live; but in the present case, where the couple are living separately as the result of a serious quarrel that has already lasted a number of years and where a divorce petition was filed more than two years ago, the better view is that a husband cannot demand that his wife leave her father and mother in the land of her birth and the place where she is earning her living and go after him to the Land of Israel, without being certain that she will lead there a happy life. That can only be done by way of request and compromise and not by compelling her to do so and deeming her a rebel for that reason alone, if she refuses.

That being so, we return once more to the question of giving effect and recognition to the French court's decision as it stands, according to which the custody of the children has been accorded to the petitioner. After consideration I, too, agree with the opinion of the learned President and my other learned colleagues, that the former situation should be restored by making the order nisi absolute.

SMOIRA P. Accordingly, we make the order nisi absolute as against the second respondent.

In doing so, we express the hope that the petitioner will not enforce her legal rights to their full extent, but will see her way clear to make some arrangement which will enable the father to see his children from time to time.

Order nisi made absolute against the second respondent.
Judgement given on April 16, 1950.