
KIVENKO *v.* YAGOD

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

1928

*May 14.
*May 16.

*Habeas corpus—Minor child—Possession of—Father claiming child from
uncle—Art. 243 C.C.*

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Montreal, Bond J., and maintaining a writ of *habeas corpus* issued at the demand of the respondent for the possession and custody of his minor child.

The respondent seeks, by means of a writ of *habeas corpus*, to recover from the appellant the custody and possession of his minor child, a little girl about six years of age. The child was born in December, 1921, and her mother died in Toronto, where she had gone for medical treatment, on the 1st April, 1922. At the time of the death of the mother the child was with her, and the respondent, who was then residing in Montreal, went to Toronto and brought the child back. Together they lived with the appellant who is an uncle of the respondent, until the latter, in October, 1923, married a second time. At the time of

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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his wife's death, and for some time thereafter, the respondent was in poor financial circumstances, and the appellant and his wife were anxious to take care of the child for him as they had become very much attached to her. Partly through the intervention of Rabbi Cohen, of Montreal, an agreement was ultimately drawn up regarding the child, and it is principally on the strength of this agreement that the appellant contests the present petition. In his return to the writ, the appellant asserts a right to the custody of the child on the ground that it was entrusted to him and his wife when the child was only twelve weeks' old; that the child was so entrusted to him by the mother and father of the child; and the last words of her mother before she died were to the effect that the child was to remain with the appellant and his wife who were to bring her up and keep her in their custody. He further alleges that in the year 1923, before Rabbi Cohen, the parties hereto agreed in writing that the child was to remain forever in the custody of the appellant under certain conditions, which the appellant has always fulfilled.

In his petition for a writ of *habeas corpus* the respondent alleges the relationship, and asserts his right to the possession and custody of his child. It is admitted that the respondent is the father of the child, and it is common ground that unless he has surrendered his rights or forfeited the same, he is entitled to the custody.

The Superior Court maintained the writ of *habeas corpus*, holding that the right of a father to the custody of his minor child was absolute and that, upon the evidence, this right had not been destroyed or obliterated by the father's conduct, character, mode of life, temperament or circumstances. That judgment was affirmed by the appellate court.

The Supreme Court of Canada, after hearing counsel for the respondent, no counsel having appeared for the appellant, reserved judgment, and at a subsequent date, delivered an oral judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Cohen & Gameroff for the appellant.

M. Garber for the respondent.