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Domestic Relations

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tentions of defendant that it was never his intention that plaintiff was ever to own the stock. The Court of Civil Appeals in the 1946 case found little authority directly, or even closely, in point, but said:

> "As between the transferor and transferee, it seems to be the rule that transfer of title may take place though there is no delivery of the certificates themselves, nor endorsement of them, nor transfer of them on the books of the corporation, and even though sale be by parol. The question is whether the minds of the transferor and transferee met, whether there was an intention that the stock should then and there be vested in the transferee and whether there were acts in the nature of a symbolical delivery of the property."[29]

The most interesting thing about this case was the sparsity of evidence showing that plaintiff owned the stock. Nothing in the decisions indicated the status of the stock during the life of the old corporation. Nothing is mentioned as to whether the plaintiff received dividends, or that any dividends were declared. Under this decision the law seems to be that an affirmative listing of stockholders shares in minutes of stockholder's meeting is sufficient to sustain ownership between transferor and transferor, if there is evidence of intent to make a present transfer of title.

Hoyt D. Howard.

DOMESTIC RELATIONS

Child Custody

DIFFICULT jurisdictional problems arise out of change of residence of minor children, particularly where the child has been removed from a state contrary to a judicial order of the state, and the jurisdiction of the state where the child removed may be involved.

"The subject matter involved in a proceeding to determine the

[29]194 S. W. (2d) 134, 137 (Tex. Civ. App. 1946).

question of custody of minor children . . . is the children themselves."[1] A proceeding to determine custody of a minor child partakes of the nature of an action in *rem*, the *res* being the child's status or his legal relationship to another.[2]

Collaterally, the problem has arisen as to what action may be taken against a parent who has removed a child contrary to the order of a court of the state.

As early as 1894 in *Legate v. Legate*,[3] the Supreme Court of Texas ruled that the state has the right in proper cases to deprive the parent of custody of the child, and that the welfare of the child itself is the basis of this power or jurisdiction. In its latest decision on this principle, the Court in *Wicks v. Cox*[4] said:

> "The principle underlying jurisdiction of the subject matter in child custody cases is the welfare of society, primarily as evidenced by the welfare of the child, but also the right, and . . . duty of a state to look after the welfare of individuals within its borders—whether within or without the scope of the full faith and credit clause of the federal constitution."[5]

In the *Wicks* case, the mother of the minor child had lived in Virginia; her husband had deserted her, and she had abandoned the child. A probation officer had, on his own authority placed the child with plaintiff, a stranger, who had cared for the child for some four years. In the meantime the mother obtained a divorce and remarried. The mother then moved to Texas. She went to Virginia and by a ruse got possession of the child and returned to Texas. The plaintiff in this case brings a habeas corpus action for the return of the child.

The court held that a technical legal domicile of a child in this state is not essential to give the court jurisdiction where both the child and the parties are before the court. It must be noted that in

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[1] Dorman v. Friendly, 176 Fla. 732, 734, 1 So. (2d) 734, 736 (1941).
[2] State, *ex rel* Larson v. Larson, 190 Minn. 489, 490, 252 N. W. 329, 330 (1934).
[3] 87 Tex. 423, 28 S. W. 281 (1894).
[4] ____ Tex, ..., 208 S. W. (2d) 876 (1948).
[5] *Id.* at ....., 208 S. W. (2d) 876, 878.

the case there was no judicial termination in Virginia of paternal rights and no adoption of the child by the plaintiff.

In Ex parte *DeWess*,[6] a collateral problem was presented as to what extent a court could take jurisdiction of an adult who had removed a child contrary to an order of court. In this case the husband in a divorce action in the District court was awarded custody of the child. The case was appealed and before decision of the Court of Civil Appeals the wife's mother by adoption, with whom the child had been domiciled and who was a party to the suit, removed the child to Oklahoma. In Oklahoma, the wife's mother instituted an action in the Oklahoma District Court for custody of the child. The wife entered an interpleader asking for joint custody of the child. The husband was personally served in Texas with an Oklahoma citation. He ignored the citation and did not appear. Meanwhile the Court of Civil Appeals in *Valentine v. Valentine*,[7] affirmed the order of the District Court giving custody of the child to the husband. Nevertheless, the Oklahoma court awarded custody jointly to the wife and the wife's mother by adoption, on the ground of change of circumstances. The wife, who had remarried, remained in Texas, and the child in Oklahoma. Contempt proceedings were instituted against the wife in Texas for wilful violation of the order of the court awarding custody of the child to the husband, and ordered that she be imprisoned until the child was returned to the jurisdiction of the court.

The Supreme Court reversed and remanded, holding that under this order there was a possibility of life imprisonment for the wife, and that by statute[8] punishments in civil contempt cases were limited to a fine of $100 and imprisonment not to exceed 3 days. The Court reasoned that where it was not within the power of the person to perform an act that would purge him of the contempt, the court is without power to imprison him for an indefinite term, and pointed out that in this case the mother, had actual control of

[6] ..... Tex. ....., 210 S. W. (2d) 145 (1948).

[7] 203 S. W. (2d) 693 (Tex. Civ. App., 1947).

[8] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1911.

the child, and might or might not come to the rescue of her daughter.

It seems clear that in the *Wicks* case the court properly asserted jurisdiction since the legal status of the mother and child had never been severed by judicial action, even though they were actually domiciled in different states.

The collateral problem presented by the *DeWees* case is more difficult. "It is established by the great weight of authority that ... a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the circumcumstances of its rendition."[9] A subsequent change in circumstances may justify a change in custody, on the basis of the welfare of the child, and such is the law in Oklahoma.[10] Since, then the Oklahoma District Court based its decree on the basis of a change in circumstances following the Texas court order, its judgment was valid on its face.

A quite different solution to this problem was found in the Washington case of In re *Penner*.[11] There the wife had brought the child to Washington from Montana in violation of an order of the Montana court. The Washington Court excused itself from exercising jurisdiction, while not denying it, and ordered the wife to return to Montana with the child, so that the question of change of circumstances as justifying a change in custody might be considered by the court which first handled the matter.

Texas has in the past followed the same doctrine as Oklahoma. In *Wilson v. Elliot*,[12] the court held that evidence as to conditions existing prior to the granting of the custody decree by the court of a sister state would not be admissible, but that the court could

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[9] Note, A. L. R. 815 (1918).

[10] Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930).

[11] 161 Wash. 479, 297 Pac. 757 (1931).

[12] 32 Tex. Civ. App. 483, 75 S. W. 368 (1902), *affirmed*; 7 Tex. 238, 73 S. W. 946 (1903).

hear evidence as to change in conditions after rendition of the decree which, if sufficient, might support a change in custody.

DIVORCE

As early as 1891 the Supreme Court of Texas indicated that in a divorce action based on the ground of cruel treatment plaintiff was entitled to a jury finding on each allegation of cruelty.[13] The court now holds that where a divorce action is based upon excesses, cruel treatment, or outrages of such nature to render living together insupportable,[14] the ultimate issue in the case is whether the acts complained of render further living together insupportable, and a single special issue properly may be submitted to the jury.[15]

In *Howell v. Howell*, the plaintiff wife complained of several independent acts of the defendent husband in suing for divorce on the ground of cruel treatment. She asked for special issues on each of these independent acts of cruelty charged to the husband. The lower court refused the request and sent the case to the jury on a single special issue which instructed the jury that if it found from a preponderance of the evidence that the acts complained of rendered further living together of the parties insupportable, the jury should find for the plaintiff. Judgment being against plaintiff, she appealed, assigning as error the trial court's refusal of her request for special issues on each of the acts on which the complaint was based. In answering a question certified to it by the Court of Civil Appeals, the Supreme Court affirmed the submission of the case in the single issue, holding that plantiff was not entitled to a special issue on each independent act, as the ultimate issue to be considered under Article 4629 (1)[16] is "the total effect of defendant's conduct considered in the light of all of the evidence."[17]

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[13] Trigg v. Trigg, 18 S. W. 313 (1891).
[14] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4629 (1).
[15] Howell v. Howell, ... Tex. ....., 210 S. W. (2d) 978 (1948).
[16] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4629 (1).
[17] Howell v. Howell, ... Tex. ....., ..., 210 S. W. (2d) 978, 980 (1948).