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[08/06/1990; Inner House of the Court of Session (Scoland); Appellate Court]
Dickson v. Dickson 1990 SCLR 692

D. v D.

Court of Session

Inner House (Extra Division)

8 June 1990

Lord President (Hope), Lord Mayfield and Lord Grieve

Introduction: The Lord Ordinary heard evidence on the petition and issued the following opinion, which also sets out the circumstances of the case.

'The petitioner, Mrs P.D., is twenty-one years of age and resides at *, New South Wales, Australia. The respondent, J.D., is aged twenty-three and resides at ***, Edinburgh. The parties married on 4th April 1987 and they have one child [. . .] who was born on 12th May 1988. The said child is presently in the care of his father in Edinburgh and the petitioner has brought the petition under the Child Abduction and Custody Act 1985 to have the child returned to Australia.**

'Certain background circumstances are not disputed. The petitioner's parents are of Scottish origin but emigrated to Australia where the petitioner was born. The family returned to England about 1975 and the petitioner was living there when she met the respondent, who is Scottish. After the parties married they lived together at various addresses in Edinburgh and Bristol. Perhaps they were rather too young and immature to cope with the strains of family life but certainly there were unsettled elements in their lifestyle. About March 1989, despite the fact that by that time the respondent had secured for himself what he describes as the best job he has ever had, they decided to emigrate to Australia. There seems little doubt that what they had in mind was permanent emigration and the petitioner, who holds an Australian passport, applied for a similar passport for their infant son. The respondent made a formal immigration application to the Australian authorities. There is also no doubt that the petitioner herself was very keen to return to Australia where she had family members and this may have influenced the respondent's decision to agree to the move. When the parties arrived in Australia they lived for some months with the petitioner's brother (who had accommodation there) and they then secured a home of their own at *, New South Wales, where the petitioner still resides. The respondent secured a number of jobs for himself and for at least some short time the parties appeared to have settled successfully in their new country.**

'One factor which caused some distress to the parties was that the petitioner had a miscarriage about April 1989 and she suffered a further miscarriage about September 1989. After her second miscarriage she obtained for herself employment as a waitress at a club. This necessitated her working in the evening and when she was at work the respondent and

the petitioner's mother (who had returned to Australia in the summer of 1989) helped to look after the child . . .

'On 21st October 1989 the respondent and the child . . . flew back to England in circumstances which are disputed. In any event after arriving in England the respondent and [the child] stayed in Swindon at the home of his sister, S.D. The petitioner has all along remained in Australia at the former family home. During the late autumn of 1989 the petitioner seems to have taken steps to investigate the possibility of securing the return of the child to Australia. About early New Year 1990 she consulted a firm of Australian solicitors, Messrs Humphrey and Corish, and about the middle of January 1990 they wrote to the respondent claiming that he was improperly retaining the said child and asking for his return. Following upon receipt of that letter the respondent took the child to Scotland to the home of his mother, Miss S.B., who resides at Greendykes, Edinburgh, and he and the child have since resided there.

'It seems that sometime after January 1990 the petitioner changed her solicitor to a person called Jan Butland. Mr Butland obtained legal aid for her to raise custody proceedings in Australia and such legal aid became available in early March 1990. About 12th March 1990 she instituted proceedings at Parramatta Family Court for custody of the said child. The application was based on ex parte allegations to the effect that the respondent had taken the child to the United Kingdom for a holiday and then failed to return him at the expected time in mid-December 1989. On 14th March 1990 the said court issued an order awarding the petitioner interim custody of the child and also ordering the respondent to return the child to the petitioner in Australia (No 9 of Process). On 30th March 1990 the petitioner presented the present petition. The petition was preceded by an application dated 26th February 1990 (No 10 of Process) from the office of the Australian Attorney-General to the Scottish Courts Administration. This was a request to secure the return of the child to Australia under the terms of the Hague Convention. The letter confirms that by virtue of section 63f of the Family Law Act 1975 (an Australian statute) the petitioner has statutory rights of custody which allegedly have been breached. Reference to the legislation in question discloses that under Australian law parents have joint custody of a child under eighteen years of age if there is no court order to a contrary effect. It is not disputed that under Australian law the petitioner would have a joint right to the custody of [the child] were such law applicable to the situation.

'The present petition came before me for hearing on 3rd May 1990 but was continued, primarily to see if arrangements could be made to bring the petitioner over from Australia. In the event the petitioner was able to attend the continued hearing which began on 24th May and indeed her presence was well justified.

'At the beginning of the hearing on 24th May the petitioner's counsel proposed that the respondent be ordained to lead. The respondent in his answers to the petition had a case based on article 13(b) of the Hague Convention (as set out in Schedule 1 to the Child Abduction and Custody Act 1985). That provision is to the effect that if circumstances otherwise justify an order for return of a child, the court is not bound to order such return if there is a grave risk that the return would expose the child to physical or psychological harm. It was contended on behalf of the petitioner that the petitioner had a prima facie right to the return of the child so that it was for the respondent to establish the only possible effective answer to the petition which was that return of the child would involve a grave risk. I refused the petitioner's motion since there was clearly a dispute in fact and in law as to whether or not the child had been habitually resident in Australia at the time when he was said to have been improperly retained by the respondent. Since I considered that this question of habitual residence was central to the petitioner's case, I left it for the petitioner

to lead at the hearing. In any event, although evidence was led by both parties on the question of the implications for the child of returning to Australia, the respondent's counsel eventually conceded that such evidence as there was did not in fact justify a submission that the article 13(b) case had been established.

'I may say that by separate petition raised by the present respondent on 3rd April 1990 Mr D. seeks the custody of his son. I accordingly do not intend to comment on matters which may eventually be more appropriately decided in any custody proceedings which ensue.

'The petitioner gave evidence and also relied on affidavits from her mother, Mrs O.M. (No 16 of Process), and her cohabitee Mr D.B. (No 20 of Process). These persons are in Australia and of course it is understandable why they were not able to be present at the hearing. The respondent gave evidence and evidence was also led on his behalf from his sister H.D., his sister S.D., and his mother Miss S.B. (Miss B. is divorced from the respondent's father). The respondent's father (who may have been able to contribute materially to certain critical questions) was not called as a witness but other witnesses deponed. (This was because he was in Canada on a prebooked visit.)

'The petitioner and the respondent each gave totally irreconcilable accounts of the critical events. According to the petitioner, during September 1989 she was depressed as a result of her second miscarriage. The respondent at the time upset her by suggesting that she was not even any good at producing children (an allegation which he himself emphatically denied). She stated that about 27th September 1989 she went to work as a waitress at a club. D.B. was also working at that club as a chef and the petitioner met him at work. However, she denied that at that time there was any relationship between herself and Mr B. other than a normal working relationship. However, the respondent without reason became obsessively suspicious of her relationship with Mr B. and without foundation regularly accused her of having an affair with him. Indeed he used to wait outside her work and spy on her. The petitioner claimed that the respondent had on other occasions showed himself to be unduly suspicious of her relationship with men and she insisted that such suspicions were always ill founded. In any event, because the parties were going through a difficult period, the respondent thought that he would take J. to the United Kingdom for a holiday and the petitioner encouraged this since it would give her a chance to sort herself out. Quite what was required to be "sorted out" was never precisely explained by her. She did, however, explain that she did not accompany the respondent to Britain because she did not like asking his family to pay for her fare and in any event the respondent was anxious that she should not lose her job. The respondent telephoned his family and the petitioner understood that they agreed to pay for the return of the respondent and the child to Britain for a holiday. I may say that the decision to return to Britain for the alleged holiday and the consequent travel arrangements all seem to have been organised within the space of a few days. In order that he should return to Britain the respondent required to resign from his own job. The petitioner denied that there had been any separation immediately before the respondent's flight to England. The respondent had said that he and the child would return to Australia about 12th December 1989. The petitioner trusted him and it was only because it never occurred to her that he would fail to return that she agreed that [the child] should go with him. The petitioner went with the respondent and her child to the airport when he left for the United Kingdom on 21st October. At the airport the respondent suggested that a note from the petitioner expressly agreeing to his taking [the child] out of Australia might be useful with airport authorities and as a result she wrote and signed the document which is No 30 of Process. About a week after the respondent had left Australia the petitioner telephoned his father in Scotland and claims to have been horrified to hear that the respondent did not intend to return to Australia. The petitioner kept on telephoning the respondent's sister S. and in about the middle of November 1989 it seems that the

respondent had clearly indicated that he was not intending to return to Australia. According to the petitioner about the middle of November she consulted a court official in Australia who is known as a Chambers Magistrate and was advised that she could not do anything about her child until after the date in December when the respondent and child were due to return had passed without such return having eventuated. She claimed that she received a letter from the respondent saying that he had taken up with another woman but was so upset that she did not retain it but instead threw it into the fire. When the respondent failed to return from Australia in December 1989 the petitioner was unable to consult a lawyer until early January 1990 because of the holiday period. It was then that Messrs Humphrey and Corish wrote to the respondent, as I have already noted. At some unspecified date (for the petitioner was unable to produce the date-stamped envelope) the respondent wrote to the petitioner, the letter which is attached to No 15 of Process. In this he indicates that she is not likely to see himself and the child ever again. The petitioner subsequently changed her solicitor for reasons which were not very clearly articulated but seemed to have been connected with difficulties over legal aid. The proceedings I have already referred to were then initiated. The petitioner claimed that it was only about Christmas 1989 that her relationship with D.B. became serious. About January 1990 Mr B. removed into her home and has cohabited with her there ever since.

'As I have suggested, the respondent presents quite a different picture. He claimed that he quickly became disillusioned with Australia and never really settled there. He denied that he had ever insulted the petitioner in respect of her miscarriages. When the petitioner proposed after her miscarriage in September 1989 that she would go and work in a club, the respondent was seriously opposed to this because he did not consider that an evening job in a club represented a suitable situation for his wife. After she started work at the club, the petitioner began to keep very late hours and on one occasion did not come home at all. The petitioner's mother informed the respondent that her daughter was "playing around". The respondent suggested that the petitioner was having an affair with the chef, D.B., and eventually she admitted that she was going out socially with Mr B. This was in mid-October 1989. The respondent was very upset and immediately separated from the petitioner, going to reside in a boarding establishment at Lynfield, Sydney. However, during the short period of separation he continued to baby-sit for the petitioner so that the child would be looked after when the petitioner was at work. The respondent decided that he would return to Britain if his family could help him with the fare. The petitioner seemed unsettled and upset by the separation and she informed the respondent that she was prepared to return to Britain with him so that they could make a fresh start. The respondent's family agreed to provide three tickets required for the journey back to Britain but the petitioner found that she could not leave as quickly as the respondent intended. Being an Australian subject she thought that she required a visa to return to Britain and there was also the question of disposing of the parties' Australian possessions. It was accordingly agreed that the respondent should return to Britain with [the child] and this would leave the petitioner free to join him as quickly as possible. Pending the arrival of the petitioner in Britain the respondent would seek to organise a job and a home there. The respondent was quite definite that the petitioner had not accompanied him to the airport when he and [the child] left Australia. The note which gave him permission to take [the child] out of the country had been drafted and given to him on the day preceding his departure. The respondent claimed that the petitioner had excused her attendance at the airport by saying that she was too upset to go there. About November 1989 the petitioner informed the respondent on the telephone that she would definitely not be rejoining him in the United Kingdom. She claimed that she had another man and was meaning to move to Brisbane. When the parties spoke on the telephone, the petitioner did not even inquire about [the child]. The first intimation which the respondent had that the petitioner wanted [the child] back was in January 1990 when he received the letter from Messrs Humphrey and Corish. This convinced him that

there was no prospect of a reconciliation and he took [the child] to Scotland. It was also about this time that he wrote to the petitioner informing her that it was unlikely that he would see her again. [The child] has settled in well under the care of the respondent.

'The petitioner is quite an intelligent woman. She gave her evidence reasonably well, as perhaps might be expected, for she is desperate to recover her child. However, even without reference to the evidence of the respondent or indeed to the other evidence, I was not altogether happy about her account of events. She was quite definite that she was not having an improper relationship with D.B. prior to her husband's departure yet she made much of her husband's concern that such a relationship existed. It is perhaps a curious coincidence that at some later stage -- said although not satisfactorily vouched to have been January 1990 -- Mr B. came to cohabit with her. The suggestion that the respondent was to take [the child] to the United Kingdom for a holiday has a curious ring to it. The petitioner had never before been parted from her child. That the mother of such a young child would want to be parted from him for several months is not readily to be assumed. On the other hand, a woman who was in some emotional turmoil because she was having an affair with another man might welcome a break from the responsibilities of motherhood. The respondent's family do not seem to have been affluent. It is therefore difficult to conceive how either the petitioner or the respondent could ever have expected or believed that they would provide money for fares from and back to Australia just so that the respondent could visit Britain for a holiday. It was scarcely five months since he had left Britain. The petitioner claims that the respondent wrote to her after he arrived in Britain and stated that he had another woman. It is perhaps a little odd that the petitioner cannot produce this letter since one would think that the evidential value of the letter must have been obvious. Indeed, the issue was not even put to the respondent when he gave evidence. The petitioner claims that one reason why she could not accompany the respondent to Britain for the holiday was they he did not want her to lose her job. However, this seems to rest uncomfortably with the situation where, according to the petitioner, in order to take the holiday the respondent resigned from his own job.

'The respondent for his part was not a particularly good witness. He tended to bluster and at times displayed a very short-fused temper. However, his very irascibility suggested a forthright approach to much of what he was saying. The respondent was not the sort of man to concede a point, so that he may have stood his ground with undue fervour on certain issues, but with regard to the salient matters I formed the view that he was telling the truth. This was particularly because he received important support on critical matters from his witnesses. His sister H. gave evidence that she had received a telephone call from her brother about September 1989. He was in tears and said that he would like to come back to England but could not afford the fare. He. said that she had then telephoned her father and the family had decided to rally round. Later H. had been informed that two fares were required and that Mrs D. would follow later. During her return telephone call to Australia the petitioner had told H. that she would follow her family to England once her passport was in order. On the morning the respondent left Australia the petitioner had telephoned H. to say that the respondent was on his way to the airport. The witness was very surprised that the petitioner had not accompanied her family to the airport. Her brother had not told her that there had been a short period of separation in Australia until a few weeks ago. The respondent's sister S. was much closer both to the respondent and to the petitioner than H. was. I found this witness to be balanced in her evidence and convincing in her manner. S. stated that the petitioner had telephoned her about 18th October 1989 to inform her that she was coming back to Britain. The petitioner had told her that she and the respondent were having difficult with their relationship and wanted to try afresh. Later she was informed that at first it would just be the respondent and the child who were to return to Britain and it was arranged that they would stay with her in Swindon, where she resides. On the day the

respondent was travelling S. got a telephone call from the petitioner. The petitioner told S. that things were not right between the respondent and herself. She disclosed that she was having an affair with another man and that the respondent knew this. She vacillated as to whether or not she would come to Britain to join the respondent. On another occasion, just prior to when the witness heard that the parties were returning to Britain, the petitioner had telephoned S. and told her that the respondent had separated from her. The petitioner was upset and said she had no one else to call. S. took the view that the petitioner was confiding in her and did not discuss these telephone conversations with the respondent or her family. As one would expect S. and H. D. may not be accurate about every detail in their evidence. However, I certainly got the impression that both witnesses were telling the truth so far as they were able. Thus S. knew that there had been a separation but H. did not claim to have knowledge of that fact. If the witnesses were colluding with the respondent to present a false story they could have done so much more effectively. The overall picture presented by the respondent and his witnesses has a flavour of authenticity. The petitioner was in a state of some emotional turmoil because she had formed the relationship with D.B. and her husband had left her. The fact of her recent miscarriage may have aggravated the situation. The petitioner may have struggled between a desire to preserve her marriage and her attachment to and interest in Mr B. Her vacillation during her telephone call with S.D. on 21st October seems to support this possibility. In any event, she agreed to come back to Britain in an effort to save her marriage. After her husband had departed to England she seems to have changed her mind resolutely and decided to stay in Australia. It is, I suppose, possible that her relationship with Mr B. became more involved or that her parents, who had now moved to Australia, were reluctant to see her part and persuaded her to stay. In any event once it became clear that her future was in Australia with Mr B. she became anxious about the fact that her child had departed and began to investigate means of regaining him.

'I realise of course that the evidence of the respondent and his witnesses is contradicted to a degree by the affidavit evidence of Mrs M. and Mr B. Unfortunately it is difficult to assess these witnesses without seeing them. There is a curious discrepancy in the evidence as to whether or not the petitioner accompanied the respondent and [the child] to the airport. Mrs M. supports the petitioner in saying that she went to the airport whereas H.D. is equally firm in her support of the respondent. It is curious that there should be this apparently irreconcilable evidence, for it is not of much moment whether the petitioner went to the airport or not and one would wonder why witnesses should find it necessary to lie about the matter. There is an odd passage in Mrs M.'s affidavit which perhaps sounds authentic. Mrs M. says that as the respondent left the country she said to him, "I will see you soon, son, you will take care of my grandson." The respondent replied, "Of course I will. I will not let him forget you." This last observation is perhaps a little peculiar from a man who is simply going on holiday for some weeks. In any event, it is of course possible that the respondent was trying to mask a true situation from his in-laws who would not have been happy to see their daughter returning to England after they had followed her from England to Australia. In any event, whatever the position may be about detail, I accept the respondent's account of events as essentially correct.

'I may say that after the parties had closed their respective proofs, I allowed certain other evidence from them as to what had allegedly occurred during an access visit which took place during a break in the hearing. I did not find this evidence significant. It merely confirmed that the parties are very upset about the present situation.

'The petitioner's case is based on the provisions of article 3 of the Hague Convention and the Child Abduction and Custody Act 1985. It seems to me, and I do not think that it was seriously disputed, that if the retention of a child is wrongful by virtue of article 3 then the

court has a mandatory obligation in terms of article 12 to order the return of the child. There are of course the exceptions that are set out in article 13. I have little doubt that at the time the respondent left Australia [the child] was habitually resident there. There was a somewhat lukewarm attempt by respondent's counsel to dispute that but it is difficult to see how it could be said that he was habitually resident anywhere else. There was no attempt made by the petitioner to argue that [the child] had been wrongfully removed but it was strongly contended that he had been wrongfully retained by the respondent. The rights of custody attributable to the petitioner would, in terms of article 3(a), require to be determined under the law of the state in which [the child] was habitually resident immediately before his retention. In respect of an abduction by way of retention then, given the summary nature of the remedy provided by the Hague Convention, I think it is to be supposed that the attributable law must be ascertainable by a reference to a fixed point of time. Thus I respectfully agree with Lord Prosser in Kilgour v Kilgour that the pertinent point of time is that when the retention complained of can be said to have begun. Under Australian law parents have joint custody, so that one parent cannot in my view unilaterally change the habitual residence of a child. Thus, if the provision had been that the petitioner had agreed merely to let [the child] proceed to Britain for a holiday, I certainly do not see that as being authorisation for a change of habitual residence. Whatever habitual residence may or may not be, it certainly not embrace a period of extraordinary residence such as might occur during the course of a relatively short holiday. Thus, if at the time when the agreed holiday term was due to expire -- that is about 12th December 1989 -- the respondent failed and furthermore refused to return the child to Australia, he was clearly retaining the child and by so doing was affecting the exercise of the petitioner's custody rights in an adverse fashion. The petitioner would not have abdicated her custody rights by permitting a holiday nor would it have been implied or agreed that her rights should be exercised outside Australia. At the time of retention the child would be habitually resident in Australia since no change of habitual residence had been agreed. The position therefore is that had I been able to accept the petitioner's version of events, I should have had no difficulty in granting the petition. However, I have not accepted the petitioner's story, so that the implications of what I have found to be established must be considered.

'The petitioner's counsel contended that even on the version of events spoken to by the respondent, the child remained habitually resident in Australia at the relevant time. According to my view of the facts it was only when the respondent received the letter from Messrs Humphrey and Corish in mid-January 1990 that the respondent could be said to be retaining the child properly or improperly as the case may be. The child had been removed from Australia with the express permission of the petitioner. Thus, in no sense, had the child been improperly removed. Given that the respondent thought it was the petitioner's wish that the child should settle in the United Kingdom, I do not see how he could be said to be retaining the child from the petitioner until such time as the petitioner made it clear that she wanted the child returned to Australia. The petitioner's counsel contended that it was sufficient that the petitioner should have changed her mind about leaving the child in England. I do not agree that this is sufficient. It would be necessary in my view that the petitioner's change of mind should have been communicated to the respondent. The concept of retention in relation to the Convention only becomes relevant if it is an act known to be contrary to the will of the person against whom the retention operates. It is significant that article 13(a) of the Convention specifically excludes the operation of the Convention if there is consent to the retention. In my view a consent once given continues to operate until it is due to expire or is withdrawn. Thus the petitioner's counsel placed weight on the fact that during November 1989 the petitioner consulted the Chambers Magistrate with a view to securing the return of her child. Even assuming that she did consult the Chambers Magistrate (about which fact I am not certain), it would be immaterial that she should have done so unless the respondent knew of the fact. On the evidence which I accept, the first time

the respondent knew that the petitioner wanted [the child] returned to Australia was when he received a letter from Messrs Humphrey and Corish. Any retention before that date could not have interfered with any custody rights attributable to the petitioner because the petitioner had consented to these rights being subject to the respondent's care of the child in the United Kingdom and she had not withdrawn such consent. Thus to find the custody rights attributable to the petitioner in terms of article 3(a) one has to look to the habitual residence of the child as at mid-January 1990.

'In my view it is critical to the success of this petition that the petitioner should have shown that at mid-January 1990 the habitual residence of [the child] was in Australia. It is only if the child was habitually resident in Australia at that time that it can be supposed that the petitioner's custody rights were governed by Australian law. If the child was not habitually resident in Australia at the critical time then his custody must have been regulated by English law (or possibly Scots law). However, whatever custody rights are attributable to the petitioner by a system of law other than Australian law, it cannot be supposed that retention of the child by the respondent is preventing the exercise of these rights. Thus if the petitioner has rights to joint custody under English law, there is no reason for assuming that she is entitled to exercise these rights in Australia other than with the agreement of the respondent as co-custodier. It would not be the child's retention in England that prevents her from exercising such rights but her own residence in Australia. Thus I must repeat that her petition must fail unless she can show that in January 1990 the child was habitually resident in Australia.

'"Habitual residence" is not entirely easy to define. By mere reference to the dictionary I am inclined to give "habitual" its particular meaning of "customary" or "normal". This would fit in with the purpose of the Convention which is to prevent parties gaining an adventitious advantage by removing a child from its normal home as distinct from the situation where the child may have a temporary and extraordinary residence by virtue of holiday or otherwise. I am attracted to the views of Bush J in Kapur v Kapur at p 926 where he found a distinction between "habitual residence" and "ordinary residence" elusive. The petitioner's counsel contended that "habitual residence" implied residence over an extended period and settled in quality. It was said that the residence of the petitioner's child in England was in no way settled even on the respondent's own evidence. Indeed the respondent, having stayed temporarily with his sister in Swindon, had then removed the child to his mother's home in Edinburgh. This had happened when the parties' marriage was going through a turbulent and unsettled phase. The habitual residence of the child is where it last had a settled home which was in essence where the matrimonial home was, namely in Australia. I was referred to Cheshire and North, Private International Law (11th edn), p 265; R v Barnet London Borough Council (ex parte Shah); C v C; and the Family Law Act 1986, section 41. I did not find any of these particularly helpful. The concept of habitual residence clearly implies more than mere physical residence. Thus there has to be an element of intention to fix the residence as habitual or normal as distinct from extraordinary. I doubt whether any extensive time is required to fix a residence as habitual. However, the question in this case is not whether [the child] had established habitual residence in England or Scotland but rather whether he had retained a habitual residence in Australia. However long it may take a person to establish a residence sufficiently settled to be described as habitual it, in my view, does not take any length of time to abandon habitual residence. If a person sells his home to move permanently from one town to another, as soon as he departs from his original home, he would not describe himself as being resident there, habitually or otherwise. If there is no intention to reside at a place nor any physical presence there, there can be no habitual residence. An adult can form [his] own intention about residence but this is not so in the case of a child aged two. Only the parents can decide where it resides. According to my findings the petitioner and the respondent both agreed that [the child] would leave Australia to settle

permanently in the United Kingdom. It was not represented that this agreement had been qualified in any way. There was no doubt in the respondent's evidence that when he left Australia with [the child] he had no intention that either he or the child should ever return to Australia. That at least was his position at that time. Thus after [the child] had left Australia, at least until the petitioner changed her mind, it could not be said that the child resided in Australia. He arrived in England. Whether or not the parties were to settle in England or in Scotland, the United Kingdom was where both parents expected [the child] to make his home and that is where he was. Even when the petitioner decided that she herself would not leave Australia, she did not at first ask for the child to be returned. The respondent and S. were positive on that point. By January over two months had passed and in the life of a young child that is a considerable period. He had lived throughout that period in England. It is difficult to see where else could be described as his normal home during that period. Until the letter from the petitioner's solicitor it had never been intimated to his carer, namely the respondent, that the child might return to Australia. However, as I have said, the critical question is not where he had established the habitual home but whether he had retained his residence in Australia. Once he comes to England with the unqualified consent of both parents to settle then I do not see how his habitual residence can be changed back to Australia without both parents consenting to that change. On the assumption, which I have accepted, that the petitioner was originally intending to join her husband and son in the United Kingdom, then, shortly after the child's arrival in England, if the petitioner had been asked where her son resided she would have said in the United Kingdom, and it is only the fact that she has later changed her mind about her plans that has caused her to doubt that situation. My conclusion is therefore that in January 1990 the child did not have its habitual home in Australia. The petitioner's counsel was anxious to emphasise that an extensive period of residence was required to establish habitual residence and suggested that the legislation was pointing towards a twelve-month period. However, if one considers the whole of 1989, the fact is that in that year [the child] spent about seven months in England and only about five in Australia. Thus, in the light of my conclusion, the petitioner has failed to show that [the child] was habitually resident in Australia at the critical date, and the petition must fail. I am encouraged in the opinion I have arrived at by an overall view of the 1985 Act and the Convention. The Act is described as the Child Abduction and Custody Act. It may therefore be supposed to deal with abduction and custody. When a child is removed without the caring parent's permission, that clearly is an abduction. Retention can also be indirect abduction. An example would be where a parent is allowed to take a child on holiday or for an access visit and then fails to return the child. However, if the parent takes the child abroad to settle with the express permission of the other parent and that other parent subsequently changes her mind about the future, I do not see how the activities of the retaining parent who is only doing what was agreed can be described in any sense as an abduction. I am sure that such was not the mischief the summary provisions of the legislation were intended to strike at.

'In the circumstances I shall dismiss this petition. In so doing I should perhaps add that I do not intend to be too critical of the petitioner. She is an inexperienced and confused young woman and it is perhaps understandable that she should struggle to recover possession of her only child. Moreover, I ought to make it clear that the decision in this petition does not impinge one way or the other on the custody issues which will later have to be decided.'

Lord President: On 1st June 1990 the Lord Ordinary dismissed a petition which had been presented to this court by the reclaimer. The petition was presented under Part I of the Child Abduction and Custody Act 1985. The order which was sought was for the return of the petitioner's child . . . to the address in Hornsby, New South Wales, Australia, where she resides. The child was born in Bristol on 12th May 1988 and is now living in Scotland, having been brought here from Australia by the petitioner's husband, the respondent to the

petition, on 21st October 1989. He lived in England for about a year after his birth but was taken by his parents to Australia in May 1989 when they decided to emigrate to that country, where the petitioner was born and brought up. The respondent was born and brought up in Scotland and was married to the petitioner in Bristol on 4th July 1987. He has now returned to live in Scotland, having separated from the petitioner, and the child is in his care at his mother's home in Edinburgh where he resides.

The purpose of Part I of the Child Abduction and Custody Act 1985 was to give the force of law in the United Kingdom to the Hague Convention on Civil Aspects of International Abduction. The United Kingdom and Australia are among the contracting states to this Convention, and the effect of the Act is that, so far as Scotland is concerned, the Court of Session has jurisdiction to entertain applications under the Convention for the return of a child at the instance of any person who claims that the child has been removed or retained in breach of custody rights, provided that the child was habitually resident in a contracting state immediately before any breach of those rights occurred. Article 11 of the Convention provides that the judicial or administrative authorities of the contracting states shall act expeditiously in proceedings for the return of children. The intention is that proceedings should be conducted as quickly as possible in order to secure the return of a child who has been wrongfully removed from his place of habitual residence with the minimum of delay. It is a mark of the importance which the court attaches to fulfilling its duties under the Convention that this reclaiming motion was heard within seven days of the Lord Ordinary's decision in the Outer House after hearing evidence and within ten weeks of the date when the petition was presented to the court.

It is not the purpose of the Convention, nor is it of Part I of the Act, to deal with issues as to which parent should have custody of the child. And, subject to an exception which is provided for by article 13 but does not now arise in this case, it is not concerned with questions as to whether the arrangements which have been made for the care and upbringing of the child are satisfactory. It proceeds upon the assumption that the state of the habitual residence should deal with these matters, and consequently the issues of fact or law which are likely to arise in such cases are few. There may be a dispute as to whether the removal or retention of the child is to be considered wrongful because it is in breach of rights of custody which were actually being exercised at the time of the removal or retention: see article 3 of the Convention. There may be a question under article 13(b), as in MacMillan v MacMillan, as to whether there is a grave risk that the return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. Or there may be a question, as there is in this case, as to whether the child was habitually resident in the contracting state immediately before the removal or retention. For the most part, however, the issues of fact or law, if not agreed, should be capable of solution by the production of documents or affidavits and it ought not to be necessary to delay matters by requiring a proof and the leading of the evidence of witnesses.

This brings us to the reclaimer's first argument, which was that the Lord Ordinary erred in law in requiring parties to lead evidence. The matter came first before the vacation judge on 25th April 1990 on the opposed motion of the petitioner to grant the prayer of the petition. The vacation judge refused to grant this motion and decided that it should be dealt with by a Lord Ordinary. The case was then put out for a hearing before Lord Caplan on 3rd May 1990, but at the request of counsel for the petitioner it was continued until 24th May and 25th May 1990 so that arrangements could be made to bring the petitioner to Scotland from Australia. Legal aid was obtained for this to be done and she was able to attend the continued hearing when it began on 24th May. No motion was made to the judge at that stage that he should not hear evidence. On the contrary, a motion was made by the petitioner's counsel that the respondent should be ordained to lead, since he had a case in his

answers based on article 13(b) that there was a grave risk that the return of the child would expose him to harm. The Lord Ordinary refused this motion because it was clear that there was also a dispute in fact and law as to whether or not the child was habitually resident in Australia at the time when he was said to have been improperly retained by the respondent. The petitioner then gave evidence, as did the respondent and three other witnesses on his behalf. The Lord Ordinary had before him affidavits from the petitioner's mother and also from her cohabitee in Australia. It was conceded by the respondent's counsel that the evidence did not justify a submission that a case of grave risk had been established under article 13(b). But the Lord Ordinary held that the petitioner had failed to show that the child was habitually resident in Australia at the critical date, and it was for this reason that he dismissed the petition.

Against that background it is hard to see how the Lord Ordinary can be criticised for requiring the parties to lead evidence and, in particular, how it can be said that he erred in law in doing so. Mrs Cowan's argument was that the provisions of the Convention and the summary nature of the proceedings made this inappropriate. The documentary material which was available in this case, consisting of the petitioner's application for custody to the court in New South Wales, that court's order awarding custody to her on 14th May 1990 and the request by the central authority in Australia for an order to be made for the child's return, was all that the Lord Ordinary required to consider, except in a case where grave risk under article 13(b) was alleged -- and in that case the evidence should be directed only to that issue. Furthermore, she said, the party resident in the other contracting state would be bound to be at a disadvantage at a proof as compared with the party resident in this country, and this showed that the court should dispose of the matter on documents. But we do not find in these arguments any basis for saying that the Lord Ordinary erred in law. There were two issues of fact to be resolved in this case, both of which were the subject of dispute. They were critical issues, since if a case were to be made out under article 13(b) the court would be entitled to decline to make an order for the return of the child and because the issue of habitual residence at the critical date strikes at the very basis of the Convention. While it ought to be possible in most cases to dispose of them without witnesses giving evidence, the question whether or not this is necessary is at the discretion of the Lord Ordinary. There is nothing in the Convention or the Act or Rule of Court 260J to prevent this course being adopted where he thinks it is appropriate, and it is certainly not inconsistent with the summary nature of the proceedings that this should be done. How the proof should be conducted must depend on the circumstances, and of course proper regard must be paid to the disadvantage this may cause to the non-resident petitioner. But these are matters for the exercise of discretion by the Lord Ordinary. As it happens the petitioner in this case was present and able to give evidence herself, and the Lord Ordinary was able to compare her evidence with that of the respondent on relatively equal terms. Furthermore, no objection was taken at the outset to the leading of evidence from witnesses in this case. The petitioner must be taken to have acquiesced in this course in these circumstances, and it is too late now for the objection to be taken that the Lord Ordinary was wrong to adopt it. For all these reasons we reject this ground of appeal.

The petitioner's next argument was that the Lord Ordinary erred in law in finding that the child was not habitually resident in Australia at the date of his retention by the respondent. It was not disputed by either party that up to 21st October 1989 he was habitually resident in that country. The question was whether the Lord Ordinary was well founded in holding that this was abandoned when the child left Australia with his father on that date. Various arguments were advanced by way of criticism of this decision. It was said that the petitioner had not given her final or unqualified consent to the child leaving Australia for good. Both parents had to consent to this, and her rapid change of mind in November 1989 when she first took steps to retrieve the child showed that she had not reached a settled intention that

he should leave and not come back. The child must be taken to have retained his habitual residence in Australia until he acquired a habitual residence elsewhere. That could not be done instantly, as it would take time to establish a residence which was habitual. This had not been achieved by mid-November 1989 when the petitioner consulted a magistrate in Australia about having the child returned to her. That was the critical date, not mid-January 1990 when her solicitors wrote to the respondent claiming that he was improperly retaining the child and asking for his return. And from that date onwards it was impossible for the child to acquire a habitual residence in this country because she had made it clear to the respondent that she wanted him back.

Mrs Cowan did not dispute any of the Lord Ordinary's finding of fact. Her argument was that his error was one of law. But in our opinion the Lord Ordinary's decision was primarily one of fact in the light of the evidence, and so far as the law was concerned no error on his part has been demonstrated. There were, we think, only three questions of law on this point which he had to address. The first was what is meant by 'habitual residence'. The second is whether it was necessary for the child to acquire a habitual residence in this country before his habitual residence in Australia could be said to have been abandoned. And the third was the date to which to look as the critical date at which the habitual residence in Australia had to be established by the petitioner. So far as the first point is concerned the Lord Ordinary said that the concept of habitual residence implies more than physical presence in the country concerned. He said that it requires also an intention to fix the residence as habitual. No criticism was made of this approach, and we need not examine it in detail in this case. It is enough to say that in our opinion a habitual residence is one which is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time. The concept is the same for all practical purposes as that of ordinary residence as described by Lord Scarman in R v Barnet London Borough Council, ex parte Shah at pp 342 and 343. A person can, we think, have only one habitual residence at any one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents. If they are living together with him, then they will all have their habitual residence in the same place. Where the parents separate, as they did in this case, the child's habitual residence cannot be changed by one parent only unless the other consents to the change. That seems to us to be implied by the Convention. As for the next point, the Lord Ordinary held that it was not necessary for the respondent to show that the child had acquired a habitual residence in this country, and we agree. The only question so far as the application of the Convention is concerned is whether the child is still habitually resident in the contracting state. If the child has left the contracting state with the consent of both parents whose intention when he left was that he should settle elsewhere, then it seems to us that he must be taken to have abandoned his habitual residence in the contracting state as soon as he leaves. And once it is abandoned in this way, that is by his departure with consent with that intention, it cannot revive again just because one parent changes his or her mind. That would be contrary to the principle that the consent of both parents in these matters is required. On this view the question as to the date at which to look for the habitual residence is not material in this case. The child has already lost his habitual residence in Australia by the time the petitioner began to take steps to obtain his return. But we agree with the Lord Ordinary that it is the date when the retention began, since this is what article 3 of the Convention provides. As he put it, it is critical to the success of the petition that the petitioner should have shown that at mid-January 1990, when the respondent knew for the first time that she wanted him back, the child's habitual residence was still in Australia. In the end of the day, therefore, the issues which are decisive in this case are issues of fact. The petitioner's final argument was that the Lord Ordinary had erred in law in various respects in his approach to the evidence, that is by speculating on some matters or by failing to attach due weight to others on which she relied. But this argument is untenable since these are all matters for assessment on the evidence and because the Lord Ordinary's findings of fact as

such were not in dispute. According to his findings the petitioner and the respondent both agreed that the child would leave Australia with the respondent to settle permanently in the United Kingdom. The petitioner's version of events was different, but the Lord Ordinary accepted the respondent's account as being essentially correct. That was his assessment of the evidence, and its effect in law was that he had no alternative but to refuse the petition.

For these reasons we must refuse the reclaiming motion. This means that the child will remain in Scotland because there is no basis for making an order for his immediate return to Australia under the Convention. But we must stress that our decision is limited to this single issue. We can express no opinion here as to which parent should ultimately have custody of the child. That matter must be decided in other proceedings if it remains in dispute.

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