Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smart v. *Smart, from the Court of Appeal for Ontario; delivered 30th July* 1892.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Hobhouse.*]

This case belongs to a class in which courts of justice have repeatedly expressed their reluctance to interfere by reason of the great difficulty of knowing what arrangements are best for a family where the normal family arrangements have been disturbed; and yet in which interference is sometimes found necessary to prevent injury to wives or children. Their Lordships approach it with a strong sense of the delicacy of the jurisdiction, though the facts are such as to leave no material doubt of the duty which lies upon them.

The Appellant and Respondent are husband and wife. They were married on the 4th June 1874. There are three children of the marriage: a girl born on the 10th April 1875; another girl born on the 19th July 1877; and a boy born on the 13th October 1880. Up to the year 1883 the family resided at Port Hope, a town in Ontario, where the husband practised as a solicitor and barrister.

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In July 1883 the wife left her home, taking her children with her, to take up a residence in Toronto. She had then, and has, a handsome fortune in possession, and a larger one in expectancy. The reason she assigned for leaving her husband's roof was habitual intoxication on his part, and the many distressing incidents common to such a habit.

Negotiations took place between the parties and their friends for a resumption of the family relations, and on the 2nd May 1884 a written agreement was signed by the husband and wife, in pursuance of which the wife returned home to Port Hope.

The recitals of the agreement are as follows:—

"Whereas unhappy differences have arisen between the said David Smart and Emilie Ardelia Smart.

"And whereas the said David Smart and Emilie Ardelia Smart have been living separate and apart for some time on account of such unhappy differences.

"And whereas the said unhappy differences have arisen from the habits of intemperance of the said David Smart.

"And whereas the said David Smart has determined to abandon such habits, and in consideration of that and for the other causes and considerations in this instrument mentioned, the wife of the said David Smart, Emilie Ardelia Smart, has agreed to return and live with him the said David Smart."

It was then agreed that the wife should advance 8,000 dollars to pay the husband's debts, and that she should out of her own estate maintain the household and family at Toronto; that if at any time thereafter the husband should again give way to intemperate habits, the wife should be at liberty to live apart from him, and should have the exclusive care of the children, under the obligation to maintain them; and that the husband should convey to the trustees of a previous settlement of land owned by him, other property described as the remainder of the property owned by him and adjacent to the land already conveyed.

In October 1884 Mr. and Mrs. Smart went to California for a visit of some duration; and when there, the husband, who appears to have kept himself sober in the meantime, relapsed into drunken habits. Arrangements were made for their return to Toronto, but when the moment arrived the husband did not appear, being in fact too drunk to travel, and the wife journeyed back to Toronto in the company of a relative. This took place in September 1885.

The wife then instituted a suit to have the care of the children secured to her according to the agreement of May 1884, and that led to a second agreement, which was made on the 23rd November 1885. That agreement was stated to be supplemental to the earlier one, and it recited that under the terms of the earlier agreement the wife claimed the possession of her three children, and that the husband had requested her to give him a covenant as to her dealing with them. The wife thereupon covenanted to maintain and educate the children at her own expense, with provisions for their religious training and for their residence in Toronto, and for the husband's access to them.

In June 1886 the husband applied for a writ of *habeas corpus* in respect of the three children, which the wife resisted. In the course of the proceedings it was arranged that the husband should also present a petition for the custody of the children, and that the questions in both proceedings should be tried simultaneously. A great quantity of evidence was gone into, and in the course of it the husband made some charges against his wife, which had great influence on the decision of the case. It appears that in April 1884 he had hinted at his wife's unchastity without any specific charge, and in a letter written to the wife's solicitor in June 1886 he said that she had confessed to having married him by fraud,

and for her own base purposes, and suggested that she herself was the cause of the trouble. In April and May 1887 he entered into more detail. A medical lady, Mrs. Ballard, who had attended the wife, was then under examination, and the husband put to her several questions to show that his wife had contracted depraved habits. This he did against the protest of the wife's Counsel. He insisted too that his drunken habits were not the only cause of her leaving him, as stated in the agreement of May 1884, but that there were other causes. When he came under cross-examination in October 1887, the wife's Counsel insisted on knowing what he meant by his several insinuations; and he then made specific and detailed allegations, which, if true, would show that his wife was a person of abnormal depravity. In that condition the cause came on to be heard before Mr. Justice Ferguson.

That learned Judge found, without hesitation as he says, that the charges so introduced had no foundation in fact, and that the wife's answer to the petition had been proved. He held that the husband had made it impossible for his wife to live with him again, and that he had been guilty of cruelty. He ordered that the writ of *habeas corpus* should be discharged with costs, and that the three children should be remanded to the custody of the wife, with provisions for their education and residence, and for the husband's access to them.

The husband appealed. In his reasons for appeal he seeks to deaden the effect of his accusations which had so recoiled upon him, by saying that he had not set them up on his application for the writ of *habeas corpus*, and that the only occasions on which he had mentioned them were privileged.

Three Judges of the Court of Appeal accepted the findings of Mr. Justice Ferguson on

the matters of fact in issue. They therefore held that the wife was not in fault, and that after the accusations her husband had made against her, she could not be expected to live with him again. They felt difficulty in saying that his drunken habits, which on the evidence he was shown to have abandoned, were by themselves a justification for depriving him of his children; but, having regard to his false accusations, they had no difficulty in affirming the judgment of the first Court. Mr. Justice Burton, who was the fourth Judge, took a different view. He considered that the wife was not justified in leaving her husband on account of his drunkenness. With respect to his accusations, the learned Judge thought it unnecessary to express any opinion as to their truth or falsehood; but he declined to hold that evidence given by the husband in a Court of Justice, especially when elicited by the wife's Counsel, should be regarded as an act sufficient to warrant the Court in refusing to give the custody of his children to him. The result was that the husband's appeal was dismissed.

Their Lordships may say at once that they cannot concur in Mr. Justice Burton's view of the husband's conduct. They cannot understand why accusations made on oath in a Court of Justice, should, irrespectively of their truth or falsehood (as to which the learned Judge does not inquire), be treated with more indulgence than accusations made elsewhere, unless the accuser is in duty bound to make them. Here the husband had no duty to make them. It is true that, if he did not, the vague and dark insinuations he had previously thrown out would be taken as groundless and would tell against him; but that is the position in which a man places himself by throwing out insinuations which he must substantiate or withdraw. He might have withdrawn these, or he might have said

that he preferred to be silent on the subject. He did prefer to support his insinuations by detailed statements which have been found to be false. Being false, the occasion on which they were made, so far from palliating his offence, aggravates it.

The law applicable to the case is the common law of England, as modified by a statute framed on the principle of what is known as Serjeant Talfourd's Act. It is thereby enacted that the Court may, if it sees fit, on the petition of the mother of an infant in the custody of its father, make order for the delivery of such infant to the petitioner, to remain in her care and custody until such infant attains the age of twelve years. In this case it was the mother who had possession of the children, and the father who was seeking to get it; but the Court considered, and rightly, that the result ought to be the same as if the parts were reversed.

On the 22nd June 1886, when the writ of *habeas corpus* was sued out, all the children were under twelve years of age. On the 25th February 1890, when Mr. Justice Ferguson's order was made, the two girls were more than twelve years of age. The boy has not quite attained that age at the present moment. Therefore, when the two orders below were made, the large discretion given by statute existed only in relation to the boy. The girls had to be dealt with under the common law, in which their Lordships mean to include the ordinary jurisdiction of the Court of Chancery.

Their Lordships have been very much pressed, as the Courts below were, with broad judicial statements of the father's legal power over his children, and of the amount of misconduct which it requires to induce the Court of Chancery to interfere with him. Their Lordships are disposed to think that the facts of this case are such that, even if it had occurred early

in this century, the Court would have been induced to give the custody of the children to their mother. But they remarked during the argument, and wish to remark again, that no one has stated or can state in other than elastic terms, the grounds on which the Court should think fit to interfere. There must be a sufficient amount of peril to the welfare of the children. But that sufficient amount can hardly be fixed for one age by the standard of another. Drunkenness, for instance, is looked upon as a much graver social offence now than was the case two or three generations ago, and its effect upon the welfare of a family must be judged of accordingly. For many years the tendency of legislative action and of judicial decision, as well as of general opinion, has been to give to married women a higher status both as regards property and person; and, in family questions, to bring the marital duty of the husband and the welfare of the children into greater prominence; in both respects diminishing the powers accorded to the husband and the father. This change must necessarily affect the views of Judges upon the welfare of families when they are called on to exercise their discretion; or, what is not a very different thing, to decide what is sufficient cause for taking children out of the custody of the father.

The case of *Fynn*, before Vice-Chancellor Knight Bruce, in the year 1848 (2 De Gex and Sm. 457), was much relied on both in the Courts below and at this bar. Viewed as a decision that case cannot be said to afford any guidance. The petition presented, not under Talfourd's Act, in the names of the infant children by their grandmother as next friend, and supported by their mother, was dismissed. But the reasons of the Court, as reported, leave it in doubt whether it was dismissed merely for the practical

reason that the grandmother and mother had not the means of supporting the children; or because the Vice-Chancellor thought ultimately, after two adjournments, that the very strong grounds, which he stated with great force, for taking the children out of the custody of the father, were not strong enough to prevail against his legal powers, which he stated also with great force; or because the parties, having had the serious difficulties on both sides clearly exhibited to them, were weary of the dispute. Viewing the report as an exposition of the law by a very eminent Judge, their Lordships do not dissent from the terms in which the legal position of the father, apart from statute, is stated. But it seems to them that the Vice-Chancellor, while acknowledging that the effect of Talfourd's Act ought to be considered, has not stated its effect in any adequate manner.

In the next year the case of *Warde* v. *Warde* was decided by Lord Cottenham (2 Phil. 786), and it illustrates both the direct and the indirect effect of Talfourd's Act. There the wife had left home, taking her children with her, on account of her husband's misconduct. He applied to the Court to have the children delivered up to him, which Vice-Chancellor Shadwell ordered to be done. There were four children, two above and two under seven years of age, which was the line drawn by Talfourd's Act. On appeal, Lord Cottenham pointed out that the Court had now an absolute authority over the younger children, and a larger power over the elder than it possessed when *Wellesley* v. *The Duke of Beaufort* (2 Russ. 1) was decided. Afterwards he said: "Children are by nature entitled to "the care of both their parents; but when the "conduct of one or both of the parents has been "such as to render it impossible that they can "live together, and the Court has therefore the

" painful duty cast upon it of deciding whether " the children shall be brought up by one parent " or the other, all that it can do is to adopt that " course which seems best for the interests of " the children." He then decides as to the eldest child, a girl of eleven, that she is likely to be injured by remaining with her father. As to the next, a boy of nine, Lord Cottenham thinks it unnecessary to decide whether, if that boy stood alone, he ought to be removed from his father's custody, because he says :—" When I am com- " pelled on such a ground to take one child from " its father, I must not accompany that measure " with the great evil and danger to the children " of separating one portion of the family from " the other." As to the younger ones he repeated that " the Court has an absolute control " over them, without regard to the peculiar " common law right of the father to the custody " of all his children." The result was that all the children were given to their mother.

Independently of the principles explicitly laid down in this case, it shows how inevitably a change of law brings about a further change in the mind of the Judge on such a subject as the welfare of families. If the Court, having a discretion in the case of younger children, decides to remove them from their father, that must influence its judgment with respect to older ones, because it brings in the question whether it is right to break up the family by separating brothers and sisters.

In the case of *Halliday* (17 Jur. 56), decided in the year 1852, the wife petitioned under Talfourd's Act for the custody of a child four years old. The particular decision is not so important as the instructive way in which Vice-Chancellor Turner expounds the law, and which is frequently referred to. He specifies three main features as belonging to Talfourd's

Act. First, it does not destroy the father's common law right, but assumes it, and introduces new elements and conditions under which it is to be exercised; secondly, it connects his right with his marital duty, and imposes the marital duty as the condition of recognizing the paternal right; thirdly, it regards the interest of the child. And he founded his judgment in favour of the wife on the husband's breach of marital duty.

These principles were re-stated by Sir Geo. Jessel in the year 1876 in the case of *Taylor* (4 Chan. Div., p. 157), and applied to the Act of 1873, which extended the power of the Court to all children under 16.

In the case of *Elderton* (25 Chan. Div., p. 220), Mr. Justice Pearson considered that there was no ground for depriving the father of his children independently of his behaviour to his wife; but, as he had been guilty of a breach of marital duty, and had made it impossible for the children to have the care of both parents, the mother was entrusted with the care of them.

In the present case we have the following circumstances: The wife has twice left her husband, taking her children with her, on account of his habitual intoxication, with its disgusting incidents and degrading example. On each occasion he agreed that she should maintain and educate the children apart from him; and though those agreements are not enforceable against him by the law of Ontario, they serve to show the then opinion of himself as well as others as to the arrangements which were most fitting under the circumstances. Since the second separation he has, to all appearance irrevocably broken up the family by falsely alleging against his wife charges so injurious that she cannot be expected ever to live with

him again. And the wife has ample means to bring up and provide for the children, while the husband has only a very narrow income.

All the authorities above cited from *Warde* v. *Warde* downwards apply to the case of the boy who was born in October 1880, and leave no doubt that in committing him to the care of his mother the Court below did what was strictly legal, as well as what was expedient for him and just between husband and wife.

As to the girls, it is true that the cases before Sir Geo. Turner, Sir Geo. Jessel, and Mr. Justice Pearson all related to children under the age specified by statute. But, as intimated above, it is probable that even prior to the passing of Talfourd's Act, in such a case as this the children would not have been left in their father's care. How can there be any substantial doubt about it now? It has been shown that Talfourd's Act at once introduced a new class of considerations when some of the children are below and some above the statutory age. But besides this, the course of legislation shows distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive, and that the welfare of the children required that it should be cut down. That was done here in 1839 by Talfourd's Act, which gave to the Court a discretion, judicial no doubt, but still a very large discretion, over children less than seven years old. The sense of the community was so satisfied of the benefit of the change, and also of its insufficiency, that in 1873 the limit of seven years was raised to sixteen. In Ontario it has been fixed at twelve. But it is impossible to measure by arbitrary limits of age the change of view which underlies the positive legislation. That change must also affect the question what is required for the welfare of the older children when their father's misbehaviour

has made it impossible that they should have the care of both parents. A judgment on such a question always was and must be in its essence a discretionary judgment; viz., one guided by views on social and domestic matters absolutely incapable of being brought under legal rules and definitions. Doubtless it is exercised within stricter limits and under greater pressure than in cases when the legislature has in express terms given a discretion. Their Lordships are now acting under that pressure. But the welfare of a family is powerfully affected by the opinion of relatives, friends, and neighbours, which no Judge has a right to disregard; and that opinion will be the opinion of the day, not of a bygone day. And whatever might have been the view taken prior to the year 1839, it is quite impossible at the present day to say that under such circumstances as are disclosed by the present case, it would not be seriously prejudicial to the children to take any of them away from their mother in order to place them in the custody of their father.

The result is that the appeal fails; and their Lordships will humbly advise Her Majesty to dismiss it. The Appellant must pay the costs.