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United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY HENN in Behalf of MABEL HENN, a Minor,
Appellant,

vs.

CHILDREN'S AGENCY (a Corporation), and KATHERINE FELTON, President or Manager Thereof,
Appellees.

No. 2188

Brief of Appellant

HENRY B. LISTER,
Attorney for Appellant.

Filed this.....day of October, 1912.

FRANK D. MONCKTON,
Clerk.

By.....Deputy Clerk.

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BRIEF OF APPELLANT

The only point to be determined by this appeal is the jurisdiction of the Juvenile Court of the State of California, to substitute a corporation as parent for a foreign infant, temporarily within the State. The Juvenile Court Act of California is evidently based upon the theory that the State is the common parent of all its citizens, but even if such an assumption of parentage is constitutional in regard to its own citizens, the same logic does not apply in the case of foreign infants, temporarily within the State. Counsel can find no case directly bearing on this point, because so far as his researches go, he has been unable to find any other instance in which a State or Nation, either ancient or modern, has ever claimed any such right.

"An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own, and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infant, the domicile of the children in either case follows the independent domicile of the parent."

Lamer vs. Macon, 112 U. S. 452.

In probate and guardianship affairs over a foreign infant, the State acts through comity only, and it is not comity, but usurpation, to refuse a foreign infant the right to return to the State of its domicile. A State may exclude a foreign infant unless accompanied by its parent or proper guardian, but it has no right to adopt a foreign infant and turn it over to a charitable institution against the wishes and without the consent of its natural guardian. It has no right to refuse to deliver it up to its parent or permit it to return to its own State.

Respectfully submitted,

HENRY B. LISTER,
Attorney for Appellant.

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BRIEF OF APPELLEES.

The matter of the custody of the minor, hereinabove referred to as Mabel Henn, has been finally determined by a judgment of the Supreme Court of the State of California, and each and all of the objections urged in this proceeding by the petitioner, were fully and squarely decided by that court adversely to her contention. The case is reported under the title of *"Ex parte Maginnis,"* 121 Pacific Rep., p. 723.

A judgment of the Supreme Court of the State of California, involving a matter confessedly within its jurisdiction will not be disregarded by this court.

Erickson v. Hodges, 179 Fed. 177;
Kroschel v. Munkers, 179 id. 961;
Howard v. Fleming, 196 U. S. 126;
Ex parte Le Bur, 49 Cal. 159.

The federal courts have no jurisdiction to issue a writ of habeas corpus, in such a case as the one at bar; the matter in dispute (the custody of a minor child) being incapable of being reduced to any pecuniary standard of value. The following federal cases among many, fully cover that point.

In re Huse, 25 C. C. A. 4 (note 25);
Ex parte Everts, Federal Cas. 4581;
Perrine v. Slack, 164 U. S. 452;
In re Barry, 42 Fed. 113; 2 How. 65; also same case, 5 How. 103;
Ex parte Burris, 136 U. S. 586.

The only point urged in the brief of appellant is fully answered by the fact that the physical presence of the minor within the State gave jurisdiction to the State courts to determine her status and adjudge as to her custody. The trial court found the minor to be an abandoned child and a resident of the State of California. The statement of petitioner that she was "unable to locate" said minor for nearly two years is significant in this connection.

"Every sovereignty exercises the right of determining the status and condition of persons

found within its jurisdiction and the law of a foreign state cannot be permitted to intervene to affect the person's rights or privileges, even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government."

Woodworth v. Spring, 4 Allen (Mass.) 321, cited with approval in

De La Montanya v. De La Montanya, 112 Cal. p. 117.

Respectfully submitted,

W. T. KEARNEY,
Attorney for Appellees.

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APPELLANT'S REPLY BRIEF.

The act of Congress of February 5, 1867, extended the writ of habeas corpus "to all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States", and made the writ issuable by the several courts of the United States and the several justices and judges of said courts within their respective jurisdictions. This act was incorporated in Section 753, revised statutes of the United States.

> "Where an imprisonment results from a statute which violates a right guaranteed by the Federal Constitution a writ of habeas corpus will issue from the Federal Courts."
>
> Ex parte James H. Savage, 134 U. S. 176.

Jurisdiction of the federal courts is claimed by the petitioner, not because of diverse citizenship, which requires a pecuniary value of $3000, but because it is claimed that Mabel Henn, a foreign minor, is restrained from returning to the State of Montana, which appears upon the face of the record to be her residence. The question is exactly the same as the recent dispute between the United States and Russia in regard to the right of citizens of the United States of Jewish race to enter and leave Russia. Russia also claimed the right of guardianship over the children of citizens of the United States of the Jewish race who entered Russia, and refused the right of said children to leave again. For this breach of international law, the United States revoked its treaty with Russia.

In the case at bar, a parent permitted a minor child to come to California for its health. The custodian, Marie Maginnis, was charged with failure to provide this child with a proper home in the State of California. It is not contended that during the time that this minor wished to reside in California that the State exceeded its jurisdiction in seeing that she was properly provided with a home, but it is contended that as soon as the

mother, the natural guardian of this child, demanded her return to the State of Montana any jurisdiction of the State of California to retain the child thereupon ceased.

A prison may be anything which restrains a person of personal liberty. A prison may be a cell, six feet by four feet, or it may be a whole state. It is contended that a statute which confers upon a court the right to confiscate all foreign persons under twenty-one years of age and prevent them from leaving the state is in direct violation of the United States Constitution and, as such, to fall within the jurisdiction of the federal courts.

Although the court found Mabel Henn to be a resident of the State of California, it conclusively appears from the face of the record that she could not be a resident of the State of California. The original complaint, charging her with being a dependent child under the statute, sets forth facts which establish conclusively that she was not a resident of the State of California, and a finding to the contrary does not, and cannot, cure this defect upon the face of the record. The case of De La Montanya v. De La Montanya held that where a father had removed his children, who were legal residents of California, to France and both he and the children were in France, the wife could not, by publication of summons against the absent husband, get a decree awarding her the custody of the children. The case of De La Montanya v. De La Montanya, if it stands for anything, deter-

mines the fact that this petitioner could not get a valid decree in the State of Montana against the respondents in the case of this minor by substituted service of summons to compel them to return the child to Montana. Mrs. De La Montanya got a decree from the Superior Court of California against her absent husband ordering him to bring the children back from France into California and with a view to having the French government enforce this order through comity. The court held that such a decree was void.

The sole question to be determined by this appeal is whether or not a state can obtain jurisdiction over a foreign minor to imprison the minor until his or her majority either in an institution or by delivering the minor over to any other person or corporation that it sees fit and thereby preventing the said foreign minor from leaving the state. Does the mere fact that a foreign minor comes physically within the territory of a state, entitle the state to the right of determining that he must continue to reside in the state until his or her majority?

Under this law, a foreign minor, in transit on a railway train through the state, may be seized and held in prison for smoking a cigarette, not as a punishment for crime; for smoking cigarettes is not made a crime, but because the law of California has decided that all minors who smoke cigarettes may be imprisoned until their majority.

It is respectfully submitted that the forcible retaining of this minor child within the State of California, against the wishes of its mother and guardian, is a direct violation of the Constitution of the United States.

Respectfully submitted,

HENRY B. LISTER,
Attorney for Appellant.