NICOLETTE TURNER, Appellant, *v.* SAMUEL NATHANIEL BURNETTE, JR., Appellee.

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 17 and 21, 1975. Decided May 2, 1975.

1. A writ of habeas corpus tests only the immediate right to custody of a child.
2. When a writ of habeas corpus arises from the detention of a child, the court is concerned not so much with the illegality of the detention as with the welfare of the child.
3. In Liberia, generally when parents of a child are living apart, the father is the custodian of the minor child against the claim of any person whomsoever.
4. Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, barring due regard both to international duty and convenience, and to the rights of its own citizen, or other persons who are under the protection of its laws.
5. Even though a foreign divorce decree might be open to challenge on the grounds of jurisdiction and failure of due process, a party to such decree is estopped therefrom when, in reliance upon such decree, he remarries.
6. A judgment of a foreign court may be impeached for want of jurisdiction, notwithstanding its recitals of jurisdiction.
7. A judgment *in personam* is not entitled to extraterritorial effect if it is shown that it was rendered without jurisdiction over the person sought to be bound.

The appellant was a citizen of the United States who married a Liberian in Liberia in 1964. They became the parents of a child in Liberia. In 1968 appellant mother left for the United States with her infant child. In 1970, the appellant sued for divorce in the courts of Illinois, where a divorce decree terminated the marriage and awarded custody of the child to the mother. It does not appear that personal service was effected upon appellee and only constructive service was made. In 1974, the appellee, who had remarried since the divorce decree in 1971, as had appellant, took his son with him from the United States and without the mother's consent, and returned with the child to Liberia. The mother followed

and sued on a writ of habeas corpus to obtain custody of her son. The petition was denied, and an appeal was taken from the denial.

The Supreme Court pointed to the distinction between the personal rights of a person, such as the right to custody of a child, which only personal service could affect, and the marriage relation which can be ruled upon by a foreign court after constructive service upon the defendant.

The Court held that it would recognize the divorce decree because appellee had benefitted therefrom by his remarriage after the divorce, but would deny the decree as to the custody provision therein, since the foreign court had not acquired jurisdiction of the appellee's person. The ruling denying custody to the mother was *affirmed*.

J. Dossen Richards for appellant. *Joseph P. Findley* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The appellant, a citizen of the United States of America, and the appellee, a Liberian, were legally married in Liberia on December 19, 1964, and to them was born a child, Emery Nathaniel Burnette, on April 19, 1966. In 1968, the appellant, together with the young child, left for the United States. The appellant alleged that they left with the express understanding that they would be joined later by appellee. The appellee alleged that the mother and child left on a vacation, to visit her parents. In any event, in 1970, the appellant sued for divorce in the Circuit Court of Cook County, Chicago, Illinois, U.S.A. The marriage was dissolved, and custody of young Emery was awarded to the appellant by a decree of the said court.

Later, both appellant and appellee remarried different

persons. The appellee has since been divorced. In 1974, while the appellee was in the United States he, apparently without the consent and knowledge of the appellant, brought young Emery back to Liberia. Subsequently, the appellant returned to Liberia and sued on a writ of habeas corpus to regain custody of the child from the appellee, in the First Judicial Circuit Court of Montserrado County. The matter was heard by Judge E. S. Koroma, who denied the petition and ruled that since there had been no showing that the appellee was morally unfit or incapable of adequately taking care of the child, he should continue to have custody of the child in keeping with Liberian law. The court also ruled that the appellant could visit the child in Liberia, but any visit outside of Liberia must be with the knowledge and consent of the appellee. Appellant excepted, to and appealed from, this ruling.

Counsel for both parties argued with great ability and skill at the call of the case. Briefly, the appellant contended that a judgment of a foreign court of competent jurisdiction should be given recognition or full faith and credit by the courts of Liberia, and, therefore, the lower court erred in denying the petition for a writ of habeas corpus.

The appellee argued that there was no error on the part of the lower court, because the foreign court never acquired jurisdiction over him, since he was never summoned or given an opportunity to be heard in the divorce suit upon which appellant based her claim to custody of the child; that in the absence of a special compact between Liberia and a foreign country, the courts in Liberia are not bound to give effect in Liberia to a judgment rendered by tribunals of a foreign country; and that under Liberian law the father becomes the custodian of the minor child when the parents are separated.

This case is one of first impression in this jurisdiction and presents an important question relating to the force

and effect of a foreign judgment in Liberia. The question is whether in a habeas corpus proceeding attacking the right of a father to retain possession of his minor child, a Liberian court, operating upon the principle of comity, must give recognition to an Illinois decree awarding custody of the child to his mother, when that decree is obtained by the mother in an ex parte divorce action in an Illinois court which had no personal jurisdiction over the father. For the reasons hereafter stated our answer is, no.

First, the writ of habeas corpus tests only the immediate right to possession of the child. It is not available as a procedure for determining, as between parents, who is entitled to the custody of their minor child. Ordinarily the basis for the issuance of the writ is an illegal detention, but where it is sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child. *Okagbare* v. *Okagbare,* 13 LLR 593 (1960).

Our Domestic Relations Law is applicable.

> "A married woman is a joint natural guardian with her husband of the minor children of their marriage while they are living together and maintain one household. Each such parent shall be equally charged with their care, nurture, welfare and education. When such parents are living in a state of separation, the father shall be the custodian of the minor children of the marriage as against the claim of any person whomsoever; but if he is unable or morally unfit to perform his paternal, legal, moral and natural duties toward his children or for any other reasons he fails or neglects to perform such duties, upon petition to a circuit court for a writ of habeas corpus or other appropriate relief and a showing in the proceeding thereon of such inability, moral unfitness or failure on the part of the father, the minor children of the marriage shall be entrusted to the mother or some other

person who is capable of performing such duties. If the father is dead or absent, the mother shall have custody of the minor children of their marriage unless it is established that she is unable or unfit or failing to perform her duties toward them." Rev. Code 10:4.1.

In this case, the parents having separated, and the child being in the custody of the father, without any allegation in the petition of inability or moral unfitness on his part to care for the child, and without any evidence that the appellant has a superior right to his custody, the lower court was fully warranted in concluding that the child was not illegally restrained of his liberty.

With respect to the judgment of the Circuit Court of Cook County, Chicago, Illinois, our law relating to admissibility of foreign judgments in our courts is found in our Civil Procedure Law.

"A foreign judgment in a case in which the defendant did not appear although a party thereto shall not be admissible against him; but if any person appeared on his behalf in the case, the foreign judgment shall be admissible unless he shows that the appearance was without his authority." Rev. Code 1:25.12.

"In all cases in which the judgment of a court of limited jurisdiction or of a foreign court is sought to be introduced in evidence, the jurisdiction of such court must be proved to extend to the case in which the judgment was given." *Id.* § 25.13.

In applying these sections on foreign judgments to the case at bar, it is clear that appellee, not having appeared in the proceedings in the foreign court, and since the appellee has contended that he was neither summoned nor given an opportunity to have his day in the Circuit Court of Cook County, the judgment of that court could not be admissible against him. Moreover, the burden of proving the jurisdiction of the foreign court is upon the party, in this case the appellant, who seeks to introduce

it into evidence. Counsel for the appellant did not offer any proof of jurisdiction; but cited common law authorities which hold that in considering foreign judgments it is proper to presume the regularity of the proceedings and the giving of due notice, or, in other words, that the foreign court did have jurisdiction to render a valid judgment; and that the burden is upon the one attacking the validity of a foreign judgment to demonstrate its invalidity. Our statutes provide differently, and, in such a case, the common law must give way to the legislative enactment, for it is within the power of the Legislature to prescribe how the judgments of the courts of another country should be admitted into evidence in Liberia. Even though we could conclude this opinion now by relying on the statutes quoted above, we would like to address ourselves to the important issue of what effect, if any, should our courts give to the judgment of the Circuit Court of Cook County, Chicago, Ill., U.S.A.

The Constitution of the United States of America, Article IV, Section 1, provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; but this provision does not require the granting of full faith and credit to a judgment rendered by a court of a foreign nation. See *Aetna Life Insurance Company* v. *Tremblay,* 223 U.S. 185 (1912); 47 AM. JUR., 2d, *Judgments,* § 127. In fact, even if it did no law has any effect of its own force, beyond the limits of the sovereignty from which its authority is derived. *Hilton* v. *Guyot,* 159 U.S. 113 (1895).

The Liberian Constitution has no such provision, and there is no statute or treaty with respect to the effect to be given a foreign judgment. In the absence of a special compact no sovereign state is bound to give effect within its territory to a judgment rendered by the tribunals of another country; and it is at liberty to give or refuse effect to it as may be found just and equitable. The extent to

which the judicial decree of one nation is allowed to operate within the territory of another nation depends upon "the comity of nations." In *Hilton* v. *Guyot, supra,* at 143, the United States Supreme Court said: "Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." See also 47 AM. JUR., 2d, *Judgments,* § 1215.

It is also stated in 16 AM. JUR., 2d, *Conflict of Laws,* § 5, that "in considering the question of comity, it should also be borne in mind that the recognition of foreign laws cannot be claimed as a right but only as a favor or courtesy. The application of comity does not rise to the effect of establishing an imperative rule of law; it has the power to persuade but not command. Comity being voluntary, and not obligatory, rests in the discretion of the tribunal of the forum and is governed by certain more or less widely recognized rules." Generally, greater force and dignity will be given to the judgments of foreign courts when parties have had their day in a court of competent jurisdiction, after due service of process or after entry of appearance, and have had a full and impartial hearing upon the merits of their case; unless it can be shown that the proceedings were tainted with fraud.

The rule of comity has several important exceptions and qualifications. For instance, a divorce decree will not be recognized where it was obtained by a procedure which denies due process of law, or was obtained by fraud, or where the divorce offends the public policy of that state in which recognition is sought, or where the foreign court lacked jurisdiction. See 24 AM. JUR., 2d, *Divorce and Separation,* § 964.

We have already mentioned that the appellee contended that the foreign court did not have jurisdiction over him; that he had not had his day in court and, therefore, the divorce decree was not binding upon him. At first blush, this argument would seem to be plausible; it falls apart when, in reliance upon this divorce decree, both parties remarried, the appellant to an American, and the appellee to a Liberian. It is our opinion that, even though the foreign decree, insofar as the divorce is concerned, might be open to attack on the grounds of jurisdiction and lack of due process, yet the appellant is estopped from contesting its validity when he, relying upon that decree, remarried. The fact that he has been divorced again does not alter the situation. He had to be divorced in order to remarry, or if he knew that he had not been divorced and yet he proceeded to marry someone else, then the second marriage was bigamous. We, therefore, hold that the foreign decree with respect to the dissolution of the marriage should be given recognition.

As to that portion of the divorce decree of the foreign court which deals with custody, is the appellee bound by it in view of the fact that he is estopped from attacking that part of the decree which relates to the dissolution of the marriage? The answer is, no, and for reasons stated hereunder.

At first, it should be pointed out that while in the United States of America, a court can grant a divorce and award custody in the same proceeding, this is not the case in Liberia; these are two separate and distinct actions.

Recourse to a copy of the decree of the court of Cook County reveals that there is a recital of service of process, yet the appellee has contended that he was never served with process and did not have his day in court. Assuming that appellee did receive notice of the pendency of the divorce suit by publication and mailing, we wonder whether such notice informed him that the question of custody of the child would also be decided in that action.

According to legal authorities, "mere recitals of jurisdiction are not conclusive and do not bar inquiry as to jurisdiction or jurisdictional facts, and a judgment of a foreign court may be impeached for want of jurisdiction notwithstanding its recitals. This rule also applies to a judgment reciting service of process or appearance." See 47 AM. JUR., 2d, *Judgments,* § 1263; 24 AM. JUR., 2d, *Divorce and Separation,* § 956. Due process requires that no other jurisdiction should give effect, even as a matter of comity, to a judgment acquired without due process.

Since the foreign decree decided both questions of divorce and custody, let us see whether, in view of the jurisdictional issues raised by appellee, it can stand under the doctrine of "divisible divorce" so as to warrant full faith and credit if this action had been brought in the United States. According to 24 AM. JUR., 2d, *Divorce and Separation,* § 853, the phrase "divisible divorce" indicates "that while a decree in a divorce case may be valid insofar as it grants a divorce, it may be invalid with respect to, or it may have no effect upon, separable personal rights. This situation arises from the fact that while a court may gain jurisdiction to grant a divorce by a constructive service of process, the court must gain jurisdiction *in personam* over the defendant, as by a general appearance or personal service within the state, in order to adjudicate separable personal rights and duties. . . . Thus the granting of an *ex parte* divorce . . . with an award of the custody of a child to plaintiff, cannot affect the right of the other spouse to custody where the latter had custody while residing outside the divorce state." If the foreign divorce court gained jurisdiction *in personam* over the defendant by his personal appearance in the action, so that it had jurisdiction to adjudicate his separable legal rights, the doctrine of divisible divorce is not applicable. See 28 A.L.R., 2d, 1358.

In the case at bar, the appellee never appeared in the

action in Cook County, and he alleges that he was never served with process. Under the doctrine of divisible divorce, it is our considered opinion that full faith and credit would not be given to that portion of the decree with respect to custody, because the right to custody of a child is a personal right which cannot be terminated without jurisdiction over such parent *in personam*. We find support for this view in the case of *May* v. *Anderson,* 345 U.S. 528 (1953). In that case, the parties were married in Wisconsin and both were domiciled there. After marital troubles developed, they agreed that the wife and children should go to Ohio for a while. The wife decided not to return, and the husband filed a suit in Wisconsin, seeking both an absolute divorce and custody of the children. A copy of the Wisconsin summons and petition were delivered to the wife personally in Ohio. A Wisconsin statute authorizes such service in an action for divorce but makes no mention of its availability in custody proceedings.

The wife did not appear and took no part in the Wisconsin proceeding, which produced not only a decree divorcing the parties, but a decree purporting to award the custody of the children to the father, subject to a right of their mother to visit them at reasonable times. The father, accompanied by a police officer, then went to Ohio, demanded and obtained custody of the children, and took them back to Wisconsin. This time, when he demanded their return, she refused to surrender them. Relying upon the Wisconsin decree he filed a petition for a writ of habeas corpus in Ohio. With both parties and their children before it, the Ohio Court decided to give full faith and credit to the Wisconsin decree and ordered the mother to release the children to their father. She appealed from this ruling, all the way up to the Supreme Court of the United States, and that Court held that the full faith and credit clause does not "entitle a judgment *in personam* to extraterritorial effect if it be made to

appear that it was rendered without jurisdiction over the person sought to be bound." It went on to declare that the mother's right to custody of her children is a personal right, and in order to be deprived of that personal right the foreign court must have personal jurisdiction.

This case involved two states of the American union, two of its citizens, and brought into play the Federal Constitutional provision of full faith and credit, yet the custody portion of the divorce decree was not given any effect by the highest court of that country on the ground that personal jurisdiction is necessary to adjudicate a separable personal right, such as custody. The divorce court in a state in which a parent is not domiciled, cannot gain jurisdiction to terminate the right to custody of a child by constructive service; and where the foreign divorce proceedings did not afford a reasonable notice that the question of custody was involved, the decree will not be recognized. 24 AM. JUR., 2d, *Divorce and Separation,* §§ 998, 999.

Thus we have considered the custody award under the doctrine of "divisible divorce," and have concluded that it would not be given full faith and credit in the United States, because the appellee never appeared in the proceedings, nor was he personally served with process, so as to give the Circuit Court of Cook County, Chicago, Ill., U.S.A., jurisdiction over him. The result is that the United States Supreme Court gave effect to the decree insofar as it affected the marital status of the parties and made it ineffective on the issue of custody.

Earlier we reached the conclusion that under Liberian law the foreign decree could not be admissible against the appellee when, although a party, he did not appear in the case, and when the appellant had not proved the foreign court's jurisdiction.

From a careful analysis of the law governing the principles of comity and full faith and credit, we find that jurisdiction of the foreign court, particularly over the

nonresident or alien, is one of the basic prerequisites in the determination of whether or not to grant recognition to a judgment of a foreign court; where it is lacking recognition it will be denied under either principle.

The principle of comity is to be read and interpreted in the light of well-established principles of justice; its intent cannot be to modify or override constitutional and statutory provisions. Therefore, we cannot give effect to this foreign decree when to do so would prejudice the rights of appellant, a Liberian citizen, or when its enforcement would contravene the positive laws of this nation.

Since for reasons already stated above, the foreign decree with respect to custody of the minor child is ineffective, and since under Liberian law the father is the proper custodian of a minor child when the parents are separated, absent a showing that he is unable or morally unfit to care for the child, the trial judge did not err in denying the petition for a writ of habeas corpus. We also find no error in the visiting rights accorded to the appellant by the lower court.

In view of the foregoing, the ruling is hereby affirmed; costs disallowed. And it is hereby so ordered.

Affirmed.