

received their support from money paid to the mother by the government. After the death of the child's father, the mother brought the child back to Montgomery county, Ala., where she married appellee (respondent) and lived with him until her death. To the mother and appellee there were born two children, and at the time of the filing of this petition and the trial, appellee's household consisted of himself, his more or less invalid mother, four children of his by other wives than the mother of the child here involved, the two children by the mother of the child here sued for, and the said child—nine in all. Respondent is a tenant farmer in good circumstances. Appellant's family consists of himself and wife and two children, the uncle and aunt of the child concerned here. It appears that the child receives and will receive from the United States government for some years ample funds for its support, maintenance, and education.

[2] The opinion of the Supreme Court in the case of *Murphree v. Hanson et al.*, 72 So. 437, 197 Ala. 246, seems to be a sufficient guide for our decision. As stated therein, "The rights of the petitioner and the defendant in the petition are secondary in consideration," the welfare of the child being the question of paramount importance.

[3, 4] It is recognized as a general rule that, other things being equal, the relatives of a minor will be preferred to strangers. *Murphree v. Hanson et al.*, supra. Here we think the record shows "other things" to be equal. And we entertain no doubt that, considered as the law requires, the evidence shows without conflict our duty to be to reverse the action of the nisi prius judge, and to award the custody of this child to its grandfather, the petitioner. Again, as said in the *Murphree Case*, supra, "we think it quite clear, from an examination of the record \* \* \* that the trial court failed to give due consideration to the question of blood relationship, \* \* \* and if it appears that the trial court took an erroneous view of the law as applied to the facts before him," the rule that the judgment of the trial court must have the effect, on review, of the verdict of a jury, is without application.

[5] Although there will be some temporary pain in taking the little child here in question from the home it has known for most of the years of its life, and from the society of its little half-brother and half-sister, yet when we contemplate its chances in the world while being raised in the more or less crowded home of its stepfather, not of its blood, compared to its prospects in the home of its grandfather and grandmother, we are led irresistibly to the conclusion that the trial court reached an erroneous conclusion, and that the petitioner should have been awarded the custody of the child.

The judgment of the court will therefore be reversed, and one will be here entered granting the relief prayed in the petition and awarding the custody of the child to the petitioner.

#### TILLMAN v. WALTERS. (3 Div. 726.)

(Supreme Court of Alabama. Dec. 10, 1925.)

1. Parent and child  $\Leftrightarrow$ 2(4)—It is immaterial whether custody of child be brought to court's attention by bill, petition, or application for writ of habeas corpus; relief denied indicating form of application.

Mere legal niceties are not favored on petition for certiorari to review Court of Appeals' dismissal of appeal from order in habeas corpus for custody of infants, and it is immaterial whether question of custody be brought to court's attention by bill, petition, or application for such writ; relief denied indicating form of application.

2. Constitutional law  $\Leftrightarrow$ 316—Due process in state courts under law not repugnant to federal Constitution includes due notice and hearing or opportunity to be heard before court of competent jurisdiction, but not necessarily appellate review (Const. U. S. Amend. 14).

Due process in proceedings in state courts, under law not repugnant to federal Constitution, conducted according to settled course of such proceedings as established by state law, includes due notice and hearing or opportunity to be heard before court of competent jurisdiction, and Fourteenth Amendment does not require that state provide for appellate review.

3. Constitutional law  $\Leftrightarrow$ 316—Neither state nor federal Constitution is offended by absence of statute providing for appellate review of order or judgment in habeas corpus, in absence of restriction on Supreme Court's superintendence and control of inferior tribunals (Const. 1901, § 140).

Legislature being authorized to limit, restrict, or abolish right of appeal, so long as it does not restrict Supreme Court's superintendence and control over inferior tribunals under Const. 1901, § 140, neither state nor federal Constitution is offended by absence of statutory provision for appellate review of order or judgment in habeas corpus in criminal or quasi civil cases.

4. Habeas corpus  $\Leftrightarrow$ 113(1/2)—Right of appeal to Supreme Court in habeas corpus and other suits does not exist under common law.

Right of appeal to Supreme Court in habeas corpus and other suits is regulated by statute, and does not exist under common law.

5. Habeas corpus ⇨2—Privilege of writ is not suspended by failure to provide for appeal in cases founded on recognized classification or distinction (Const. 1901, § 17).

Privilege of writ of habeas corpus in criminal or civil cases is not suspended by state authorities in violation of Const. 1901, § 17, by failure to provide for appeal in class of cases founded on recognized classification or distinction.

6. Habeas corpus ⇨117(1)—Circuit judge's order on petition for writ for custody of minor is conclusive until material circumstances warrant another judgment, or until modified and reversed by review, or in exercise of Supreme Court's superintendence and control over inferior courts (Const. 1901, § 140).

Order of circuit judge on petition for habeas corpus for custody of minor is final and conclusive until material circumstances warrant another judgment, or until modified and reversed by review, or in exercise of Supreme Court's superintendence and control over inferior jurisdictions, under Const. 1901, § 140.

7. Habeas corpus ⇨117(1)—Habeas corpus proceedings for custody of children are in nature of private suit, wherein judgment is final.

Petition in habeas corpus proceedings, civil in nature, as to determine custody of children, debtors, etc., for bail or for discharge of one indicted for crime, partakes of nature of private suit, in which public primarily has no concern, and judgment rendered is final adjudication of custody.

8. Habeas corpus ⇨113(3).

Right of appeal from order of circuit judges directing custody of infant on habeas corpus exists under Code 1923, §§ 6078, 6085.

9. Constitutional law ⇨46(3)—Constitutionality of act as affecting right to bail and right to apply successively to different courts for writ held immaterial, as respects right of appeal from order denying writ for custody of child, application not being criminal procedure (Code 1923, §§ 3238, 4305 et seq., and sections 4305-4307; Const. 1901, §§ 16, 140).

Constitutionality, as affecting right to bail, of Code 1923, § 3238, which in its original form (Code 1907, § 6245), was broad enough to accord right of appeal from order affecting custody of infants, and right to apply successively to different courts for writ of habeas corpus under Const. 1901, § 140, are immaterial as respects right of appeal from order of circuit judge denying writ for custody of minor, such writ not being criminal procedure within section 3238, declaring right of appeal as to criminal cases or cases in nature thereof, wherein writ is authorized under Code 1923, § 4305 et seq., and sections 4305-4307, §§ 3360-3393, and Const. 1901, § 16.

10. Parent and child ⇨2(2)—Primary control and custody is with government, and delegated to natural or legal guardians so long as they are fit and suitable and it is to child's best interest.

Primary control and custody of infant is with government, and is delegated to natural or

legal guardians so long as they are fit and suitable persons for purpose and it is to best interest of child to remain in such custody.

#### Certiorari to Court of Appeals.

Petition of Lisbon Tillman for certiorari to the Court of Appeals to review and revise the judgment and decision of that court in the case of Tillman v. Walters, 108 So. 61. Writ granted.

See, also, Tillman v. Walters (Ala. Sup.) 108 So. 67 (3 Div. 752).

John S. Tilley and Hill, Hill, Whiting, Thomas & Rives, all of Montgomery, for appellant.

L. A. Sanderson, of Montgomery, for appellee.

THOMAS, J. This is a petition for certiorari to the Court of Appeals to review its action in dismissing an appeal from an order in habeas corpus before the circuit judge for the custody of infants. 108 So. 61.

[1] A preliminary observation may be made, as to such petition, proceedings or pleadings therein, that mere legal niceties are not favored. *Murphree v. Hanson*, 72 So. 437, 197 Ala. 246, 259; *State v. Thurman*, 88 So. 61, 17 Ala. App. 656; *Frank v. Mangum, Sheriff*, 35 S. Ct. 582, 237 U. S. 348, 59 L. Ed. 969. It is immaterial, in any matter affecting the custody of a child, whether it be brought to the attention of a court by bill, petition (*McDaniel v. Youngblood*, 77 So. 674, 201 Ala. 260), or application for writ of habeas corpus (*Harrist v. Harrist*, 43 So. 962, 151 Ala. 656); and the relief denied indicates the form of the application. *Murphree v. Hanson*, supra; *Powell v. Johnson* (Ala. Sup.) 104 So. 525.

[2] It should be observed that due process, required by the Constitution in legal proceedings in the state courts based upon a law not repugnant to the federal Constitution and conducted according to the settled course of such proceedings as established by the law of such state, includes due notice, a hearing, or opportunity to be heard, before a court of competent jurisdiction. Where the law of the state provides for an appeal in a case to the Supreme Court of that state upon well-recognized grounds, that procedure will be looked to in the determination by the federal court of whether the defendant has been deprived of his life, liberty, or property contrary to the Fourteenth Amendment. This amendment does not require that a state shall provide for an appellate review. *Hurtado v. California*, 4 S. Ct. 292, 110 U. S. 516, 28 L. Ed. 232; *Pittsburgh, etc., Co. v. Backus*, 14 S. Ct. 1114, 154 U. S. 421, 38 L. Ed. 1031; *Reetz v. Michigan*, 23 S. Ct. 390, 188 U.

(323 Ill. 323)

**VAN KOTEN v. VAN KOTEN.** (No. 17435.)(Supreme Court of Illinois. Oct. 28, 1926.  
Rehearing Denied Dec. 10, 1926.)**1. Dower** ⇨42—**Husband and wife** ⇨30.

Husband and wife, by postnuptial contract, based on valuable consideration, may release their rights in each other's property and thereby extinguish all rights, including right of dower.

**2. Husband and wife** ⇨278(1)—**Where spouses are living apart, or can no longer live together with confidence in each other, or separation is necessary for health or happiness, property settlement, fairly and understandingly made, is valid.**

Agreements between husband and wife for separation are not per se invalid, and, where they are living apart, or can no longer congenially live together with confidence and faith in each other, or separation is necessary for health or happiness of one, agreement, fairly and understandingly made, settling their rights in each other's property, is valid.

**3. Husband and wife** ⇨278(2).

Provision in valid separation agreement that husband will pay wife certain sum, each month for her support is not void as against public policy.

**4. Marriage** ⇨1.

"Marriage" is a civil contract to which there are three parties—the husband, the wife, and the state—a status based on public necessity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Marriage.]

**5. Husband and wife** ⇨4.

Obligation imposed by marriage contract to support wife cannot be abrogated without consent of state.

**6. Husband and wife** ⇨278(2).

Agreement between husband and wife, material provision of which is that wife release all rights to support, is void as against public policy.

**7. Husband and wife** ⇨279(2).

Wife, seeking to rescind separation agreement settling property rights, for fraud, must return or tender money received under it.

**8. Husband and wife** ⇨279(2)—**Wife, bound to return or tender money received under separation contract as condition of its rescission for fraud, made a sufficient tender when she alleged readiness and willingness to repay the sum.**

Wife, bound to return money received under separation contract as condition of rescission for fraud, alleging that she was ready and willing to repay it, made a sufficient tender, as the court might order it paid into court when defendant's rights required it, as condition precedent to granting relief.

Error to Circuit Court, Champaign County; Franklin H. Boggs, Judge.

Bill by Ida Van Koten against Clifford E. Van Koten and others. Decree dismissing the bill, and plaintiff brings error. Reversed and remanded.

Dobbins & Dobbins, of Champaign, for plaintiff in error.

Herrick & Herrick, of Farmer City, for defendant in error.

HEARD, J. November 28, 1921, Clifford E. Van Koten and Ida Van Koten, residents of Champaign, being husband and wife and the parents of a child aged 7 years, entered into a written agreement which, after reciting that the parties thereto had ceased to live and cohabit together as husband and wife, and that it was the desire of the parties to arrange their property interests so that each might relinquish and surrender any and all rights and interest which he or she might have or claim in the property of the other and the wife to relinquish any rights which she might have to future support and maintenance from the husband, provided that, for and in consideration of the premises and of the sum of \$3,000 in hand paid by Clifford E. to Ida Van Koten, and of the deliverance to her of all the household goods and furniture contained in the dwelling house formerly occupied by them, and the payment of all bills for family expenses then outstanding, she thereby released to him all claims, rights, title, or interest from making any claim for support or maintenance in any manner from him. It was further agreed that Van Koten should pay to his wife the sum of \$20 on the first of every month for the care and support of the child, which payments were to continue as long as the child should be in her custody. It was further agreed between the parties that, in consideration of the division and adjustment of the properties, each agreed to and did thereby relinquish any and all future rights which he or she might acquire in any property of the other by reason of the marriage relation, and that, in case any such right or interest arose thereafter, each of the parties agreed to execute and deliver, on request, any and all instruments of conveyance to relinquish such right. After the signing of this agreement Van Koten paid to his wife the sum of \$3,000 and delivered to her the household goods and furniture mentioned in the contract and paid to her each month the sum of \$20 for the support of the child. Thereafter Ida Van Koten filed her bill in chancery in the circuit court of Champaign county against Clifford E. Van Koten, A. L. Schilling, and Lottie Schilling, praying that certain deeds signed by her and Van Koten to the Schillings should be canceled and set aside, and that the agreement of November 28, 1921, between her and Van Koten should be set aside and canceled, and that he should be required to pay to her a just