The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

T. L. Monahan, for the appellant.

H. M. Mowat, K.C., for the respondents.

The judgment of the Court was delivered by HODGINS, J. A.:—I do not think that, in the circumstances of this case, it makes any difference whether the Act . . . 8 Edw. VII. ch. 59 or the present Act, 3 & 4 Geo. V. ch. 62 (in force the 6th May, 1913), which repealed that enactment, governs this application.

A writ of habeas corpus was issued . . . on the 20th February, 1913, and a return was made on the 12th April, 1913. On that return it was open to the appellant, under the Ontario Habeas Corpus Act, 9 Edw. VII. ch. 51, sec. 7, to dispute the validity of the return in law and its accuracy in fact. In the latter case, evidence might be taken by affidavit or otherwise, and in this case was taken, viva voce, before the Judge, following the practice approved in Re Smart Infants, 12 P.R. 2. . . . Further material was filed after the return; and on the 5th June, 1913, the order now in appeal was made. . . .

The application was clearly one under sec. 13 of 8 Edw. VII. ch. 59, for an order for the production of the child. The writ of habeas corpus appears to be the proper method, or one of the proper methods, of obtaining the relief sought, for upon the return of the writ the custody of the infant is determined: Simpson on Infants, 3rd ed., p. 123. Notwithstanding that the application is made under the section mentioned, and although on the return of the writ the provisions of that section may be invoked, the case does not differ from any ordinary application made upon the return of a writ of habeas corpus. The section quoted, 13, presupposes a committal, and one made by proper authority, and deals with the matter on the footing that, in spite of what has taken place, the legal guardian's custody (see sec. 14 of 3 & 4 Geo. V. ch. 63) may be displaced in favour of the right of the parent. This parent must bring himself within that section, and shew that he or she has not been guilty of such conduct as should disentitle him or her to the custody of the child, that he or she is not unmindful of parental duties, nor is the parent applying one who has forfeited the right to have his or her wishes regarded in respect to the religion in which the child should be brought up.

These are all matters which may be and should be considered