

9, 1951

UNIVERSITY OF LONDON
 W.C.1. 108-445/1950
 -9 JUL 1953
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

In the Privy Council

ON APPEAL
 FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARK T. MCKEE (Defendant) - - - - Appellant

AND

EVELYN MCKEE (Plaintiff) - - - - Respondent.

Case for the Respondent

RECORD.

1. This is an appeal by special leave, granted the 28th day of July 1950, from a judgment of the Supreme Court of Canada delivered on the 6th day of June 1950. By that judgment the Supreme Court of Canada (Cartwright, Kerwin, Estey, Locke JJ. ; Kellock, Taschereau, Fateux JJ. dissenting) allowed the appeal of the Respondent from a judgment of the Court of Appeal of the Supreme Court of Ontario, delivered on the 24th day of June 1948, whereby the said Court (Hogg and Ayleswood JJ. A. ; Robertson C.J.O. dissenting) dismissed the appeal of the Respondent from the Judgment of Wells J., which awarded the custody of Terry Alexander McKee, the infant son of the parties, to the Appellant with a limited right of access to the Respondent. The Supreme Court of Canada ordered and adjudged that the Respondent, having undertaken to return with the said Terry Alexander McKee to the United States of America and to keep the Appellant fully advised as to the said infant's whereabouts, should have the custody of the said infant, and the Supreme Court of Canada further ordered that the Appellant should pay the costs of the Appeal and the costs of all proceedings taken in the Supreme Court of Ontario.

pp. 932-933.

pp. 902-904.

Vol. V, pp. 857-858.

pp. 902-903.

2. The Appellant and Respondent in these proceedings are citizens of the United States of America. They were born there and married there in 1933. The infant, Terry, was born in the United States of America on the 14th day of July 1940. In December 1940 the Appellant and Respondent separated and have not resided together since that time. On the 4th day of September 1941 they executed an agreement, whereby financial provision was made for the Respondent and the said infant, and which contained the following paragraph :—

p. 903.

p. 903.

Vol. IV, pp. 731-738.

“(5) It is further understood and agreed that neither of the parties hereto shall remove Terry Alexander McKee, son of the

Vol. IV, p. 733.

Parties hereto, from or out of the United States of America without the written permission of the Party not so removing or wishing to remove the said boy from the United States of America."

p. 904.

Vol. IV, pp. 742-758.
Vol. IV, pp. 759-761.

Vol. V, pp. 855-856.

3. On the 18th day of September 1941 the Respondent commenced an action for dissolution of her marriage to the Appellant in the Superior Court of the State of California in and for the County of Los Angeles. On the 28th day of September 1942 the Appellant entered a cross-plaint for divorce. After a sixteen day trial in October and November 1942 the Honourable Thurmond Clarke delivered judgment on the 17th day of December 1942, dismissing the Respondent's complaint, granting the Appellant a divorce on his cross-plaint and awarding the custody of Terry to the Appellant, but directing that Terry spend three months in the Summer time with the Respondent. The judgment also approved and confirmed the property Settlement Agreement but reduced the amount payable by the Appellant to the Respondent, for the maintenance of the said Infant Terry, from \$125.00 to \$100.00 per month. Subsequently there were applications by both parties to the Superior Court of the State of California for modification of this Order and certain minor modifications were made. 10

Vol. V, pp. 846-849.

4. On the 31st day of May 1945 the Appellant applied to the Superior Court of California to modify the Order as to custody, in such a manner that complete custody would be granted to him. The Respondent delivered a cross-application for full custody and both applications were heard in June 1945, at which time the Infant was in the State of California. The hearing having occupied five days, by Order dated the 1st August 1945, the custody of the said Infant, Terry, was awarded to the Respondent with right of reasonable visitation to the Appellant. The said Order set out the reasons for giving the custody to the Respondent and in particular set out as follows:— 20

Vol. V, p. 847.

"And it appearing to the Court that it is for the best interests and welfare of the said minor child, Terry Alexander McKee, that he at this time be placed under the care, custody and supervision of his Mother, the Plaintiff and Cross-Defendant; and . . . now, therefore, it is ordered as follows etc." 30

Vol. V, p. 856.

The Appellant appealed from this Order to the District Court of Appeals in California and his Appeal was dismissed in November 1946. The Appellant then applied for a re-hearing which was refused; and then applied for leave to Appeal to the Supreme Court of California which was refused on the 23rd day of December 1946. This exhausted the Appellant's rights of appeal in California, but the effect of these Appeals was to stay the operation of the Order of the 1st day of August 1945, until the 13th day of January 1947. 40

5. On or about the 24th day of December 1946 the Appellant, having learnt on the 23rd day of December 1946 that his final appeal had failed, without the knowledge of the Respondent, took the said infant, Terry, out of the United States of America into the Province of Ontario in Canada and arrived in the city of Kitchener in the Province of Ontario on the 26th day of December 1946. The Appellant, without informing the

Respondent, there lodged the said infant, Terry, with two elderly persons, William and Wilhelmina Ament, while he returned to the United States to look after this business interests, all of which lay entirely within that country.

6. The Respondent discovered the whereabouts of the said infant, Terry, in the month of February 1947 and on the 18th day of March 1947 instituted Habeas Corpus proceedings in the Supreme Court of Ontario directed to the Appellant and the said William and Wilhelmina Ament. Her application was supported by her own affidavit setting out the relationship of the parties, the place and date of the Infant's birth, the Order of the Superior Court of the State of California dated the 1st August 1945 awarding her the full custody of the said Infant, and the rejection of the Appellant's appeals. By way of return to the writ the Appellant filed an Affidavit denying the jurisdiction of the Superior Court of California to make the Order of the 1st day of August 1945, and further denying the fitness of the Respondent to have the custody of the said infant, but setting out no new facts as occurring since the Order of the 1st day of August 1945 as a ground for making a different order in regard to the custody of the said infant. The return came before Smily J. on the 25th day of March 1947 who reserved the matter, and on the 2nd day of April 1947 directed the trial of the following issue:—

“ Who is to have the custody of the infant, Terry Alexander McKee, as between the said Evelyn McKee and the said Mark T. McKee.”

7. The issue came on for trial before Wells J. and occupied eleven days. During the hearing it was conceded by Counsel for both Parties that the judgment of the Superior Court of California dated the 17th day of December 1942, granting the Appellant a divorce, was valid. The only facts given in evidence at the trial which had occurred subsequent to the Order of the Superior Court of California dated the 1st day of August 1945 giving the Respondent the custody of the said infant, Terry, were as follows:—

(A) That on the 24th day of December 1946 the Appellant had brought the said infant, Terry, out of the United States of America into Ontario in breach of his agreement of the 4th day of September 1941.

- (B) That when the Respondent came to Kitchener in order to commence the proceedings culminating in the trial, she visited the house where the said infant, Terry, was being kept by the Appellant, with a reporter and a news photographer who took pictures of her Michigan Attorney and herself vainly knocking at the door, and that the Respondent further supplied newspapers with hysterical publicity.

(C) That the Respondent indulged in public love-making of a reasonably innocuous character in a small restaurant in Kitchener shortly before the trial.

Wells J., however, was of the view that he was bound by authority to investigate the whole matter at length and to reach a determination as

to what, in his view, would be in the best interests of the Infant under Section 1 subsection (i) of the Infants Act R.S.O. 1937 Ch. 215 s. 1 ss. (i) which authorised him to—

“ Make such Order as the Court sees fit regarding the custody of the Infant and the right of access thereto of either Parent, having regard to the Welfare of the Infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father ”

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without being in any way bound by the Californian Order of the 1st day of August 1945, which he held was given without jurisdiction, although, as he expressed it, that judgment was entitled to be given the greatest weight. 10

8. The issue, who is to have the custody of the Infant, Terry, largely depends upon the two main questions arising on this Appeal :—

(i) As to the validity of the Californian Court's Order of the 1st day of August 1945.

(ii) As to the effect to be given by the Courts of Ontario to a valid foreign custody Order, in respect of an infant within the jurisdiction of the Ontario Courts.

9. The Respondent respectfully submits that the Order of the 1st day of August 1945 was valid for the following reasons :—

(A) There is no evidence that the Californian Court itself, 20 entertained any doubt as to its jurisdiction to make the Order.

(B) The Appellant, who is a qualified attorney in Michigan, apparently entertained no doubt as to its validity, or he would scarcely have left the United States of America in December 1946 and brought the infant into Ontario.

Vol. V, p. 860.

(C) It was conceded at the trial before Wells J. that the divorce pronounced by the Californian Court in 1942 was valid ; and the Order of the 1st day of August 1945 was made by the same Court, and was ancillary to the said divorce.

10. The Respondent further respectfully submits that the Appellant, 30 having invoked and submitted to the jurisdiction of the Californian Court both at first instance and on appeal, is estopped from denying the validity of the Order of the 1st day of August 1945 of the Californian Court.

11. If it be held that the Order of the Californian Court of the 1st day of August 1945 is not valid, then it is respectfully submitted that the earlier Order of the Californian Court of the 17th day of December 1942 granting the custody of the said infant, Terry, to the Appellant, but directing that the said infant spend three months in the summer time with the Respondent, was valid and was in full force and effect on the 24th day of December 1946 when the Appellant took the said infant into 40 Canada.

12. As to the effect to be given by the Ontario Court to the Order of a foreign court, the Respondent respectfully submits that the Courts of Ontario, on being satisfied that the Order was a valid one, made in accordance with the same principles as obtain in Ontario, should attach the same importance to it as they would to an Order made in their own Courts, and in the absence of any substantial change of circumstances should—

10 (A) in the case of Habeas Corpus proceedings, where a guardian has been appointed by a foreign court, order that the child be delivered to the said guardian, or

(B) in the case of custody proceedings, make a similar Order to that made by the foreign court.

13. The Respondent respectfully submits that if any less effect is given to an order of a foreign court in respect of an infant, than that contended for in paragraph 12, it will cause or encourage persons interested in the custody of such an infant to carry it from country to country or province to province ; a course of conduct which would have the following results :—

20 (A) It would be detrimental to the welfare of the infant.

(B) It would give an advantage to unscrupulous persons possessing ample financial means, who lack respect for orders of the Courts.

(C) It would prolong and multiply litigation until the infant attains his majority.

(D) It would be likely to cause breaches of the peace.

(E) It would be detrimental to the relationship between friendly countries.

14. The Respondent respectfully submits that in the event of the dismissal of this appeal and in order to provide an effectual means for the enforcement of such judgment, that the judgment so dismissing the appeal should include a substantive direction requiring the Appellant to deliver to the Respondent the infant, Terry, at the office of the Registrar of the Supreme Court of Ontario at Osgoode Hall, Toronto, similar in effect to the provision in that regard contained in the formal judgment of the Supreme Court of Canada but fixing a new date for such delivery over as a date approximately one month after the date of the judgment dismissing the appeal.

Vol. V, p. 903.

15. The Respondent respectfully submits that the Judgment of the Supreme Court of Canada is right and ought to be affirmed and that this
40 Appeal ought to be dismissed for the following amongst other

REASONS

- (1) BECAUSE Smily J. was wrong in not ordering the Infant, Terry, to be delivered to the Respondent on the return to the Writ of Habeas Corpus.

- (2) BECAUSE the Order of Wells J. was not to the benefit of the Infant.
- (3) BECAUSE Wells J. gave insufficient weight to the 1945 Order of the Californian Court.
- (4) BECAUSE there was no sufficient change in the circumstances to justify Wells J. in not making a similar order to that made by the Californian Court in 1945.
- (5) BECAUSE insufficient weight was given by Wells J. to the admission by the Appellant's counsel that the Respondent had been a good mother to the Appellant's 10 children by a former marriage.
- (6) BECAUSE Wells J. gave insufficient weight to the conduct of the Appellant in removing the Infant, Terry, out of the United States of America into Ontario in breach of his agreement, and for the purpose of avoiding the Order of the Californian Court of the 1st August 1945.
- (7) BECAUSE there was no evidence that the removal of the Infant, Terry, from his native land—the United States of America—where his future as a man would probably 20 lie, into a foreign country among strangers, was to his benefit.
- (8) BECAUSE the reasons given by the majority of the Supreme Court of Canada are right and ought to be affirmed.

CONOLLY H. GAGE.

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AND
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Respondent.

Case for the Respondent

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