

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
9 JUL 1953

In the Supreme Court of Canada
APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE HABEAS CORPUS ACT, REVISED
STATUTES OF ONTARIO 1937, Chapter 129 and amendments
thereto, and

IN THE MATTER OF AN APPLICATION OF EVELYN McKEE
as next friend and legal guardian for possession of her son Terry
Alexander McKee.

BETWEEN:

EVELYN McKEE,
(Plaintiff) Appellant,

— and —

MARK T. McKEE,
(Defendant) Respondent.

APPELLANT'S FACTUM

SLAGHT, FERGUSON, BOLAND & SLAGHT,
Solicitors for the Appellant.

BEAMENT, FYFE & AULT,
Ottawa Agents.

SIMS, BRAY, SCHOFIELD & LOCHEAD,
Solicitors for the Respondent.

GOWLING, MACTAVISH, WATT, OSBORNE & HENDERSON,
Ottawa Agents.

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UNIVERSITY OF LONDON
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-9 JUL 1953

INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE SUPREME COURT OF CANADA
APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

10- IN THE MATTER OF The Habeas Corpus Act, Revised
Statutes of Ontario, 1937, Chapter 129 and
Amendments thereto,

AND IN THE MATTER OF Terry Alexander McKee,
an infant.

B E T W E E N :

EVELYN MCKEE,

(Plaintiff) Appellant,

20-

- and -

MARK T. MCKEE,

(Defendant) Respondent.

PART I

30-

STATEMENT OF FACTS

* V p.875

This is an appeal from the Judgment of the
Court of Appeal for Ontario (Robertson, C.J.O.,
Hogg, J.J.A., and Aylesworth, J.J.A.,) dated June
24th, 1948, dismissing an appeal, (Chief Justice
Robertson dissenting) by the Appellant, the mother,
from the Judgment of the Honourable Mr. Justice Wells
40- dated 18th October, 1947 awarding the custody of the
infant child, Terry Alexander McKee, to the Respond-
ent, the father.

V p.859

The parties to these proceedings are all
American citizens. They were all born there, and
have always lived there. The Appellant and Respond-

*Roman Numerals refer to
Volume of Case.

ent were married there, and their infant child, Terry Alexander McKee, was born there. The Appellant was awarded custody of the infant by a judgment of the Courts of California, where the parties resided, in a proceedings commenced there by the Respondent. The child was brought into Ontario by the Respondent for the purpose of avoiding the operation of the California judgment and the Appellant has followed the Respondent into Ontario for the purpose of obtaining possession of the child in accordance with the California judgment.

V p.846

V p.846-1.27

V p.879-1.43

V p.881-1.27

V p.883-1.8

10-

V p.886-1.11

20-

The point to be decided in this appeal is whether, the child being in Ontario, the Ontario Courts ought to have ordered the Respondent to release the child and deliver possession of him to the Appellant in accordance with the judgment of the Courts of California whose jurisdiction the Respondent had unsuccessfully invoked, or was the Ontario Court right in directing an issue between these foreigners, who were temporarily within the jurisdiction, with respect to a foreign child brought into the province to evade the operation of the judgment of his own courts.

II p.357-1.29

I p.55-1.16

I p.7

30-

The Respondent brought the child to Kitchener, Ontario, about Christmas Day, 1946, and the Appellant followed them into Ontario as soon as she learned of the child's whereabouts and on the 21st day of March, 1947 applied for and obtained by an order of the Honourable Mr. Justice Treleaven a writ of habeas corpus directed to the Respondent and William A. Ament and his wife, Wilhelmina Ament, with whom the Respondent and the child were temporarily lodging, requiring them to produce the child.

I p.20

40-

The Honourable Mr. Justice Smily, before whom the motion came, on return of the writ of habeas corpus, directed that an issue be tried in which the Appellant should be plaintiff and the Respondent defendant and the issue should be who should have custody of the child.

The Appellant based her claim to custody on the said judgment of the Superior Court of the State

Ex parte Minors 1946 - Father Minors to Children

Custody to father - by California Court -

Smiley's order - p. 50 - vol 1 -

(Haines Corp. v. Bell -
Ch. 129 - QSD - vol 1

Hughes suggest ① order suggested by Robertson
in his judgment.

1942 - Father - in Call. dec - order custody Child for
Minors cited upon.

1945 - then other Court culprits.

② Order of father returns to Smiley's
subject to California Court. ?

reference Smiley - p. 848 - vol 8
& agreement - 731 - vol 4

Clause 5 - 733 - *

~~order of Clark 731 -~~

~~In Haines in answer JGT -~~

Order Clause 5 of Agreement
page 848 Clark - 760

Robertson advised that he knew his order on agreement
and was in contempt - referred by Robertson -

- V p.846
I p.42-1.5 of California dated 1st August, 1945 which was the result of litigation between Appellant and Respondent extending back to September, 1941. The Judgment on which the Appellant relied had been appealed by the Respondent unsuccessfully to the Court of last resort in California.
- I p.20-1.29 10- Mr. Justice Smily included in his order directing an issue a clause giving leave to the Appellant, if leave were necessary, to make a formal motion for delivery of the custody of the child to her.
- I p.40-1.24
I p.26 20- At the opening of the trial of the issue before Wells, J., the Appellant filed an application for delivery of possession of the child to her, and thereafter Wells, J., proceeded to try the issue as if an application for custody had been made of an Ontario child under The Infants Act and as if the Order of Smily, J., gave him the right to dispose of the whole matter.
- V p.857 30- The issue directed by Mr. Justice Smily was tried before the Honourable Mr. Justice Wells in a thirteen day trial between the 18th day of September and the 10th day of October, 1947, at the conclusion of which his Lordship awarded full custody of the infant to the Respondent with a limited right of access to the Appellant. The Appellant was living in Southern California and the child was being kept on a farm near Linwood, Ontario. In this way Mr. Justice Wells reversed the Judgment of the Supreme Court of California.
- I p.42-1.46
II p.337-1.9
338-1.39 40- The Appellant and Respondent were married at St. Albans, Vermont, on the 19th July, 1933. Both had previously been married. The Respondent was a widower with eleven children by his first wife who had died in 1931. The Appellant had one child, Gerald, by her first marriage. After seven years of marriage the child whose custody is in dispute in these proceedings was born in California on the 14th July, 1940, where the parties had resided since 1937. At the time of the trial of the issue before Wells, J., the child was seven years of age, the Appellant
- I p.45-1.37

refers to p. 737 - sec 13.

no cl

Kelloch: the Clarke order has nothing to do with custody when it confirms the agreement was only as to financial arrangements but nothing to do as to the custody.

Refers to 316 of Criminal Code -

Malice a case of unreasonableness against the father

Under Clarke order mother entitled to get child in July -

Write directly to both of them. Father & Mother -
No application for leave to appeal - here

1933 - Supreme Court -

Under L.C. Act appeal lies in Statutes Corpora - without leave -

thirty-nine, and the Respondent sixty.

I p.43-1.7

After marriage the Appellant and Respondent lived a few weeks in Washington, D.C., and a few months in Port Austin, Michigan, where the Respondent owned a summer home. They then lived two years in Milwaukee where the Respondent conducted a shipping

10-

I p.45-1.44

business. In 1937 they moved to California, and resided there until they separated on the 22nd of December, 1940.

IV p.731

After separation the Appellant and Respondent entered into protracted negotiations terminating in what they described as a property settlement agreement (Exhibit 3). This agreement was dated 4th September, 1941 and was subsequent to the events which were put forward by the Respondent in California and in Ontario

20-

as evidence that the Appellant was unfitted to have custody of the child, but which, even if true, were not of such a character as to stand in the way of the Respondent, by that agreement, agreeing -

IV p.732-1.31
-39

(a) to pay the Appellant \$300.00 per month commencing 1st September, 1941 until her death or remarriage.

IV p.734-1.33

30-

(b) to pay the Appellant (Paragraph 7) \$125.00 per month for the maintenance of the infant until he should reach the age of twenty-one years. This clause, it is submitted, by necessary implication amounted to an agreement that the Appellant should have sole custody of the child.

IV p.733-1.30

(c) That their home place was Azusa, California, (Paragraph 6).

40-

Further,

IV p.734-1.6
p.733-1.32

(d) He transferred to the Appellant their home at Azusa, and set forth that he had purchased the same for \$22,000.00, had altered and repaired it for \$14,000.00, and furnished it at a cost of \$15,000.00.

Requirements on the circuit

Wells - does not approve the breach of agreement -

McPherson admissions - Vol IV - 396⁹ 399 -

Wells 470 - pleasent little house -

Rebuttal -

re Clarke findings of facts -

260) - Vol IV - every objection
261 f

we cannot cross-examine findings of facts

- IV p.733-1.20 (e) By Paragraph 5 he agreed not to remove the infant child from the United States without the written permission of the Appellant.
- IV p.736-1.8 (f) In any action of divorce neither was to seek any decree at variance with the agreement. (Paragraph 10).
10-
- IV p.737-1.10 (g) By Paragraph 13 it was agreed that adequate knowledge has been obtained and sufficient investigation made on behalf of each party "to fully and advisedly act".
- IV p.731-1.1 The property settlement was signed 4th
September, 1941 and the Appellant brought an action
V p.855-1.10 for divorce against the Respondent on 18th September,
20- 1941 in the Superior Court of the State of California.
IV p.739 The Respondent filed a cross-complaint which is veri-
fied by the affidavit of his attorney sworn on 28th
IV p.740-1.29 September, 1942. In this cross-complaint the Res-
pondent alleged as his only ground for divorce that
for more than one year preceding the filing of the
action she had treated him "in a cruel and inhuman
manner". There is no allegation of misconduct
IV p.741-1.7 against the Appellant of any kind. As part of the
relief sought by him the Respondent asked that the
30- aforesaid property settlement be approved.
- IV p.759-1.19 The divorce action was tried in a sixteen
day trial between October 28, 1942 and November 20,
1942, before Judge Thurmond Clarke of the Superior
Court of California and resulted in an interlocutory
decree of divorce dated 17th December, 1942. On the
IV p.760-1.18 cross-complaint of the Respondent the custody of the
infant child, then about two years old, was awarded
IV p.760-1.23 to the Respondent with the provision that the child
40- should spend three months in the summertime with the
Appellant during which period the child was not to
be taken out of the State of California without the
consent of the court. The Respondent was ordered to
IV p.761-1.10 pay the Appellant \$300.00 per month pursuant to the
property settlement, and an additional \$100.00 per
IV p.760-1.3 month during the time the child was with the Appellant,
and the property settlement agreement (Exhibit 3)
IV p.760-1.29

was affirmed and approved.

V p.860-1.24

At the trial before Mr. Justice Wells both sides accepted the judgment of Judge Thurmond Clarke in the Superior Court of California dated December 17, 1942 as being valid and binding.

10-

IV p.744-1.30

Judge Thurmond Clarke made certain findings of fact against the Appellant that she was indiscreet in her association with one de la Fuente. Whatever those findings may be, they were not of such a character as to stand in the way of the California judge finding that the Appellant was a fit and proper person to have custody of the infant child for a period of three months each year.

V p.855-1.45

20-

V p.856-1.4

2nd March, 1943 - The Appellant launched an appeal from the judgment of Judge Clarke on 2nd March, 1943, but lacking funds with which to carry it on, filed a notice of abandonment of such appeal on 21st May, 1943.

Thereafter a number of applications were made in the original divorce action in the Courts of California and in the Courts of Wisconsin by both parties, for an order varying the original custody order.

30-

V p.861-1.5

These applications were not, as Mr. Justice Wells seems to have thought, all by the Appellant, nor were they all unsuccessful. The facts are as set forth below.

IV p.762

31st May, 1943 - Application was made in the original action by the Appellant to Judge Clarke for a modification of custody order fixing the period of three months during which the Appellant was to have custody, and on 10th June, 1943 the Respondent applied in the same proceeding for an order modifying the original order.

40-

IV p.762-1.34

By order dated 28th June, 1943 Judge Clarke fixed the three months period mentioned in the Interlocutory judgment dated December 17, 1942 as the period between 1st July, 1943 and 30th September, 1943

IV p.763-1.17

- IV p.763-1.44 inclusive, and ordered the Respondent to surrender the child in Los Angeles 1st July, 1943. Judge Clarke further ordered that the Respondent's application for modification of original award should be denied, but it was a term of the order that during the period the Appellant had custody that the Appellant would not remove the infant child from California without an order of the court.
- IV p.764-1.24
- 10- 20th August, 1943 - The Appellant applied for a modification of the award of custody and the Respondent filed a cross application for modification on September 15th, 1943. Both applications were heard by Judge Mosk on 22nd and 23rd September, 1943. These applications were both denied by order dated 29th September, 1943, but the Appellant was given the care, custody and control of the infant, for one day each week, for the period 1st October, 1943 to 30th June, 1944. The Respondent was also ordered to furnish the Appellant with transportation from Los Angeles to Milwaukee three times during the period.
- IV p.766
- IV p.766-1.44
- IV p.767-1.9
-24
- 20- 12th January, 1944 - The Appellant filed a complaint (verified by affidavit 7th January, 1944) in the Circuit Court, Milwaukee County, Wisconsin, seeking exclusive custody of the child and asking that the Respondent be restrained from removing the child from the jurisdiction of the Wisconsin Court on the ground that he would attempt to do so to render the court's judgment ineffective.
- 30- IV p.768
- IV p.796
- 40- 30th June, 1944 - Judge Daniel W. Sullivan in the Circuit Court, Milwaukee County, made an order denying the Respondent's application for modification of a previous order but granting to him or his agent the control of the child for one day in each week when the Appellant would otherwise have custody, and giving the Appellant permission to take the child to Michigan between 1st July, 1943 and September 30th, 1943. The Appellant was denied the right to take the child out of Wisconsin or Michigan except for the purpose of travelling between the two States.
- IV p.768
- 7th July, 1944 - The Appellant filed in the said Circuit Court Milwaukee County a very lengthy

complaint seeking exclusive custody of the infant child and declarations with respect to collateral matters; alleging the Superior Court of Los Angeles County possessed no jurisdiction to enter the divorce judgment because at the time, although physically residing within the State she was not a resident there within the meaning of California laws sufficient to give California Courts jurisdiction.

IV p.784-1.30

In this Wisconsin complaint the Appellant further assailed the integrity of the California judge who granted the original divorce judgment, of her original attorneys and the Respondent's attorneys, charging collusion among them, resulting in the judgment fixing custody of the child.

IV p.785-1.13

She alleged in the strongest terms that the finding of the California Courts of wrongful conduct on

IV p.791-1.37

20- her part was based on perjured testimony. She pleaded that by the property settlement of September 4th, 1941, it was agreed that the infant child should remain in her custody until he reached his majority.

V p.846

24th May, 1945 - On this date the Respondent instituted in the Superior Court of Los Angeles County, in the original divorce action in which he obtained a divorce and was awarded custody for nine 30- months of the year, an application to show cause seeking sole custody of the child Terry. The Appellant made a cross-application for sole custody.

V p.846-1.39

After a hearing lasting five days Judge Schmidt, before whom the application came, by order dated 1st August, 1945 awarded sole custody of the infant to the Appellant and denied custody to the Respondent.

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The order of Judge Schmidt contained a provision that the child should not be removed from the State of California without the consent of both parties and without an order of the court.

V p.853-1.34

-39

During the hearing before Judge Schmidt the Respondent undertook that he would not endeavour to circumvent the order of the court.

V p.856-1.15

The Respondent appealed from the said order of Judge Schmidt to the District Court of Appeal. The appeal appears to have come on for hearing 8th November, 1946, and was dismissed. (The case is reported in 174 Pacific Reporter, page 18.)

10- The fact that the Appellant had assailed the original California divorce proceedings did not in the opinion of the court disentitle her to custody of the child, nor is it suggested that it affected her fitness to have custody.

20- The majority of the court agreed with Counsel for the Appellant that Judge Thurmond Clarke, who made the original custody order, must have decided that any "dereliction allegedly proven against the Appellant in the original divorce action did not militate against granting custody to the Appellant during three months of the year".

V p.856A-1.22

An application for rehearing was denied on November 22nd, 1946.

V p.856A-1.27

An application for leave to appeal to the highest court of appeal was heard on December 23rd, 1946, and denied.

IV p.615-1.33 30-
-46

IV p.616-1.30

-37

IV p.616-1.35

IV p.616-1.45

40- The appeal taken by the Respondent from the order of Judge Schmidt seems to have had the effect of staying all proceedings in the trial court on that judgment. The evidence of a California attorney who gave evidence on commission as the Respondent's witness is to the effect that the stay kept the whole case "in statu quo" - or, "as it was before the appeal was taken". It was said by this witness (Arch. H. Vernon) that the jurisdiction of the trial court did not re-attach until the remittitur comes down from the Appellate Court. Although the Supreme Court of California had dismissed the Respondent's application for leave to appeal on 23rd December, 1946, the remittitur was not filed with the trial court until 13th January, 1947. It is submitted that the California attorney did not go so far as to say that the Respondent was the lawful custodian of the child, as against the Appellant, during the

V p.856

interval between 23rd December, 1946 when the Respondent's application to the Supreme Court of California was dismissed, and 13th January, 1947 when the remittitur was filed in the trial court. His evidence, it is submitted, only goes to the length of stating that the trial judgment was unenforceable during that period. He was far from 10- saying that the Respondent's custody was legal.

I p.53-1.41

The Appellant was in California on December 23rd, 1946, and learned of the judgment denying the Respondent's application for leave to appeal to the court of last resort on 24th December, 1946. The Respondent and the infant child were at Port Austin, Michigan, on 23rd December, 1946, where the Respondent learned that his application to the Supreme Court for leave to appeal had been denied.

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II p.351-1.18

26th December, 1946 - The Respondent, with full knowledge that the Appellant had been awarded custody of the infant and that his last right of appeal was exhausted, removed the child from Michigan and brought him to Kitchener, Ontario.

II p.357-1.29

I p.55-1.15

The Appellant was not informed as to the whereabouts of the infant child until late in February, 1947, when she learned that he was in 30- Kitchener.

I p.78-1.43

The Appellant immediately came to Kitchener, arriving there the latter part of February, 1947. She immediately endeavoured to get custody of her child and engaged a solicitor, Mr. Brock. She remained in Kitchener about a week when she was refused custody.

I p.147-1.46

I p.148-1.8

I p.149-1.11

40- The Appellant went to Detroit to consult a Detroit attorney as the Respondent had been a resident of Detroit and had taken the child out of Michigan.

I p.149-1.16

I p.5

She returned to Kitchener and instructed her solicitor to apply for a writ of habeas corpus to regain custody of the child. Her affidavit is sworn on 17th March, 1947. The notice of motion is

- I p.4 dated 18th March, 1947, and was returnable on 21st March, 1947.
- I p.7 The order for the writ of habeas corpus is dated 21st March, 1947. It was directed to the Respondent, and to William A. Ament and Wilhelmina Ament, with whom the Respondent and the infant were
10- then lodging.
- I p.22-1.11 On the return of the motion, Mr. Justice Smily considered that an application for custody ought to have been made and treated the request of the Appellant as such application. His Lordship directed an issue in which the mother should be the plaintiff and the father should be the defendant, and the question to be tried should be - "Who is to have custody of the infant Terry Alexander McKee"
- I p.2-1.32 20- The parties were given leave to take evidence on commission.
- IV p.668-1.11 The Respondent took the evidence of a number of witnesses on commission in California. This evidence had been fully gone into by the Courts of California in the original divorce proceedings or there were opportunities to present it in one or other of the applications for modification of the order of which there were no less than three in
IV p.701-1.38 30- California, and one or two in Wisconsin, between the original trial in October and November, 1942, IV p.713-1.35 and the commencement of proceedings in Ontario in -42 March, 1947.
IV p.728-1.7
IV p.729-1.45
III p.515-1.27
I p.101-1.34
- V p.859 The issue directed by the Honourable Mr. Justice Smily came on for trial before Mr. Justice Wells, between the 18th day of September and the 10th of October, 1947, two days of which were at Kitchener and the remainder of the thirteen days
V p.857-1.34 40- at Toronto.
- II p.266-278 His Lordship proceeded to retry in Ontario, notwithstanding repeated objections by the Appellant's Counsel, that which had been tried a number of times by the Superior Court of California, and arrived at the opposite result awarding full control
p.278-1.17
-24
V p.858-1.1

and custody to the Respondent.

II p.357-1.29

II p.359-1.9
p.360-1.26
p.358-1.37

II p.360-1.43

II p.362-1.1

The infant and the Respondent arrived in Kitchener on Christmas day, 1946. They lodged with Mr. and Mrs. Ament until about Easter 1947 when the Respondent moved the infant to a farm in Wellesley Township three and one-half miles from the Village of Linwood, about twenty-five miles west of Kitchener-between the Towns of Listowel and Elmira. Until some time in May he resided with the witness H. H. Stever while the Respondent renovated a farmhouse next door. The Respondent engaged a man and wife to look after the farm. They were not called as witnesses.

20- During the spring of 1947 the infant attended the local public school, S.S. No. 3 Wellesley. The school is two and one-half miles from the farmhouse.

The Trial Judge visited the farm. The record does not disclose how this came about, but is referred to by the Trial Judge in his reasons for judgment.

V p.863-1.30
V p.863-1.35

30- Mr. Justice Wells proceeded on the basis that the mere presence of the child in the jurisdiction gave him the right to determine custody in as full and ample a manner as if the child were an Ontario child. In his opinion the jurisdiction of the Courts of Ontario was not affected by the fact that the Respondent brought the child into Ontario to avoid the operation of the California judgment, and in breach of contract and an undertaking given to the California Court. He came to the conclusion that the California Courts had no jurisdiction to deal with the matter although the child was born 40- there, the parties resided there, although he found the original judgment of divorce in the action in which the custody order was made to be valid and binding, and although the Respondent invoked the jurisdiction of the California Court, not only in the original divorce action but in all subsequent proceedings. Notwithstanding his attitude towards the jurisdiction of the California Court he had no

V p.868-1.21

V p.860-1.24

doubt about the jurisdiction of the Ontario Courts although neither the Respondent nor the child had ever had any previous connection with Ontario and the child had been virtually kidnapped and brought into Ontario.

- Mr. Justice Wells admitted in evidence
- 10- facts which had been dealt with in the California Courts and proceeded to retry the very issue tried in California. He admitted new evidence of facts which ante-dated the California decree without any real explanation of why those facts, although known to the Respondent, had not been presented to the California Courts. He admitted in evidence newspaper pictures of the parties and newspaper accounts of the trial. He admitted in evidence proceedings in the Courts of Wisconsin -- complaints drawn there
- 20- by the Appellant's attorneys, and admitted depositions made de bene esse in the Wisconsin proceedings. (Exhibit 26). On this evidence, which the Appellant submits was irrelevant and inadmissible, he proceeded to reverse the Judgment of the Supreme Court of California. He ignored the finding of the Judges of the State of California that, whatever the findings against the Appellant in the original divorce action, they did not stand in the way of a finding that she was a fit and proper person to have custody
- 30- of the child, and he did not give weight to the statement in the Judgment of the Court of Appeal for California, "Nor does the fact that the mother had instituted in another state, an action assailing the original California divorce proceeding and again seeking custody of the child, in any manner affect the situation, however ill advised such action may have been." He failed to give any weight to the admission made by Counsel for the Respondent at the trial that there was no suggestion that the Appellant
- 40- was not a good mother to the Respondent's children, and he did not refer to the fact that the Respondent had under a separation agreement with the Appellant agreed that he would pay the Appellant for her maintenance of the child, Terry Alexander McKee, until he became twenty-one and would not remove him from the United States without her consent. He

further ignored the Respondent's undertaking to the Trial Judge of the California Court that he would not attempt to circumvent the order of that Court.

1.3 10- In the Court of Appeal Chief Justice Robertson dissented strongly from the Judgment of the majority of the Court. He thought that the Judgment of Mr. Justice Wells was wrong and that it should be set aside and custody of the child given to the mother. He cited the headnote in Nugent v. Vetzera (1866) L.R. 2 Eq. 704, to the effect that

"The Court will not from any supposed benefit to infant subjects of a foreign country interfere with the discretion of the guardian appointed by the foreign court"

1.1 20- He was strongly of the opinion that there was grave impropriety in upholding in the Courts of Ontario a claim made to the custody of an infant who is the subject of a neighbouring and friendly country, by one who has brought the infant into Ontario in breach of his agreement not to remove the child from the country to which he belongs and in defiance of, and for the purpose of evading, the Order of the Courts of that country to which Court Respondent

1.12 30- had himself submitted the question of custody. He thought that the Ontario Court ought to have exercised its jurisdiction only to the extent of returning the child in proper custody to the country whose subject he is. He was further of opinion that Mr. Justice Wells was not by the Order directing an issue clothed with power to dispose of the whole matter.

-1.18 40- Mr. Justice Hogg, who wrote the majority Judgment of the Court of Appeal, after reviewing many authorities found that the Ontario Courts had jurisdiction to award custody. He agreed with the Trial Judge that it was in the best interests of the child that he should be left with the Respondent. He thought that the fact that the Respondent had brought the child into Ontario to avoid obedience

Respondent says -

distinguish / it was not a dispute between parents - just to face if education
was evidence of Dutchman's education

English guardian not discharged - 756

Infant sent to England by Dutchman's guardian

Overruled by in re B. Littlewood

to the Judgment of the California Court could not be held to override the best interests of the child. He did not deal with the fact that the Courts of the parties' own country had decided it was in the best interest of the child that the Appellant should have sole custody. He felt that even if Mr. Justice Wells exceeded the authority conferred upon him by
10- the Order directing an issue, the Court ought not to interfere. It is submitted he did not distinguish between an infant domiciled in Ontario, and one brought into Ontario under the peculiar circumstances of this case.

Mr. Justice Aylesworth agreed with Hogg, J.A. He gave no reasons.

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PART IIERRORS IN JUDGMENT APPEALED FROM

- I. The majority of the learned judges of the
10- Court of Appeal erred in treating this case as if it
were one to which The Ontario Infants Act applied.
- II. The Court of Appeal failed to distinguish
the jurisdiction to restore the infant to his lawful
guardian from jurisdiction to award custody, the
former in the Appellant's submission applying to all
infants within the jurisdiction, the latter applying
to Ontario children only -- not foreign children
with foreign guardians temporarily within the juris-
20- diction, and not children taken away from their
foreign guardians and brought into Ontario by stealth.
- III. The Ontario Court ought to have exercised
its jurisdiction under The Habeas Corpus Act and
restored the child to the Appellant upon proof of
the California judgment which awarded custody to her.
- IV. The Court of Appeal ought to have held that
a foreigner who has brought into Ontario a foreign
30- child to whom he has no right of custody, to avoid
the operation of a judgment of a court whose juris-
diction he not only submitted to, but also invoked,
and in breach of his contract and undertaking given
to the foreign court, has no right to have retried
in Ontario the issues decided by the foreign
judgment; and, conversely, the Court of Appeal ought
to have held that, a foreign guardian who has come
into Ontario to regain possession of her ward who
has been carried here by stealth, cannot be required
40- to go through a long trial of an issue and retry
issues already tried in the courts of the guardian's
own country before having her ward restored to her.
- V. The Respondent and child being in the juris-
diction only for the purpose of avoiding the operation
of the foreign judgment and not being bona fide
residents of Ontario nor domiciled therein, it was

contrary to the law of Ontario to refuse to accept the judgment of the courts of the infant's own country where those courts had jurisdiction and where the case had been tried on its merits. The Ontario Court ought to have delivered possession of the infant to the Appellant in accordance with the judgment of Judge Schmidt in the California court dated 1st August, 1945.

VI. The Court of Appeal ought to have held that the judgment of the California court dated 1st August, 1945 was valid and binding and that the Respondent was estopped from denying its validity and binding effect.

VII. The Trial Judge erred in admitting any evidence which ante-dated the judgment of the California court awarding the Appellant custody.

VIII. The Trial Judge erred in admitting evidence of facts and incidents dealt with in proceedings in California.

IX. The Trial Judge erred in admitting the following evidence:

(a) Exhibit 26 - being depositions of E. G. Haumesch taken de bene esse or on commission in a proceeding between the Appellant and the Respondent in the Courts of Wisconsin;

(b) Proceedings in the Courts of Wisconsin;

(c) Newspaper comments and news items concerning the trial of the issue.

X. The reasons for judgment (called Findings of Fact and Conclusions of Law) of the Honourable Thurmond Clarke dated 17th December, 1942 (Exhibit 23 (iv) - Vol. IV of Case, p.742) were treated by the Trial Judge as facts proven. The Appellant submits the said Findings of Fact and Conclusions of Law were not admissible except for the very limited

purpose of showing what issues were before the California Court in that proceeding.

XI. On the evidence the Appellant was entitled to custody.

XII. It was in the best interests of the child
10- to restore him to the possession of the Appellant
in accordance with the judgment of the courts of his
own country.

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PART IIIARGUMENT

The Appellant relies on the dissenting
10- judgment of the learned Chief Justice of Ontario.

Neither the learned trial judge in Ontario nor any American judge found the Appellant unfitted to have the care and custody of the infant. On the contrary, the judge in California found her a fit and proper person to have custody.

The learned trial judge in the Ontario courts did not find, nor did any evidence establish, any immorality on the part of the Appellant. On the contrary, the trial judge found her a woman who had "acceptably brought up the younger members of Mr. McKee's family after his first wife's death". (There were seven of McKee's children so "brought up".) She is a woman with respect to whom Counsel for the Respondent at trial stated, - "There is not the slightest suggestion that Mrs. McKee has not been a good mother to these children." She is a woman whom the Respondent considered to be a suitable companion and wife to a man in his station in life. For eleven years, and until he became enamoured with a young girl, he unhesitatingly entrusted the care and custody of his children to her.

The Respondent himself described her, in an answer to a question put by the trial judge as an excellent mother.

- II p.341-1.9 40- "Q. Up to the time of your difficulties in 1940 had she brought your children up properly?
- A. I considered her an excellent mother, your Lordship, up to that time."

V p.870-1.45

871-1.15

20-

871-1.45

II p.245-1.20

V p.887-1.30

30-

III p.464-1.25

II p.341-1.25

"Q. She is obviously a woman of very great personality?

A. A very, very strong personality, and she had a wonderful hold on the children . . ."

10- It was not denied that the Appellant was kind both to the Respondent's children and to the infant child Terry.

20- 1. It is respectfully submitted that there is a fundamental error in the judgment of the trial judge and that of Mr. Justice Hogg in the Court of Appeal. They dealt with the Respondent as if he were domiciled in Ontario and a bona fide resident thereof. The Respondent ought to have been looked at as the Chief Justice of Ontario regarded him -- as a fugitive from the laws of his own country and a person in contempt of the courts of his own country, and one who had no legal right to the child whatever.

30- When the Respondent brought the child to Ontario from Michigan about Christmas Day, 1946, neither the Respondent nor the child became either resident or domiciled here.

V p.883-1.6
p.885-1.6
-11
p.898-1.1
p.869-1.31

40- The Chief Justice of Ontario has found that the Respondent came to Ontario to evade the operation of the California judgment dated 1st August, 1945. Mr. Justice Hogg does not dissent from that view. Mr. Justice Wells does not make a contrary finding. He is content to say that the child was in McKee's lawful custody.

The Respondent was born in the United States and all his family and business connections are there and not in Canada.

II p.332-1.4

He was born in Iowa.

II p.332-1.45

He became a director of an insurance company.

II p.333-1.12

He became a qualified attorney in Michigan in 1913 and is still an attorney there.

II p.333-1.16
-40

He was Secretary for the Insurance Federation; has been Counsel for the National Council of the Red Cross; Chairman of the Red Cross in the State of Michigan, and was a Lieutenant in the American Army during the First War. He became Vice-President of the Salt Lake and Utah Railroad, Assistant to the President of American Short Line Railway Association, and later Vice-President. He was a director of the Greyhound Corporation; organizer of Sand Products Corporation of Detroit; organized the McComb Publishing Company of Mt. Clemens, Michigan. His sand company purchased the Wisconsin and Michigan Steamship Company in which he has held the office of President and Vice-President and is now Chairman of the Board. The Respondent has no business of any kind in Ontario, but is now

II p.334-1.37

- (a) on the Management Committee of Pan American Airways;
- (b) Chairman of the Board of the steamship company;
- 30- (c) Director and Vice-President of the Sand Products Company.

II p.335-1.35

He attends Board meeting every Tuesday in New York City.

II p.337-1.12
p.337-1.10
p.338-1.20

His first wife, who bore him eleven children, lived with him in Michigan and she died there. All his children were educated in the United States and all, except Terry, reside there.

40-

IV p.731
p.733-1.20

The child was not only not in the custody of his guardian, but was brought here contrary to the separation agreement between the Appellant and Respondent dated 4th September, 1941. This fact is so found by the Chief Justice of Ontario. Mr. Justice Hogg did not dissent from that fact and, with

V p.855-1.40
p.897-1.46

IV p.760-1.29 respect, he accepted that view of the Respondent's conduct. Moreover, the original decree of divorce between the parties which was acted on by the Respondent and found to be valid and binding by the Honourable Mr. Justice Wells, approved and affirmed the said separation agreement including the Respondent's covenant not to remove the child from
 10- the United States.

V p.853-1.34 It was never denied that at the hearing in California which resulted in the order relied on by the Appellant, the Respondent undertook that he would not try to circumvent the order of the court.

V p.885-1.21 He did not move to Ontario until he had exhausted every right of appeal in California. As Chief Justice Robertson has found, there was no
 20- evidence that he had any intention of moving anywhere prior to his learning that his California appeal was dismissed. He hurriedly departed from Michigan immediately after he learned that his California appeal was dismissed. He had made no prior arrangement for accommodation in Kitchener. He first stopped at the hotel for a few days, then boarded with the Aments until Easter, 1947; then boarded on a farm until May. He moved to Ontario in breach of his contract with the Appellant, a circumstance
 30- which even the trial judge did not approve. He knew that the mother was entitled to custody in Michigan and that that State would recognize the California judgment.

In re Kinney, (1875) 6 P.R. 245, discloses that in Michigan at that date, the mother was entitled to custody of a child under twelve years of age.

40- Epstein v. Epstein, 234 Mich. Reports, shows that by Section 11484, 3 Comp. Laws 1915 -

"In the case of the separation of husband and wife having minor children, the mother of such children shall be entitled to the care and custody of each of the children

"under the age of twelve years. It is only when the mother is not of good moral character or where conditions exist in her home that the court will ignore this provision of the statute."

In re Valh, 235 Northwestern Reports,
10- 854; 254 M.R. 25 -

20-

"The decree of divorce was given by the Court of Common Pleas for Lucas, Ohio, at a time when both parties were resident there. Its jurisdiction in such cases is similar to our circuit courts and full faith and credit must be given to the decree under Article 4, Sec. 1 of the Constitution of the United States. The custody of the minor child was given to his mother. It does not appear that this decree has been in any way modified or changed by the court granting it.

30-

At the time the writ of habeas corpus was filed the mother had acquired a domicile in Michigan. The domicile of an infant until emancipation is that of the father. But under the decree of divorce, the mother was given his unrestricted custody. His domicile thereafter became that of his mother and when she removed to this state and became domiciled here the domicile of the child was Michigan.

30-

When a divorce is granted the wife and unrestricted custody of the minor child is given her, her own domicile and not the father's establishes that of the child. (9 R.C.L. p. 549)"

It is submitted that these facts make it clear that he resorted to this jurisdiction for the sole purpose of evading the California judgment.

The Respondent's appeal to the court of last

resort in California was dismissed on December 23rd, 1946. By that dismissal the right of Mrs. McKee to sole custody was affirmed and any right the Respondent had to the child was gone. The fact that the Appellant was not in a position immediately to enforce the judgment, it is submitted, did not make the Respondent's custody of the child legal.

10-

Therefore the child Terry was not in the possession of his legal guardian as he came into Ontario.

2. Having resorted to Ontario as a fugitive, he could not be said to be residing here and certainly not domiciled here.

20-

In re Stirling [1908] 2 Ch. 344 -

"Bona fide residence is an intelligible expression if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which is not obtainable in the country of domicile."

30-

Toronto Hospital for Consumptives v. City of Toronto, 58 O.L.R. 273 at 280.

A fortiori the Respondent did not change his domicile.

"The abandonment or change of domicile is a proceeding of a very serious nature and an intention to make such an abandonment must be proved by satisfactory evidence."

40-

Per Middleton, J., in Seifert v. Seifert, (1914) 32 O.L.R. 433, at 438; Wadsworth v. McCord (1886) 12 S.C.R. 466 at 478; Udny v. Udny (1869) L.R. 1 Sc. App. 441.

3. The Infants Act had no application.

It is submitted that the Ontario courts ought to have distinguished between jurisdiction to order the release of a foreign child from the possession of one who has unlawful possession of it -- and jurisdiction over domestic children and the right to make custody orders in respect of them.

Section 1 of The Infants Act, R.S.O. 1937, Chapter 215, reads:

"1.-(1) The Supreme Court or the surrogate court of the county or district in which the infant resides, upon the application of the father or of the mother of an infant, who may apply without a next friend, may 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, and may alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian appointed under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise, as the court may deem just.

(2) The court may also make an order for the maintenance of the infant by payment by the father, or out of any estate to which the infant is entitled, of such sum from time to time as, according to the pecuniary circumstances of the father or the value of the estate, the court deems reasonable.
R.S.O. 1927, c. 186, s. 1."

This section, which gives the surrogate court of the county where the infant resides jurisdiction to award custody, it is submitted, means that the surrogate court is entitled to exercise the same jurisdiction as the Supreme Court if the child is resident in the county. It does not, of itself at least, confer on either the surrogate
 10- court or the Supreme Court jurisdiction to award custody of foreign children who are neither domiciled nor resident in the province. In other words, The Infants Act did not enlarge the jurisdiction of the court.

It is submitted that a child who has been stealthily carried into Ontario -- whether kidnapped or not -- is not a child to whom The Infants Act, R.S.O. 1937, Chap. 215, applies. The word "infant"
 20- in the Act must denote such infants as are domiciled or resident within this province. It must exclude infants temporarily in the province. It is further submitted that The Infants Act must be read as being intended to apply in cases not governed by rules of conflict of law.

See Dicey, 5th Edition, page 3, where it is pointed out that several Acts are so interpreted, and particularly the Divorce Acts - where "husband"
 30- and "wife" denote only such persons as are held subject by reason of domicile.

Journal of the Society of Comparative Legislation, Vol. 22 (1940) p. 234, where A. Berriedale Keith, in commenting on In re B's Settlement, [1940] Ch. D. 54, said with reference to The English Guardianship of Infants Act, 1925:

40- "It might have been expected that the court would read the Act of 1925 as intended to apply only in cases not governed by rules of conflict of laws."

He was there referring to the English Act of

1925, Section 1 of which reads:

10- "Where in any proceeding before any court (whether or not a court within the meaning of The Guardianship of Infants Act, 1886) the custody or upbringing of an infant or administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding the question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother or the claim of the mother is superior to that of the father."

20-

In *Byers v. Bartolucci* (1918) 42 D.L.R. 486 - the Court of King's Bench in Quebec held that the provisions for the appointment of tutors, made in the Quebec Civil Code, have relation to normal conditions in the province.

30- The following is from the judgment of Cross, J., at 488:

"The provision for the appointment of tutors, made in the Code, have relation to normal conditions in the province. Thus, tutorships are dative and are conferred by the court of the domicile (Art. 249 C.C.) and in general, one tutor only is named, though there may be exceptions"

40- "I take it that it would be a mistaken exercise of jurisdiction for a court of this province to name a tutor to the person of a minor neither domiciled nor resident here. That does not mean that the court should not name a tutor to serve some object of a local character."

The provisions in The Infants Act that the interests of the child are paramount, do not, it is submitted, make The Infants Act applicable to infants who do not belong in the province.

Dicey - Conflict of Laws, 5th Edition,
554, Note (R) -

10-

"It does not appear that the more recent doctrine which places the interest of the children above all other considerations would alter the position as regards foreign guardians."

It is further submitted a fortiori The Infants Act does not apply to give jurisdiction to an Ontario court to deprive a foreign guardian of
20- his right to possession of his ward.

4. The Appellant therefore adopted the correct procedure in the Supreme Court of Ontario when she applied for a writ of habeas corpus, as jurisdiction to issue the writ depends on physical presence alone. X
30- Something more than mere physical presence is required for the exercise of jurisdiction under The Infants Act. In the case at bar there is nothing to create jurisdiction but the mere physical presence. X

The Infants Act was never intended to be used as an alternative remedy to the remedy by way of habeas corpus.

40- Re Harding (1929) 63 O.L.R. 518 - A judgment of the Court of Appeal for Ontario consisting of Latchford, C.J., and Justices Riddeil, Orde and Fisher -

" this right to relief under The Infants Act, while in a sense an alternative to that available by way of

"habeas corpus is neither dependent upon nor coincident with that form of relief."

In re Smart Infants, (1888) 12 P.R. 312, 435, 635 - Per Osler, J.A., at 638. - (Smart v. Smart ~~/1892/~~ A.C. 425, where this point is not dealt with.) -

10-

"It would be an extraordinary exercise of the powers of amendment or of directing a special mode of trial, to compel him to adopt one which for any reason he might deem less advantageous to himself or more so to his adversary."

20- The Infants Act was not intended to change the law as stated in Nugent v. Vetzera (1866) L.R. 2 Eq. 704 -

"The court will not from any supposed benefit to infant subjects of a foreign country who have been sent to this country for the purpose of education, interfere with the discretion of the guardian who has been appointed by a foreign court of competent jurisdiction."

30- The above submission is borne out, it is respectfully submitted, by the case of Monaco v. Monaco (1937) 157 L.T. 231.

40- The question was whether an infant should be removed from England against the wishes of his grandfather, the reigning Prince of Monaco. The judgment of the court was solely directed to ascertaining who was the infant's guardian according to Monégasque law. Once the identity of this guardian was determined, an order in accordance with his wishes appears to have been made almost as a matter of course.

The Ontario court ought to have exercised its jurisdiction on the habeas corpus proceeding and determined only who had the legal custody of the child -- who was his guardian according to the laws

of his own country -- and it is submitted, with respect, that it was not justice to require the Appellant to go through a long trial as against a person who had brought the child into Ontario by stealth, and who in his own country had no right to his possession.

- V p.887-1.2 10- The Respondent's position in Ontario was in no higher plight than that of a kidnapper. He was fleeing -- "substantially as if he were a fugitive" -- from the operation of an order of a court which was valid and binding upon him. He was in contempt of that court. He had no right to the child, and was breaking his own solemn contract. In such circumstances, possession of the child ought to have been restored to the Appellant on the habeas corpus application. The provisions of The Infants Act were irrelevant. Chief Justice Robertson was strongly of the opinion that the matter should have been concluded by directing the return of the infant to the United States in safe custody when the Respondent's conduct in bringing the infant into Ontario was disclosed.
- V p.886-1.38 20-

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- 30- 5. Mr. Justice Wells ought not to have awarded custody.

- I p.22-1.20 Mr. Justice Smily thought the Appellant ought to have made a motion for the delivery of the child to her, and the formal order recited that leave had been given to her to do so. He referred to Re Kenna (1913) 29 O.L.R. 590, where evidence taken before same judge.
- I p.20-1.24
-31

- I p.26 40- The Appellant filed a notice of such an application at the opening of the trial.

In re Smart Infants (1888) 12 P.R. 635, at 638 - it was held that the court had no right to require the applicant to substitute a petition for a writ of habeas corpus.

The notice filed by the Appellant was not a notice under The Infants Act, but a notice in the habeas corpus proceedings, and ought to have been so treated by Mr. Justice Wells.

10- The presiding judge on the return of the habeas corpus might try the sufficiency of the return in law and in fact, and might direct an issue with respect to material facts.

Re Kenna (1913) 29 O.L.R. 590, 597.

But,

20- "It was the right of the applicant, however, to determine by what form of proceedings he would invoke the assistance of the court, and it would be an extraordinary exercise of the powers of amendment or of directing a special mode of trial to compel him to adopt one which for any reason he might deem less advantageous to himself or more so to his adversary."

Per Osler, J.A., in Smart v. Smart, 12 P.R. 635, at 638.

30-

I p.20-1.32

V p.888-1.3

The habeas corpus proceedings were not referred to the trial judge. He had no power to dispose of the whole matter. On this point the Appellant adopts the reasoning of the Chief Justice of Ontario.

I p.57-1.19

The trial judge took the position he was not trying the habeas corpus.

40-

The New Zealand case of Re J.H. & L.J. Thomson Infants, 30 N.Z.L.R. 168 - A decision of a single judge is distinguishable. There the children were domestic and all that was decided was that the law of the land applied to them. No foreign judgment or domicile was in question. There was no question of the judge's jurisdiction.

It is respectfully submitted that the case of Stevenson v. Florant [1927] A.C. 211, referred to and relied upon by Hogg, J.A., does not apply here. Here again the child was a domestic child. No question of foreign judgments or jurisdiction was in question. There the judge had jurisdiction to do what he did in the proceedings in which he
 10- made his order. It was a question of whether another procedure ought to have been adopted. In the case at bar the problem is, did Mr. Justice Wells ever have jurisdiction conferred upon him. It is submitted he did not.

20- 6. If the plain contractual rights of the parties are upheld and enforced the child should have been released to the Appellant.

IV p.733-1.20

IV p.734-1.33

The Respondent had solemnly agreed by Clause 8 of the Separation Agreement not to remove the child from the United States without the Appellant's consent. The Respondent had further agreed by Clause 7 to pay the mother \$125.00 per month until the child, Terry, reached the age of
 30- twenty-one years.

IV p.754-1.34

V p.889-1.3
 p.896-1.39
 p.897-1.46

This agreement was found to be in effect by Judge Clarke- and he affirmed it in his judgment. Mr. Justice Wells finds Judge Clarke's judgment valid. Mr. Justice Hogg refers to it in terms which admit its validity and binding effect.

40- Clause 7 of the Separation Agreement provides:

"It is further understood and agreed that the party of the second part (the Respondent) agrees to pay to the party of the first part the sum of One hundred and twenty-five dollars on the 15th day of September, 1941, and one hundred and twenty-five

"dollars on the first day of each and every month thereafter until the said Terry Alexander McKee reaches his 21st birthday, for his use and benefit "

10- The child was with the mother when the agreement was signed and remained with her. It is submitted that the said clause by necessary implication if not by express language gave custody of the child to the Appellant until he reaches the age of twenty-one years. This agreement was declared valid and binding on the parties by the divorce judgment which Mr. Justice Wells finds to be binding.

IV p.760-1.29

V p.860-1.24

20- Mr. Justice Wells at trial, in referring to that part of the agreement whereby the parties agreed not to remove the child from the United States without the written consent of the other, said,-

"No agreement of a party can be permitted by the court to operate against what the court conceives to be the child's best interests."

30- and he obviously applied that principle to Clause 7 of their agreement - notwithstanding that he found the judgment valid and binding which confirmed the agreement.

It is respectfully submitted that if The Infants Act is applied Mr. Justice Wells overlooked Section 2 (2) of The Infants Act above referred to.

40- Section 2 (2) of The Infants Act, R.S.C. 1937, Chap. 215, provides that the parents may enter into a written agreement as to which parent shall have custody.

"(2) Where the parents are not living together or where the parents are divorced or judicially separated, they may enter into a written agreement as to which parent

"shall have the custody, control and education of such infant, and in the event of the parents failing to agree either parent may apply to the court for its decision. R.S.O. 1927, c. 186, s. 2."

- 10- At any rate the contract was made in California, and the courts there confirmed it.

-
- 20- 7. The courts below erred in not treating the judgment of Judge Schmidt, 1st August, 1945, as a final judgment regardless of whether McKee was a fugitive with no right to the child or in lawful possession of him at the date of entry.

- 30- Reliance was placed on the judgment of Middleton, J., in *In re Gay* (1926) 59 O.L.R. 40, as authority that a judgment dealing with custody is not in its nature final. It is submitted that Judge Schmidt's judgment was final as of its date, and being final it was a good defence in any proceeding in which McKee might claim custody.

A judgment awarding custody is a judgment in personam.

Re Harding, (1929) 63 O.L.R. 518.

In that case application was made for the custody of an infant who had been removed from the jurisdiction. Orde, J.A., said:

- 40- "That jurisdiction operates in personam and is not necessarily fettered by the fact that the subject matter involved is beyond the territorial jurisdiction of the court has been recognized ever since the decision in *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444, 1 W. & T.L.C. in Eq., 9th Ed., p. 638."

Swaizie v. Swaizie, (1899) 31 O.R. 324:

10- A British subject residing in Wisconsin instituted proceedings against his wife there for divorce. He obtained judgment for divorce, and his wife obtained an order against her husband for alimony. In an action in Ontario against him on this judgment he pleaded there was no jurisdiction in the Wisconsin court and that he was not domiciled in Wisconsin. Held that the defendant had himself invoked jurisdiction of foreign court and was therefore precluded from denying it. Per Meredith, C.J., at 330.

20- An order which may be varied in respect of future payments may be invariable in so far as concerns arrears, in which case an action may be brought for the recovery of the latter.

Beatty v. Beatty [1924] 1 K.B. 807.

Lindley, M.R., -

30- "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in matters with which it is competent to deal, English courts never investigate the propriety of the proceedings of the foreign court unless they offend against English views of substantial justice."

Pemberton v. Hughes [1899] 1 Ch. 781
at p. 790.

40- Therefore a judgment awarding custody is as final as of its date as any other judgment.

Wallis v. Wallis [1929] 1 W.W.R. 631
(Sask.)

The principle that orders for custody are temporary

"is not to be taken as enabling persons to make application for custody from time to

10- "time under the same circumstances as those which existed at the time the former orders were made. I could find no authority to the effect that the doctrine of res judicata does not apply to applications for custody in the same manner as it applies to all other matters before the court. Such orders are recognized and acted upon as conclusive as of the time that they were made but are not conclusive of the question for all time."

held: In re C. [1922] 1 W.W.R. 1196, it was

20- "At best it will only be acted upon as conclusive as to the time when it was made but not conclusive of the question for all time."

Under all the rules of private international law the judgment was as conclusive against him as if it had been rendered in Ontario.

- 30-
- (a) He was a subject of the foreign country in which the judgment was obtained;
 - (b) He was a resident of the foreign country when the action began;
 - (c) He selected the forum in which the action was brought;
 - (d) He voluntarily appeared;
 - (e) He submitted himself to the forum in which judgment was obtained.

40- Dicey, 5th Edition, 398.

The judgment of Judge Schmidt dated 1st August, 1945 was a complete defence to any claim for custody made by the Respondent.

Dicey, 6th Edition, p. 441 -

"A valid foreign judgment in personam, if

"it is final and conclusive on the merits (but not otherwise) is a good defence to an action in England for the same matter where either

- 10- (1) the judgment was in favour of the defendant, or
 (2) the judgment being in favour of the plaintiff has been satisfied."

The judgment in California would have supported a charge of abduction under Section 316 of the Criminal Code.

20- Rex v. Hamilton (1910) 22 O.L.R. 484, where it was held that Indiana decree was binding on the father who brought the child into Ontario without the consent of the mother to whom custody had been awarded.

In Westergaad v. Westergaad, (1913-14) S.C. 977, p. 980, a case dealing with the custody of a Danish child where an order had been made by the Danish court,-

30- "The position of the matter is, either the judgment is not final, then the Danish Tribunal would be the proper place in which to apply for an order allowing it, or that it is final, in which case no foreign court can have the right to interfere."

It is respectfully submitted that in the circumstances of this case, that was the only way in which the judgment of Judge Schmidt in the California court ought to have been treated.

40- The child was a child of the State of California. The judgment must be treated in Ontario as conclusive, if not conclusive then the parties ought to go back to California for an amendment to the judgment.

Dicey, 5th Edition, 461 - 463:

"A valid judgment is conclusive as to all matters adjudicated and cannot be impeached for an error of law or fact."

- 10- There were no altered circumstances except those created by the Respondent in furthering his appeals in California or in evading the operation of the California court order.

8. The Respondent was estopped from denying the validity of the California judgment.

20-

(a) The judgment awarding the Appellant sole custody was merely a modification of the original judgment of Judge Clarke dated 17th December, 1942, which was acted on by the Respondent. Mr. Justice Wells found the original judgment valid.

V p.845
IV p.759

- (b) The Respondent invoked the jurisdiction of the California court on the original trial, on all subsequent applications for modification and on the application where sole custody was awarded to the Appellant.
- 30-

IV p.739
IV p.759

It was too late for the Respondent to contend that the California court had no jurisdiction, and his right to do so, if he had ever had such right, was gone. The California court was a Superior court -- one of universal jurisdiction and superintendency -- it had admitted jurisdiction to deal with custody. The Respondent acted on the original judgment of 17th December, 1942 which awarded partial custody to him, and participated in subsequent applications for modification.

40-

IV p.762
IV p.766
IV p.796
V p.845
V p.846

In *Mayor of London v. Cox* (1867) 2 H. of L. 239, at 282, the leading case on prohibition, and so a leading case on jurisdiction -

10- " If the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior court and is defeated, then, if the defect be of power to try the particular issue only (defectus triationis, as it is called), the right to move for a prohibition is gone."

The trial judge has found that the domicile of the child was in Michigan. There the domicile of a child under twelve is that of its mother. See page 22 of this document.

20- Armitage v. A.G. (1906) p. 135 - The courts of this country will recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled if the courts of the country or state of his domicile would recognize the validity of the decree.

30- The judgment of Judge Schmidt in the California court dated the 1st of August, 1945 being valid and binding, it is submitted there was no right to retry the issues which had been tried in the California court. The trial judge ought not to have admitted any of the commission evidence, and he ought not to have admitted any evidence preceding the 1st of August, 1945, and particularly he ought not to have admitted evidence concerning facts and incidents which were dealt with at any of the hearings in California, including the last hearing which culminated in the judgment of August 1st, 1945.

Dacey, 5th Edition, page 461 - 463.

40- Westergaad v. Westergaad (1913-14)
S.C., 977 at p. 980.

Rex v. Hamilton (1910) 22 O.L.R. p. 484.

9. If The Infants Act was applicable - even if McKee had changed his residence, nevertheless the judgment of the California court awarding custody to the mother ought to have been followed.

10- The trial judge and Mr. Justice Hogg in the Court of Appeal mentioned *Johnstone v. Beattie*, (1843) 10 Cl. & Fin. 42, and a Massachusetts case, *Woodsworth v. Spring* (1862) 4 Allen's Reports, 325, as authority that the foreign judgment was not binding. It is submitted that there has been a clear development in our law since 1843 and those cases are not now followed.

20- In *Johnstone v. Beattie* the facts were: In October, 1835 Thos. Beattie, domiciled in Scotland, appointed the Appellant and his wife tutors and curators of the child; whereby they were entitled upon his death, to the custody and care of the child. Beattie died in 1836. His widow took the infant child to Scotland and later to England where the widow died in 1840. Before she died the widow expressed the very strong desire that the child should remain with its grandfather in England because of its very delicate health. Upon the death of the mother the grandfather applied to the Court of Chancery for the appointment of guardians. The Scotch tutors appeared and opposed the application: 30- It was held that the Scotch tutors were not as such guardians in England. The court required some person in the jurisdiction answerable to the Court of Chancery, but there was no reason why the Scotch tutors should not be among the guardians appointed by the Court of Chancery. The court appointed 40- English guardians. Lords Brougham and Campbell strongly dissented. Lord Brougham thought that if the English court exercised its jurisdiction it should not go beyond confirming the appointment of the Scotch tutors. Pages 97 - 98.

At Page 100 -

"If this decision is affirmed, who can

"safely send his child to England for any purpose, whether of education or of health?"

10- Lord Campbell thought the jurisdiction of the English court should have been restricted to an inquiry if the infant needed its protection. He pointed out at page 128 that English children visiting Scotland or Spain might be detained there by guardians appointed by courts of those countries until they were twenty-one years of age. (Lord Cottenham at page 117, seemed to think the health of the child and mother's wishes had a good deal to do with it.) Lord Langdale had no doubt about the authority of the English courts to appoint a guardian, particularly where the infant required the court's protection. The exercise of the court's jurisdiction became a matter of the court's discretion and expediency, 20- depending on the peculiar circumstances of each case.

V p.891-1.44

Woodsworth v. Spring (1862) 4 Allen's Reports, 325.

30- The petitioner had been appointed guardian of an infant child in Illinois and sought to regain possession of the child in Massachusetts where an aunt had removed the child and had been appointed guardian without the knowledge of the petitioner. The courts in Massachusetts emphasized the sovereignty of their own state and gave custody of the child to the Massachusetts guardian. The learned judges referred to Johnstone v. Beattie. Nevertheless, at page 325, the court said:

40- "It would not do to say that a foreign guardian has no claim to the control of the person of his ward in this country. If such were the rule, a child domiciled out of the state who was sent hither for the purpose of education, or came within the state by stealth or was brought here by force or fraud might be emancipated from the control of his rightful guardian duly appointed in the place of his domicile and

"thus escape or be taken out of all legitimate care and custody."

10- In *Johnstone v. Beattie* the court was dealing with subjects of the same sovereign. In *Woodsworth v. Spring* the court was dealing with citizens of the United States, but in both cases the judges appreciated that it was not justice to ignore the judgment of the foreign jurisdiction. It is submitted that these cases were decided in times of strong nationalist feeling in a society where the means of communication were vastly different from today and with an entirely different viewpoint towards foreigners.

20- The dissenting views of the law lords in *Johnstone v. Beattie* seem to have been adopted by Lord Campbell in *Stuart v. Bute* (1861) 9 H. of L. 460 at 465. In referring to the judgment of the House of Lords in *Johnstone v. Beattie*, Lord Campbell said at page 464:

30- "But the House did not decide and no member of the House said that foreign guardians are to be entirely ignored, or laid down anything to countenance the notion that a guardian who has been duly appointed in a foreign country, and who comes into England or Scotland to reclaim a ward stealthily carried away from him and brought into England, would undoubtedly have the child restored to him in England by a writ of habeas corpus."

40- In *Stuart v. Bute, A.*, the infant, was a Peer both in England and Scotland. A.'s mother died in Scotland in December, 1859. By the will of the mother, S. and M. were appointed guardians, and that appointment was confirmed by the Vice Chancellor, by whom a scheme for the infant's education was prepared and approved of. A. was then in Scotland under the personal care of M. She promised to bring him to England to be educated, as S. proposed, in accordance with the scheme of the Court of Chancery. She brought him to London but in conse-

quence of disagreements between herself and S., suddenly carried him back to Scotland. Proceedings in the Court of Session were instituted to compel her to give up the custody of the infant S., but though the Court of Chancery had, on the application of S., directed that he should be back in England to be educated, the Court of Session pronounced an interlocutor, postponing the case for nearly four months, and afterwards two other interlocutors interdicting anybody whatever from taking the infant, "a domiciled Scotch subject", out of the jurisdiction of the Court of Session. It was held that as the jurisdiction of the Court of Chancery had been established, it was the duty of the Court of Session to deliver up the child to the guardian who had been selected by the Court of Chancery.

20-

Even if the Ontario Infants Act refers to foreign infants temporarily within the jurisdiction, the Act should be applied according to the principles of private international law recognized by our own courts.

The parties are both Americans and had no previous connection with Canada. The facts and incidents on which their rights rest all arise in the United States, therefore their rights are governed by foreign law which has determined the result and the rules of comity apply.

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Cheshire, 3rd Ed., 4-5:

"The invariable application of the *lex loci*, i.e., the local law, of the place where the court is situate, would often lead to a gross injustice.

40-

"When transaction took place in foreign jurisdiction, courts will inquire whether transaction governed by foreign law.

"In justifying this reference to a foreign law judges and text-book writers . . . have

"frequently used the term 'comity' in order to indicate that they make the reference, not to compulsion, but from consideration of justice and mutual conveniences of states -- because justice requires it."

10- It is submitted that our courts have invariably applied the rules of private international law and have applied foreign law in those cases where it has determined that the case is governed by foreign law, i.e., when dealing with a foreign child. It is submitted our courts have refused to follow a foreign judgment only when there was clearly no jurisdiction in the foreign court and no trial on the merits, and in so doing have in fact followed the rule stated in Dicey, 6th Edition, Page 441.

20- If the judgment of the Court of Appeal were right it would, to use the language of Wood, V.C., in *Nugent v. Vetzera* (1866) L.R. 2 Eq. 704, result in the startling situation that a Canadian child if sent abroad, might be kept there against the wishes of his legal guardians, and vice versa, foreign children who enter Ontario for any purpose may be kept here against the wishes of their legal guardians, a state of jurisprudence which would put an end to all interchange of friendship between civilized communities.

30- The correct principle is set out in the headnote in *Nugent v. Vetzera* (1866) L.R. 2 Eq. 704 -

40- "The court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country."

At page 715, V. C. Woods -

"I assume that they (the children) are most anxious to remain here and not to go back to

"their own country, but I have no right to deprive the guardian appointed by the foreign court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned and under which authority alone they remain here and are maintained here."

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Cheshire, 2nd Edition, page 598 -

"In fact it may be said that in modern times the English court will confirm the foreign appointment or will refuse to interfere with the guardian's discretion unless there is some exceptional reason to the contrary."

Nugent v. Vetzera (1866) L.R. 2 Eq. 704.

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DeSavini v. Lousada (1870) 18 W.R. 425.

In re Bourgoise, (1889) L.R. 41 Ch. D. 310.

Monaco v. Monaco, The Times Newspaper, March 23, 1937.

Eversley, page 54^{1/2} -

30-

"The right of foreign guardians to the control and custody of their wards (subjects of a foreign country) for whom English guardians have been appointed, will be respected and not interfered with, and if the foreign guardian thinks in the honest exercise of their discretion that it would be to the advantage of his wards to remove them, the court will permit them to do so. This is an acknowledgment of the principle that the status of persons with respect to acts done and rights acquired in the place of their domicile will be governed by the law of the domicile and England

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. . . will hold as valid or invalid such acts, rights and contracts according as they are holden valid or invalid by the law of the domicile."

The principle was followed in Savini v. Lousada (1870) 22 L.J.N.S. 61; 18 W.P. 423. In this

— Distressed by Respondent - Requirements between guardians

- 1 - best interests between parents
- 2 - Court in favor of Italian guardians

→ Resp. 5 refers to 540 - quotes Decree rule 38 -

case an Italian child was in England.

Vice Chancellor:

10- "This is a plain and simple case and my
duty is equally plain
The child was an Italian subject and was
placed under the care of the Italian laws,
a council of guardianship being appointed,
acting under the jurisdiction of the Italian
court. I am bound to respect the rights
and authority of that court as if our
positions were reversed. I should expect
the Italian court to respect mine
I am bound without exercising any authority
of my own to recognize that of the Italian
court I must comply with the
20- wishes of the Italian guardian."

The principle that the right to custody is
governed by the law of the domicile was followed
in Ontario, *In re Kinney*, (1875) 6 P.R. 245.

30- In this case the parents of the child were
domiciled in Michigan. They brought cross actions
for divorce. The child was placed by the father in
the custody of a person in Ontario. The mother ap-
plied in Ontario for an order for custody of the
child on the ground that under Michigan law she was
entitled to such custody until the child should
have arrived at the age of twelve. She had obtained
an ex-parte order for custody in Michigan and had
previously given her husband a written agreement
renouncing any claim to custody. Held, the Michigan
law must govern, but as she had obtained an ex-parte
order for custody in Michigan and as the Michigan
divorce action would come on for trial in a few
40- weeks, and the mother having voluntarily renounced
custody, no order was made awarding custody to the
mother.

Per Wilson, J., -

"It appears that the husband and wife are

10- "the citizens of a foreign country, and it must follow that the infant child placed in this country for a time only, and probably for a special purpose, has not acquired in law a different domicile from that of the parents. For the purposes of this case I must consider the domicile of the father, mother, and child to be that of a foreign country. And in disposing of this matter I must determine the rights of the parties, and must make my judgment conform to the law which governs these rights, subject to the general principles of our own law. I must ascertain what the law of that country is as applicable to the contested rights before me, and so far adopt that law as part of our own internal law in determining these rights, subject, as before stated, to our own general principles of jurisprudence."

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The above case holds clearly that judgment in Ontario must conform to the law governing the rights of the parties.

A later pronouncement of the same principles is found in the Court of Session in Scotland, who were dealing with the case of a guardian appointed by a court of competent jurisdiction in Denmark.

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Westergaad v. Westergaad (1913-14) S.C. 977, p. 980. Lord Justice Clerk:

40- "The petitioner now desires that this court should contrary to the terms of the Danish decree (granting custody) pronounce a finding in this petition giving her free access to her son at such time We have no power to review or alter what has been judicially done in Denmark. As long as no action by the respondent (person awarded custody) is taken contrary to that judgment we have no jurisdiction. We may be called upon to assist to make the decree of a foreign court effective against a party

10- "resident in this country, but we can not be called upon to review it We can aid the enforcement of it but we cannot set it aside or authorize anyone who is under it (the judgment) to act contrary to it. If, for example, a person in the position of the respondent here were to take her daughter from the custody of the mother who had that custody by lawful judgment obtained in Denmark, I do not doubt that we might have powers to interpose and give aid to the carrying out of the Danish judgment."

In Re Ethel Davis (1894) 25 O.R. 579 -

20- In this case the foreign judgment was followed. The case was referred to in the Court of Appeal and by the trial judge.

30- It is submitted it does not support the right of the Ontario court to interfere with the judgment of the California court in this case. The facts were: An action had been brought for divorce in Buffalo. The defendant husband was served with notice of the proceedings and appeared by his attorneys, but offered no evidence. In the proceedings the wife was granted custody of the children. Shortly before the judgment was pronounced the husband left Buffalo, taking the infant with him, and went to live at Smithville, Ontario. On an application by the wife in Ontario for custody of the child it was held that the wife was entitled to custody. Street, J., held that the court (Buffalo)

40- ". undoubtedly had jurisdiction over all parties at the time the proceeding was instituted, and I can find no authority that their jurisdiction was taken away by the departure from the country with the apparent object of escaping the consequences of the impending judgment. The foreign guardian has no absolute rights as such under this judgment in this country, but

"the fact of her appointment by the court in Buffalo is entitled to great weight."

In *Rex v. Hamilton* (1910) 22 O.L.R. 484, the court upheld the foreign judgment. The parties to this action were born in Ontario but were married and became domiciled in Indiana. They were divorced 10- in Indiana in the year 1907, when the mother was granted custody of the children. The father brought the children to Ontario. The case came before the Court of Appeal, consisting of Moss, C.J.O., Justices Garrow, MacLaren, Meredith and Magee, on a stated case. The question for decision was whether the decree of the Superior Court of Marion County in the State of Indiana was of such validity and effect in Ontario as to render the child's father liable under Section 316 of the Criminal Code. Meredith, J.A., 20- at page 488, bottom:

"The parties having chosen to become domiciled in the State of Indiana and to seek and obtain a divorce there according to the laws of that State are bound by the decree which was pronounced."

The judgment goes on to say:

30- "Virtually what the defendant is asking is that the courts of this Province should undertake to review the proceeding in the Indiana court, treating the matter as if it were *res integra*."

At page 489:

40- "The order of the foreign court gave the custody to the mother at the time. That order was then in force; if it were deemed that, for any reason, it should be rescinded or curtailed in respect of her right of exclusive custody, the proper course was to apply to the Indiana court for relief; it had there been once varied in the defendant's favour at his instance; he had no right to disregard it."

In Re Chisholm (1913) 47 N.S.R. 250 -

This case is relied on by Mr. Justice Hogg as stating the correct principle. The foreign judgment was not binding. The facts were that the father and mother were both natives of Cape Breton. They were married in Montana in the year 1895. The

10- father brought the three children to Nova Scotia where he appointed a guardian to them, after which he returned to the United States to work. After the departure of the husband from Montana the wife applied for and obtained in Montana an ex-parte decree of divorce on the ground of desertion. The decree gave custody of the children to the wife. A writ of habeas corpus was taken out in Nova Scotia on the application of the wife and on production of the children the mother applied for an order for

20- delivery of the children to her custody.

The trial judge gave the Montana decree no weight whatever because it was obtained ex-parte. In the Court of Appeal the court felt not bound and said in certain circumstances the foreign decree would have considerable weight, "but we are not able to see such circumstances exist in the present case". Clearly the Montana court had no jurisdiction to award the divorce as the father was domiciled in

30- Nova Scotia and he had taken no part in the Montana proceedings.

Re E. (1921) 19 O.W.N. 534 -

In this case a divorce decree was granted in Winnipeg at the instance of a father and the father was granted custody by the Winnipeg court. There was no trial on the merits and there was no attornment to the jurisdiction by the mother. The

40- mother was served with notice of the proceedings but did not appear personally. The parties had been married in New York, lived in Toronto for a number of years and separated here. The judgment absolute said nothing about custody and stress was laid on that fact by Mr. Justice Rose in the Ontario court. The wife claimed that the notice served on her made

no reference to custody and she did not know that that was in issue in Winnipeg. In the Ontario proceedings the husband was found guilty of cruelty to his wife and child. His application in Ontario for custody was based on his supposed legal right under the Manitoba decree. The mother was awarded custody.

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Re Gay, (1926) 59 O.L.R. 40 -

This case was relied on by the trial judge and by Mr. Justice Hogg in the Court of Appeal, but, as Chief Justice Robertson said in his dissenting judgment, it was a very different kind of case from the case at bar. The father was a British subject. The parties were married in Michigan and the children were born in Michigan. Early in the year 1924 the father and children returned to the father's farm in Ontario, where they were residing two years later when, on the 1st February, 1926, the mother obtained a decree of divorce in Detroit and was awarded custody of the children by the decree. The husband did not defend the divorce proceedings. The husband had returned to the domicile of origin before the divorce proceedings took place in Michigan. Clearly, therefore, the Michigan court had no jurisdiction. Moreover, there was no trial on the merits in the American court. The Ontario court treated the children as Ontario children, which they were in fact.

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Re Snyder [1927] 38 B.C.R. 336 -

Husband and wife were married in Washington, D.C. They immediately moved to Cleveland, Ohio. Three children were born. The husband moved to Montreal in June, 1926 taking the children with him. In August, 1926 he went to Vancouver. In August, 1926 the wife started divorce proceedings in Ohio, and obtained a decree of divorce 11th October, 1926, the husband not defending. In September, 1926 husband started proceedings under the Equal Guardianship Act, to which the wife appeared. Macdonald, C.J.A., after referring to Eversley, 4th

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Edition, 629 - Stuart v. Bute, -

10- "Thus it appears that both here and in the United States the power and right is recognized of the courts of the country in which the infant is found to appoint a guardian, notwithstanding that a guardian may have been appointed in another country."

This statement, with respect, is too broad, and is not borne out by Eversley.

Eversley on Domestic Relations, 4th Edition, 629:

20- "A guardian appointed under the law of a foreign country, has no direct authority as guardian in England, but the English courts recognize the existence of a foreign guardianship and will in their discretion, give effect to a foreign guardian's authority over his ward."

Referred to in re Snyder at p. 338.

V p.867-1.19

30- The case of Cody v. Cody [1927] 3 D.L.R. 349, was relied on by the trial judge. The headnote reads:

40- "A father cannot contract out of his right to the custody of his child, which is given him both as a right for his own gratification and as a liability for the well-being of the child and the benefit of the State. Therefore, a father who has not contested and who would appear to have consented to and in a measure assisted proceedings in which a mother has obtained a divorce in a court not having jurisdiction, which court also made a decree regarding the custody of the child, is not therefore prevented from claiming custody in the court having jurisdiction."

The parents were natives of Ontario. The

child was born here and the parents had always lived here. The father left his wife in Ontario and went to Saskatchewan. In 1922 the wife went to Detroit and on August 15th, 1923 obtained a divorce. That State required two years residence.

- 10- On application by the father in Saskatchewan he was granted custody of his children. Clearly the court awarding custody to the mother had no jurisdiction, and there was no trial on the merits. It is to be noted that this was a Saskatchewan case. In Ontario The Infants Act by Section 2 (2) recognizes an agreement as to custody between mother and father.

Re Armstrong (1915) 8 O.W.N. 567 -

- 20- Referred to by Hogg, J.A., as supporting the proposition that no agreement by the parents could absolve the court from considering the infant's welfare. There the parents had agreed and the agreement was embodied in a consent judgment. Middleton, J., did not interfere with that agreement: His statement appears in no way necessary for the decision of the case, and the effect of Section 2 (2) of The Infants Act is not considered. The statement does not go the length of stating that no agreement between the parents is binding upon them.

- 30- In Re Bergman v. Waldron (1923) 3 W.W.R. 70 -

In this case the Court of Appeal for Saskatchewan recognized the appointment of a guardian made by an Ontario court.

- 40- In the Court of Appeal Mr. Justice Hogg relied on the judgment of Morton, J., in one of the latest cases in England dealing with the appointment of a foreign guardian - In re B.'s Settlement (1940) Ch. D. 54. This case is not, however, it is submitted, authority for the proposition that a foreign judgment may be ignored or that the issues between the parents may be retried. In that case there was no trial on the merits and the father who claimed custody in England relied on an interlocutory order for custody

Distinguished by Precedent -
referred to p. 82 - Stuart case misapprehended in this case
no evidence against fitness of said guardian
Child leaves with guardian 7 years -

- obtained ex-parte in a Belgian court at the commencement of a divorce proceeding while the mother and child were in England. The mother had custody of the child in England for almost three years before the father applied for custody. It is clear that the custody order of the Belgian court which Morton, J., did not follow was obtained ex-parte without
- 10- notice to the mother and without any trial whatever on the merits and without any appearance by the mother or submission by her to the Belgian jurisdiction. The Belgian court did not make a custody order upon the mother and father "becoming divorced" as stated by Mr. Justice Hogg, but upon the commencement of the divorce proceeding. Morton, J., in his judgment made it clear that the matter of final custody would be tried in Belgium. He further made it clear that he was not laying down any general rule
- 20- as to the weight which the court ought to give to a foreign judgment. The mother did not leave Belgium as a fugitive, nor did the father follow her in close pursuit, as the Appellant has followed the Respondent in the case at bar.

With respect to this decision, A. Berriedale Keith has this to say in the Journal of the Society of Comparative Legislation, Vol. 22 (1940) p. 234:

- 30- "It is a remarkable breach of respect due to foreign law that a mother who takes her child from its natural home against the rights of the father should find an English court bound to prefer the interests, as it conceives them, of the child to the rights of the father, as declared by the foreign court with primary jurisdiction over the domestic relations involved."
- 40- In Re X.'s Settlement (1945) Ch. D. 44 -
- Two infants were made wards of the court in England. The parents were domiciled in Scotland. The father later brought action in the Court of Session in Scotland. He then applied to the Court of Chancery in England for leave to apply for custody in

the Court of Session. Vaizey, J., before whom the application came, said:

10- "If the courts of Scotland should think it proper to make, and did make, any order or orders with regard to these children, then that order or those orders will, as I understand the matter, most certainly receive in the courts of this country the fullest respect and attention in accordance with the principles laid down by the House of Lords in Stuart v. Bute (1861) 9 H.L.C. 440, 464, 470."

In re an Infant [1943] Ch. D. 305 -

20- Bennett, J., was, apart from the authority of the judgment of Lord Langdale in Johnstone v. Beattie, doubtful of the jurisdiction of an English court to appoint a guardian of a foreign child who had no property in England - case where child had been brought to England from Germany, its parents being in a concentration camp in Italy - on application made by next-of-kin.

30- Mr. Justice Hogg in his judgment has thought it sufficient to establish the fact that the Ontario courts had jurisdiction to hear the issue and award the custody of the child. He stopped there. Mr. Justice Hogg treated this case as if the Respondent and child were bona fide residents of Ontario, instead of regarding the Respondent as a fugitive as did Chief Justice Robertson. He treated this case as if it were an application by an Ontario parent under The Infants Act without any previous court proceedings between them.

40- He did not give any weight to the California decree, even though it was delivered after a trial on the merits and by a court which had jurisdiction and whose jurisdiction the Respondent invoked and was estopped from denying. He did not have regard to the fact that no Canadian and no English court have ever failed to follow a foreign judgment by a

court which had jurisdiction and where there was a trial on the merits. With respect, the judgment appealed from is a strange breach of respect for the judgment of the courts of a friendly country.

A further result of the judgment of the Court of Appeal would be that a litigant having illegal custody of an infant, might, after contesting a custody application in every state of the United States, in succession invoke the jurisdiction of every Canadian Superior Court from Newfoundland to British Columbia and thence to the Yukon and the Northwest Territories to try and retry the question of custody in an endeavour to obtain a decision in his favour, and this litigant although unsuccessful in every Canadian court would with our blessing proceed to some other country to renew his frustration of the courts of his own country and this country and to defy their judgments.

It is submitted that such is not the law of Ontario.

10. On the basis that the Respondent was not bound by the California decision and that he was entitled to go behind that decision and retry the question of custody, the trial judge admitted:

(a) Evidence concerning facts and incidents that were in issue in the courts of California and tried there. (p.82-1.35 to p.87-1.17; p.90-1.21)

Counsel objected strongly to the admission of such evidence. (p.91-1.31)

(b) Evidence of facts and incidents occurring before the dates of the hearing in California but which it is said were not introduced in evidence in the California proceedings, (p.88-1.25 to p.92-1.43) which facts were within the knowledge

of the Respondent prior to the final hearing in California.

See ruling at p.92-1.44 to p.94-1.36; p.95-1.39 to p.96-1.4. This ruling concerned the following matters:

- 10- Re de la Fuente (p.95-1.39);
- Re William Shields, with whom the Appellant became acquainted in 1944. (p.99-1.19 to 27; p.99-1.40 to p.101-1.34);
- Re McCarthy's Ranch - The evidence in this respect concerned a visit to this ranch in February of 1945. (p.101-1.35 to p.102-1.13.)
- 20- Re Murray's Ranch (p.103-1.16 to p.105-1.29). This evidence concerns incidents alleged to have taken place in February, 1945.
- Re William Miller (p.105-1.30);
- April, 1945 - Re The Elks Club and Re Big Bear Lake. (p.106-1.3 to p.107-1.27);
- The trusts set up by McKee (p.134-1.34);
- 30- The disposition of property under the property settlement. (p.135-1.33 to p.138-1.17).

All of these alleged incidences took place before the hearing in California in May and June of 1945.

- 40- It is submitted, with respect, that none of the incidences above referred to showed that the mother was unfit to have custody of her child. In any event, it is submitted that they were res judicata as being matters dealt with by the California court or matters which were within the knowledge of the Respondent prior to the final hearing in California.

(c) The Appellant was cross-examined at

great length on the following matters:

- (i) The whereabouts of the child after the 1942 judgment; (p.96-1.12 to p.97-1.34) and the custody of the child after the 1942 judgment. (p.96-1.4);
- 10- (ii) The taking on by the Appellant's own son of the name of McKee, (p.102-1.29 to p.103-1.1), and that son's war service, presumably to make an unfavourable comparison with the war services of the sons of the Respondent. (p.98-1.30 to p.99-1.39);
- (iii) The Appellant's divorce from her first husband. (p.102-1.14 to 28).

20- The trial took on the aspect of an investigation by way of cross-examination of the Appellant's conduct of the litigation between herself and the Respondent. In this respect she was cross-examined at great length on the following matters:

- (i) The Milwaukee action and the allegations in the statement of her claim in that action drawn by her attorneys in Milwaukee. (p.109-1.38 to p.134-1.20; p.118-1.22; p. 119-1.7); In connection with that proceeding she was cross-examined on where she claimed to be domiciled, (p.107-1.46 to p.109-1.11) although it was clear that she was not familiar with the law of domicile.
- 30-

40- The admissibility and relevancy of the facts sought to be brought out in the cross-examination are argued at p. 111-1.15 to p.112-1.38.

- (ii) Her conduct of the Ontario litigation. (p.146-1.2); Offers made to her of compromise. (p.149-1.11 to p.153-1.10).

(iii) The newspaper accounts and comments on the Ontario trial.

- Ex. 10 referred to in Evidence at p.153;
 Ex. 11 referred to in Evidence at p.157;
 Ex. 12 Clipping from Globe & Mail, 18th
 March, 1947;
 10- Ex. 13 referred to in Evidence at p.163;
 Ex. 14 referred to in Evidence at p.164;
 Ex. 15 referred to in Evidence at p.168;
 Ex. 16 referred to in Evidence at p.169;
 Ex. 17;
 Ex. 18 referred to in Evidence at p.178.

20- It is submitted that none of the above matters was relevant or material on the question of the mother's fitness. It is submitted that the Court of Appeal in California in dismissing the Respondent's appeal there took the right view of these matters when that court said, - ". . . that the attack on the California attorneys in the Wisconsin proceedings did not militate against the mother's right to the custody of the child no matter how ill-advised those proceedings might be." (174 Pacific Reporter, p.18) This judgment was referred to by the trial judge. (p.84-1.2).

30- It is submitted that the patience and dignity with which the Appellant submitted to the prolonged cross-examination on these collateral matters spoke more eloquently than anything Counsel can say as to her fitness to have custody of her child.

40- (d) The trial judge allowed to be introduced in evidence the following items which, it is submitted, were clearly inadmissible:

- (i) The lengthy Findings of Fact of Judge Thurmond Clarke which the learned trial judge treated as findings of fact. (p.94-1.39);
- (ii) The proceedings in the courts of Wisconsin

which were drawn by the Appellant's attorneys. (p.109-1.38; Exhibit 23; p.114-1.28; p.111-1.16; p.113-1.8);

10- (iii) The depositions of E. G. Haumesch (Exhibit 26, p.798) taken de bene esse, or on commission, for use in the courts of Wisconsin but never so used. These depositions were not taken in the case at bar.

20- (e) The trial judge also permitted the Appellant to be cross-examined on confidential communications between her and her attorneys without informing the Appellant that the said communications were privileged. (p.117-1.5; p.117-1.41).

(f) The trial judge admitted, over the objections of Counsel for the Appellant, evidence of facts and incidences of matters concerning the Respondent and the child since their arrival in Ontario, and tried the case on the basis of what the Respondent was presently doing for the child and what he intended to do for the child. (p.372-1.28; p.360-1.26 to p.364-1.20).

30- It is submitted that the case should have been looked at only as it stood on the date the writ of habeas corpus was issued, and the Respondent's intentions for the child's future welfare were irrelevant.

40- 11. As to the findings of the trial judge with respect to Mrs. McKee, Counsel refers to the first page of this part of the Argument. The Court of Appeal in California stated:

"Judge Thurmond Clarke who made the original custody order must have decided that any dereliction allegedly proven against the

"Respondent (the present Appellant) in the original divorce action, did not militate against granting custody to the mother during three months of the year."

- for 8 1/2 years of the child's life
 Charge of 16 1/2 children -
- Mr. Justice Wells' finding that the evidence did not show the mother to be immoral must by
- 10- necessary implication, it is submitted, carry with it a finding that the Respondent's evidence tending to show immorality was disbelieved by Mr. Justice Wells. His Lordship did not base his decision on immorality. He based his decision as to the mother's character and ability not on her conduct as a mother (which was admitted by the Respondent and his Counsel to be of the highest order) but upon her conduct of the litigation and the newspaper accounts of the trial, all matters which, it is submitted, were
- 20- irrelevant to the issues to be tried. Not one incident prior to the time the decision was taken to separate was referred to in evidence which in any way was derogatory to the Appellant's moral or social conduct, or in any way tended to show that she was unfitted to have custody of the child. The trial judge said, in referring to the Appellant's conduct of the litigation, - "It does in my view reflect very seriously on her judgment and capability", but it is submitted that the judges in the Superior Court of
- 30- California took the proper view when they stated - "that the attack made on the California attorneys in the Wisconsin proceeding did not militate against the mother's right to the custody of the child, no matter how ill-advised those proceedings might be.". 174 Pacific Reporter, p. 18, (read by the trial judge - I p.84-1.2).

- It is submitted that the conduct of the litigation and the newspaper reports had no relevancy
- 40- to her fitness to have custody of her child. Neither her ability to conduct litigation nor the wisdom of her pleadings was in issue.

The trial judge based his judgment on the general theme that the father was better able to provide for the child than the mother, (V 870-1.9-20) and that the child was approaching an age when the

father's supervision would be more beneficial to him than the mother's, (V p.872-1.19-27) and that he might profit in a financial way by being left with the father. (V p.872-1.39- p.873-1.36) Mr. Justice Hogg in the Court of Appeal, without going into detail, agreed with the trial judge. (V p.897-1.32-45). It is submitted that it was not
 10- open to the Ontario courts to determine these matters.

It is submitted that the correct view of the Respondent's character and his case was that taken by the Chief Justice of Ontario, that the Respondent was "not likely to have been scrupulous as to the kind of evidence he would present to the Ontario court in support of his position. "His whole case is tainted by his original misconduct and should
 20- have been viewed with grave suspicion." (V p.887-1.37 - p.888-1.2).

The Appellant submits that the dissenting judgment of the Honourable, the Chief Justice of Ontario, is right, and that the judgment of the Court of Appeal should be set aside, and an order should be made directing the Respondent to release the infant child to the custody of the Appellant.

30- All of which is respectfully submitted.

R. I. FERGUSON,

of Counsel for the Appellant.

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