

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.

FACTUM OF THE RESPONDENT

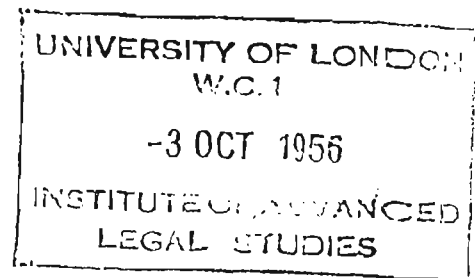
SLAGHT, FERGUSON, BOLAND & SLAGHT,
Solicitors for the Appellant.

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

GOWLING, MACTAVISH, WATT, OSBORNE & HENDERSON,
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—AND—

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FACTUM OF THE RESPONDENT

PART I.

STATEMENT OF FACTS

Case References

(a) GENERAL:

This is an appeal from a judgment of the Court of Appeal for Ontario (Hogg and Aylesworth, J.J.A.; Robertson, C.J.O. dissenting) dated June 24th, 1948, affirming the judgment of Wells, J. dated October 18th, 1947.²⁰ The Court of Appeal dismissed the appeal of the present appellant from the judgment of Wells, J. which awarded custody of Terry, the infant son of the parties, to the present respondent with a limited right of access to the present appellant.

pp. 875-6.
pp. 857-8.

(b) HISTORY OF PARTIES AND U.S.A. PROCEEDINGS:

The appellant and respondent were married in Vermont in 1933. The child Terry was born in California on July 14th, 1940. The parties separated in December, 1940, and have not resided together since that time. On

p. 42, l. 43-
p. 43, l. 1.
p. 44, ll. 4-10.
p. 44, ll. 16-19.

Case References

Ex. 3, pp. 731-8 September 4th, 1941, a Property Settlement agreement was executed by the parties under which certain financial arrangements were made for the benefit of the appellant, the child Terry and a son of the appellant by a former marriage. There was no specific reference in this agreement to the question of custody of Terry.

pp. 759-61. On September 18th, 1941, the appellant commenced an action for dissolution of her marriage to the respondent in the Superior Court of the State of California in and for the County of Los Angeles. On September 28th, 1942, the respondent entered a cross-complaint for divorce. After a 16-day trial in October and November, 1942, the Hon. Thurmond Clarke by interlocutory 10 decree on November 20th awarded custody of Terry to the respondent and then delivered judgment on December 17th, 1942, dismissing the appellant's complaint, granting the respondent a divorce on his cross-complaint and awarding custody of Terry to the respondent but directing that Terry spend 3 months in the summer time with the appellant. The judgment also approved and confirmed the Property Settlement agreement, but reduced the amount payable by the respondent to the appellant for maintenance of Terry from \$125.00 to \$100.00 per month.

p. 760, ll. 18-28.
p. 760, ll. 29-33.
p. 734, ll. 32-45.
p. 760, ll. 40-46.

pp. 762-7. Subsequently, both parties applied to the said Superior Court from time to time for modification of this judgment as to custody, the general result of 20 which applications being to leave the judgment as it was but to fix the 3 months Terry was to spend with the appellant and to award to each party certain rights of access during the times Terry was with the other. During all of these proceedings the appellant was ordinarily resident in California and the respondent in Michigan. The respondent having moved temporarily with Terry to Milwaukee, Wisconsin, on January 12th, 1944, the appellant commenced proceedings in the Circuit Court of the State of Wisconsin seeking custody of Terry. This action never proceeded to trial but was dismissed on the merits on consent by order dated June 28th, 1945, i.e., during the proceedings referred to in the next succeeding paragraph. 30

pp. 768-770.
p. 845.

pp. 846-9. On May 31st, 1945, the respondent moved the Superior Court of California to modify the order as to custody. The appellant delivered a cross-application and the hearing took place in June, 1945. By order dated August 1st, 1945, custody of Terry was awarded to the appellant with a reasonable right of visitation to the respondent. The respondent appealed to the Supreme Court of the State of California but his appeal was dismissed, the dismissal and consequently the judgment dated August 1st, 1945, being effective January 13th, 1947. During these proceedings by agreement of the parties and their counsel the status quo as to custody and access continued so that from November 1942 to 1946, inclusive, Terry was in the custody of 40 the respondent and spent the months of July, August and September in each year with the appellant. From September 30th, 1946, to the present time Terry has at all times been with the respondent.

(c) HISTORY OF PROCEEDINGS IN ONTARIO:

p. 357, ll. 29-33.

p. 7.

pp. 20-21.

p. 25.

p. 26.

pp. 857-8.

The respondent having moved to Kitchener, Ontario, with Terry on December 26th, 1946, the appellant was granted a writ of Habeas Corpus ad subjiciendum by Treleaven J. on March 25th, 1947. On the return to the said writ on March 25th, 1947, Smily, J. reserved judgment and on April 2nd, 1947, delivered judgment in which he gave the appellant leave to file an application for custody of Terry and directed the trial of an issue as to custody with the appellant as plaintiff and the respondent as defendant. The appellant sought leave to appeal to the Court of Appeal from the judgment of Smily, J. but such leave was refused by Genest, J. on April 15th, 1947.¹⁰ The issue came on for trial before Wells, J. in Kitchener and Toronto in September and October, 1947. At the opening of the trial the appellant filed a Notice of Motion for custody of Terry. On October 18th, 1947, Wells, J. delivered judgment awarding custody to the respondent with a limited right of access to the appellant. From this judgment the appellant appealed to the Court of Appeal for Ontario, the appeal being argued in March, 1948. By a majority judgment delivered on June 24th, 1948, the Court of Appeal dismissed the appeal.

PART II.

STATEMENT OF POINTS IN ISSUE AND OF RESPONDENT'S POSITION

p. 32.

The broad question postulated by the Notice of Appeal is: assuming a foreign tribunal of competent jurisdiction has awarded custody of an infant to one parent, have the Courts of Ontario jurisdiction to review the situation at a time when the infant is resident or physically situate within Ontario, and in their discretion award custody to the other parent?

The chief points in issue on this appeal and the position of the respondent in regard thereto may be stated as follows: 10

I. Was the Superior Court of California a court of competent jurisdiction to grant the order of August 1st, 1945? The position of the respondent is that the said order is invalid in that at that time the said Court had no jurisdiction over the child Terry who was then neither domiciled, resident nor physically situate within California.

II. If the Superior Court of California was not a Court of competent jurisdiction at the relevant time, then was such defect cured by the fact that the jurisdiction of the said Court was invoked by the respondent or alternatively is the respondent by such conduct estopped from challenging such jurisdiction? The position of the respondent is that an award of custody is not 20 one of those types of proceedings in personam where attainment to the jurisdiction either cures a lack of jurisdiction or estops the attorning party from later calling such jurisdiction into question.

III. Assuming that the California order is valid and binding upon the parties, is such order res judicata in Ontario and, therefore, either enforceable per se or not to be reviewed by the Ontario courts? The position of the respondent is that no foreign decree as to custody is res judicata in Ontario with respect to a child resident or physically situate within Ontario at the time an application is made to the Ontario courts and that on such application being made the Ontario courts have the widest discretion to enquire into all 30 the facts and make an award, the foreign decree having no greater sanction than its very considerable evidentiary value. The respondent further takes the position that even though the California judgment be res judicata it can only be so up to the date of the proceedings giving rise thereto and that as in the case of domestic decrees as to custody the Ontario courts always have the right and duty to regard changed circumstances since such date and to exercise their discretion in the light of such changed circumstances.

IV. Has the Infants Act, R.S.O. 1937, Chapter 215, any application to these proceedings? The position of the respondent is that the trial before

Wells, J. was an issue as to who ought to have custody according to the principles enunciated in the Infants Act.

V. On the facts the following points are or may be in issue:

(a) Was the respondent resident and domiciled in Ontario or the United States of America at the time of the application to the Supreme Court of Ontario by the appellant? The position of the respondent is that at such time he was at least resident and perhaps domiciled in Ontario and that in any event such enquiry is irrelevant as the question of jurisdiction of the Ontario courts depends on where Terry himself was resident or physically situate at that time. 10

(b) Did the respondent remove Terry to Ontario surreptitiously against his own undertaking and against the order of the California court? The position of the respondent is that such removal was at a time when he had full custody of Terry even according to California law, that there then was no such undertaking in effect and that in any event such enquiry is only relevant as evidence on the question of who ought to have custody.

(c) Did the learned trial Judge proceed on any wrong principle in the exercise of his discretion as to who ought to have custody of Terry? The position of the respondent is that the overwhelming weight of the 20 evidence indicated that the best interests of the child lay in his being placed in the custody of the respondent.

PART III.

ARGUMENT

The respondent submits that the judgment appealed from should be affirmed for the following among other reasons:

SECTION I—AS TO THE VALIDITY OF THE CALIFORNIA ORDER OF 1945:

p. 268, ll. 26-31. It should be noted in passing that at the trial before Wells, J. both parties
p. 860, ll. 24-26. accepted the California divorce judgment of December 17th, 1942, as valid
and binding. The majority in the Court of Appeal for Ontario did not con-
p. 891, ll. 14-16. sider it necessary to determine as to the validity of the 1945 order.

In considering the validity of a foreign judgment, the Ontario courts are 10
concerned with the competence of the court which pronounced such judgment;
i.e., did that court have jurisdiction over the parties and the subject matter.
In determining whether or not such jurisdiction existed, the general principles
of law applicable to our courts will be considered. In the absence of such
jurisdiction, then that foreign judgment is not valid and may be impeached
in our courts. Phipson on Evidence, 8th ed; 399-400; Pemberton v.
Hughes (1899) 1 Ch. 781; Papadopoulos v. Papadopoulos (1930) P. 55.

In result, it is submitted that unless the California courts had jurisdiction
in 1945 over both the parties to those and these proceedings and the infant
Terry, whose custody was the subject matter of that suit, then the order 20
made was pronounced by a Court not of competent jurisdiction and such order
is neither valid in our courts nor binding upon the parties.

The basis of jurisdiction over the custody of a child has been variously
claimed to rest upon the child being resident, physically situate or domiciled
within the territorial limits of such jurisdiction and as pointed out by the
learned trial judge no weight is given to a judgment not of the residence or
domicile. Supporting jurisdiction based upon residence or physical location
are the following authorities: The Infants Act, loc. cit., section 1.
p. 867, ll. 4-10.

“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 30
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.”

Upper Canada Consolidated Statutes, 22 Vic., Chapter 93, Section 1; Dicey's Conflict of Laws, 5th ed. 549-550; 6 Hals. (Hailsham ed.) 323; 17 Hals. (Hailsham ed.) 658-9, *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 8 E.R. 657; *Stuart v. Moore* (1861) 4 L. T. (N.S.) 382; *Woodworth v. Spring* (1862) 4 Allen's R. 321; *Loasby v. Home Circle* (1893) Tru. 533; in re D. (1943) Ch. 305; 31 Corpus Juris (1923 ed.) 988; *Westlake on Private International Law* (7th ed.) 38 & 44; *Cleaver v. Cleaver* (1941) O.W.N. 640; *Dickson v. Dickson* (1944) 2 D.L.R. 396.

In favour of domicile as the basis of jurisdiction are the following: In re M. 39 D.L.R. 177, re *Harding* 63 O.L.R. 518; *Kilpatrick v. Kilpatrick* (1930) 10 1 D.L.R. 288; *Cody v. Cody* (1927) 3 D.L.R. 349; *Schiach v. Schiach* (1941) 2 D.L.R. 590.

It is noteworthy that while in the cases in which residence or physical location has been adopted as the basis of jurisdiction, such adoption has often been at the expense of an order of the courts of the domicile whereas in the cases resting upon domicile it has not been suggested that the courts of residence or physical location would not have at least a concurrent jurisdiction. Indeed, in the case of *In re M.*, loc. cit., such jurisdiction was expressly reserved. In any event, this enquiry is probably academic because on either test the California courts were without jurisdiction in 1945. 20

p. 846. The 1945 proceedings were commenced in May and the trial took place in June. It is the date of institution of proceedings and not the date of judgment which must be looked at in order to determine jurisdiction. Dicey, op. cit., 398; re *Ethel Davis* (1894) 25 O.R. 579; *Emanuel v. Simon* (1908) 1 K.B. 302. It is beyond dispute that at that time Terry was neither resident nor physically situate in California.

p. 332, ll. 6-31.
p. 343, l. 35-
p. 345, l. 35.
p. 347, l. 35-
p. 348, l. 4.
p. 743, ll. 31-9.
p. 22, ll. 34-7.
p. 860, ll. 32-47.
p. 866, ll. 13-33.

The domicile of an infant is that of his father. Dicey, op. cit., 99-100; *Wadsworth v. McCord* (1886) 12 S.C.R. 466. The evidence indicates clearly that the respondent's domicile in 1945 was almost certainly in Michigan possibly in Iowa but indisputably not in California. The California judge in 1942 found that the respondent was permanently resident in Michigan and had never been resident in California. Both Smily, J. and Wells, J. found that the respondent was domiciled in Michigan in 1945. Wells, J. also found that Terry was resident and domiciled in Michigan in 1945. 30

Nor, it is submitted can it be successfully maintained that a court once having had and exercised jurisdiction on the basis of domicile, residence, or physical location retains what might be termed a continuing jurisdiction over the infant until he attains his majority even though such infant may long since have ceased to be domiciled, resident or situate within such court's territorial jurisdiction. *Re Hilker* (1914) 6 O.W.N. 82. 40

p. 868, ll. 21-25.

In result, as found by the trial judge, it is submitted that the California court proceeded entirely without jurisdiction in 1945 and that the order of August 1st, 1945 is invalid.

SECTION II.—AS TO THE EFFECT OF THE RESPONDENT INVOKING THE JURISDICTION OF THE CALIFORNIA COURT IN 1945:

It is common ground that the respondent himself instituted the proceedings which culminated in the order of August 1st, 1945. For the appellant it is argued that such conduct estops the respondent from impeaching the jurisdiction of the California court to make that order. The respondent submits that this was a type of order to which the doctrine of estoppel by record does not apply for the reason that attornment to the jurisdiction is of no effect where the court acted entirely without jurisdiction. Cheshire on Private International Law, 3rd ed., p. 141. This rule is stated in general terms in 13 Hals. (Hailsham ed.) 438, citing *Toronto Railway Company v. Toronto Corporation* (1904) A.C. 809.

Applying this general principle to matrimonial cases it is found that in the 1879 edition of Dicey reference is made to the case of *Zycklinski v. Zycklinski* (1862) 2 Sw. & Tr. 420 in support of the proposition that estoppel by submission does apply in a divorce action even though the court acted entirely without jurisdiction. This doctrine was expressly disapproved in *Armitage v. Attorney-General* (1906) P. 135 and the rule now in effect is stated in Dicey, op. cit., 221-2 as follows:

“Rule 56—the court has jurisdiction in an action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the court.

“In the application of this principle two things must be borne in mind.

“The first is that the principle is applicable only to actions or proceedings which are strictly of the nature of an action. The second is that submission can give the court jurisdiction only to the extent of removing objections thereto which are purely personal to the party submitting, as for example, the objection in the case of a defendant that he has not been duly served with a writ. . . Submission cannot give the court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the court. Hence the principle does not apply to a suit for divorce.”

The Armitage case has been followed many times in England and Canada: e.g., *Papadopoulos v. Papadopoulos*, loc. cit; *Thompson v. Crawford* (1932) O.R. 281, aff'd. (1932) 4 D.L.R. 206; *Chatenay v. Chatenay* (1938) 3 D.L.R. 379.

While different considerations might ordinarily prevail with regard to a divorce action, being a proceeding in rem, as there the question of jurisdiction falls to be determined upon the locus of the res itself, than to an order as to custody, a proceeding in personam, it is submitted for the respondent that the 1945 order was made as ancillary to the original judgment of the California courts in 1942, and that the rule in the Armitage case has been extended to such ancillary decrees. 6 Hals. (Hailsham ed.) 329; Papadopoulos v. Papadopoulos, loc. cit; Thompson v. Crawford, loc. cit; Cody v. Cody, loc. cit.

In result, it is submitted that the respondent is at liberty to impeach the 1945 order for lack of jurisdiction and that the court which pronounced 10 that order having been one of incompetent jurisdiction the appellant can derive no assistance whatsoever in our courts from that order.

SECTION III.—AS TO THE EFFECT OF A VALID FOREIGN CUSTODY ORDER
RE AN INFANT NOW WITHIN ONTARIO JURISDICTION:

It is probably beyond dispute that the Ontario courts had jurisdiction to adjudicate with regard to Terry's custody. Indeed, such was conceded by p. 23, ll. 15-18. counsel for the appellant before Smily, J., was assumed by all the learned judges before whom the case has been argued, and expressly so found by the judgment of the Court of Appeal for Ontario. In the event that this be now p. 897, ll. 23-6. disputed, it might be well briefly to refer to the evidence which in the respon-20 dent's submission clothed the Ontario courts with jurisdiction on the ground that Terry was physically located, resident or domiciled (or all three) within Ontario at the time of the Ontario proceedings.

In the first place, it is common ground that Terry was physically situate in Ontario from and after December, 1946. Secondly, as to residence, Terry had been living with relatives in Kitchener for some 3½ months, and then resided with relatives near Linwood, Ontario, until early May, 1947, when with the respondent he moved into their permanent home where he has lived ever since, and where the learned trial Judge saw him. Thirdly, as to domicile, the respondent through his first wife had close personal connections 30 with her relatives in Waterloo County and had frequently visited in Kitchener and its environs with members of his family; he had varied and important business connections in Canada; and for some time prior to these proceedings he had the intention of living in Canada. In furtherance of this intention p. 368, ll. 15-23. long prior to these proceedings he had purchased the farm where he now lives; p. 360, ll. 25-45. he and Terry entered Canada as immigrants and established their permanent home on the farm near Linwood where they have in fact lived since May, 1947. It is submitted that these facts include the factum of residence and the animus manendi required for the acquisition of a domicile of choice. Dicey, op. cit., p. 83. For the appellant, great stress has always been placed on the respon-40 dent's American citizenship but it is submitted that the animus manendi required for domicile need not include any intent with regard to allegiance. Dicey, op. cit., p. 89.

It becomes pertinent, therefore, to enquire into the effect of the 1945 California order in the adjudication of an Ontario court as to the custody of an infant, such enquiry being on the assumption either that the California order is valid or that the respondent is estopped from challenging the jurisdiction of the California court.

It is first necessary to distinguish between foreign judgments in rem and foreign judgments in personam. It is conceded that a foreign judgment in rem, such as in divorce proceedings, if granted by a foreign court of competent jurisdiction is binding on Ontario courts. A foreign judgment in personam, on the other hand, is binding on the courts of Ontario only if it is for a debt¹⁰ and is final and conclusive. Dicey, op. cit., 465-7; Cheshire, op. cit., 798 & 801. The opinions of text-writers as to the enforceability of foreign judgments in personam in the courts of Ontario are all based on cases which were concerned with judgments for money or money's worth, e.g. Dicey, op. cit., 461-2, based on *In re Henderson* (1887) 37 Ch. D. 244 which was an action on a Spanish money judgment; Westlake, op. cit., p. 409, based on *Henderson v. Henderson* (1884) 6 Q.B. 298, an action on a Newfoundland money judgment; Westlake, op. cit., pp. 403-404, based on *De Casse Brissac v. Rathbone* (1861) 6 H. & N. 301, 158 E.R. 123, a case concerning a French money judgment. Perhaps the leading case was *Emanuel v. Symon*, loc. cit.,²⁰ which laid down 5 classes of cases in which valid foreign judgments in personam are binding, to which a 6th class was added by *Phillips v. Batho* (1913) 3 K.B. 25, both of which cases were concerned with foreign money judgments.

Further, such foreign judgment must be one which is final and conclusive in the sense that it is not subject to be abrogated or varied by the same court which pronounced it. 6 Hals (Hailsham ed.) 326. It is submitted that by the domestic laws of all jurisdictions, and certainly those of Ontario, a decree as to custody is never final but is always subject to review at the instance of either parent or a guardian. As far as California law is concerned this proposition is self-evident in the number of applications for modification which³⁰ were made in the McKee case, as found by the majority judgment of the Court of Appeal for Ontario. In Ontario the proposition is enshrined in the Infants Act, Section 1, cit., supra.

p. 897, ll. 4-10.

The California order of 1945 is deficient in both respects so that it is submitted that such order is neither enforceable per se nor binding upon the Ontario courts.

The learned Chief Justice of Ontario held that "it is not a question of jurisdiction but rather one of comity between friendly nations". With great respect it is submitted that the learned Chief Justice of Ontario erred in two respects. In the first place, if the court had jurisdiction at all then such⁴⁰ jurisdiction must be exercised in accordance with the guiding principle that the welfare of the child is the paramount consideration and that any rights of a foreign guardian, however validly appointed, must yield to the child's

p. 883, ll. 19-21.

best interests. Wharton on Conflict of Laws, 3rd ed., pp. 585-6, 589; Schmitthoff on English Conflict of Laws, 2nd ed., p. 286. Secondly, it is respectfully submitted that the learned Chief Justice of Ontario mis-applied comity of nations. The doctrine of comity of nations has been largely discredited as a proper basis for the enforcement of foreign judgments for the reason that such doctrine leads as a logical conclusion to the remarkable results of reciprocity, whereby of two foreign judgments of exactly the same kind but of different countries of origin one will be enforced in Ontario because the courts of origin enforce similar Ontario judgments while the other will not be recognized in Ontario because the courts of its origin do not afford similar recognition to Ontario judgments. The doctrine of comity has been replaced by what might be termed the doctrine of obligation in accordance with which the Ontario courts will enforce a valid foreign judgment which has adjudicated a certain sum to be due. Cheshire, *op. cit.*, pp. 764-773; Westlake, *op. cit.*, pp. 396-7; Schmitthoff, *op. cit.*, 416-418; Wolff on Private International Law, 1944 ed.; pp. 14-15, 254; 5 C.E.D. (Ont. ed.) 198. 10

It is submitted that the principles of conflict of laws applicable in Ontario give only evidentiary value to a valid foreign decree as to custody; that such a decree cannot be enforced *per se* in Ontario and is not binding upon the courts of Ontario and that the extent of the mandate flowing from such a judgment is that it is entitled to great weight as a matter of evidence in a full enquiry into the circumstances, such enquiry being directed to a determination of the best interests of the infant as the paramount concern of the court. 20

Story on Conflict of Laws, 8th ed., p. 697; Cheshire, *op. cit.*, p. 534; In re B's Settlement (1940) Ch. 54; In re Kinney (1875) 6 P.R. 245; Re Mott, 5 D.L.R. 406; Re Chisholm (1913) 13 D.L.R. 811; Re E. (1921) 19 O.W.N. 534, *aff'd.* 20 O.W.N. 92; Re Gay (1926) 59 O.L.R. 40; In re Snyder (1927) 3 D.L.R. 151; Porteous v. Papineau (1937) 3 D.L.R. 592. It has been argued in the lower courts on behalf of the appellant that the rule enunciated by the Court of Appeal for Ontario in Re Gay, *loc. cit.*, is limited to cases in which there was no trial in the foreign forum. In none of the cases cited for the respondent was the validity of the foreign decree questioned by the applicant in the domestic courts who had been the unsuccessful party in the foreign forum except in Cody v. Cody, *loc. cit.* Further, the reports of the following cases indicate that the applicant in the domestic courts had taken part in the foreign proceedings: Re E., *loc. cit.*, Re Ethel Davis, *loc. cit.*; Cody v. Cody, *loc. cit.* 30

It is further submitted by the respondent that the California order of 1945, being unenforceable here it is not *res judicata* and that the learned trial Judge quite properly admitted evidence of circumstances prior to the 1945 proceedings. Indeed, the contrary was not seriously contended by the appellant before the Court of Appeal. Dicey, *op. cit.*, 462; Wallis v. Wallis (1929) 1 W.W.R. 631, (1929) 2 D.L.R. 253; Re E., *loc. cit.*; Re Ethel Davis, *loc. cit.*; Re Gay, *loc. cit.* As pointed out by Wells, J. it would be difficult to determine the welfare of the child if the fullest enquiry were not permitted. 40

Finally, as to the effect or sanction of the 1945 California order, assuming such order to be valid, *res judicata* and binding in Ontario it can only be so as to facts and circumstances extant at the time of the proceedings which culminated in such order. *Res judicata* is a branch of the law of estoppel and the estoppel can only operate with regard to matters which were or could with reasonable diligence have been brought to the court's attention. 6 C.E.D. (Ontario ed.) 448; *Davison v. Forbes* (1915) 9 O.W.N. 145. The authorities cited *supra* establish beyond doubt, it is submitted, that even a domestic custodial decree is not final and conclusive and is always subject to review on the basis of changed circumstances. In this case, as indicated by Smily, J. 10 and found by Wells, J. and the Court of Appeal for Ontario, it is submitted that there have been changed circumstances since 1945, of sufficient significance by themselves to warrant the learned trial Judge awarding custody to the respondent. It is important to observe that the reasons for judgment of the Honourable Judge Schmidt were based on alleged deficiencies in the manner in which the child was then being maintained. Reference to the evidence in the trial before Wells, J. indicates that in every respect referred to by Judge Schmidt the circumstances had materially altered since 1945. P. 289, l. 35-p. 290, l. 36; p. 291, l. 41-p. 293, l. 17; p. 298, ll. 11-16; p. 361, l. 3-p. 363, l. 16; p. 767, ll. 37-43; p. 873, ll. 15-24; p. 873, l. 44-p. 874, l. 11. Most significant 20 of all Terry is a boy who at the time of the trial in Ontario was almost 2½ years older with all the consequences thereof referred to by Wells, J. The normal rule, if it can be termed a rule is that the best interests of a boy of 7 or more years of age are in his being with his father. *Re Orr* (1933) O.R. 12.

p. 22, l. 37-
p. 23, l. 9.
p. 23, ll. 22-6.
p. 872, ll. 14-26.
p. 897, ll. 33-46.

p. 847, ll. 9-31.

p. 872, l. 14-44.

SECTION IV.—AS TO THE APPLICATION OF THE INFANTS ACT:

It is only the fact of unlawful detention and nothing else that gives the court jurisdiction by Habeas Corpus. *Barnardo v. Ford* (1892) A.C. 326 at 334-5, and such unlawful detention must be patent on the proceedings. *Rex v. Wong* (1925) 44 C.C.C. 133 at 136. On the return to a writ of Habeas Corpus in criminal matters the whole proceedings in the court below must be 30 gone into. *Tremear's Criminal Code*, 5th ed. 1480. It is submitted that this principle applies a fortiori to custody cases where the matter has to be determined on the merits in the best interests of the child. *Stevenson v. Florant* (1925) S.C.R. 532, (1925) 4 D.L.R. 530, *aff'd.* (1927) A.C. 211; *Re Kenna* 29 O.L.R. 590; *Wolff*, *op. cit.*, 417; *Bailey on Jurisdiction*, pp. 513-4, 516, 521; *Scott & Roe on the Law of Habeas Corpus* pp. 33, 73, 151 et seq.

See also Hogg,
J.A., p. 896,
ll. 23-38.

The applicable statute is the Habeas Corpus Act, R.S.O. 1937, Chapter 129 Section 7:

"Although the return to a writ of habeas corpus is good and sufficient in law the court or judge before whom the writ is returnable may examine 40 into the truth of the facts set forth in the return, by affidavit or other evidence, and may order and determine touching the discharging, bailing, or remanding the person. R.S.O. 1927, c. 116, s. 7."

Case References

See also Hogg,
J.A., p. 898,
l. 42-p. 899, l. 28

It is submitted that Smily, J. had full authority and discretion under this section to examine the material and do one of the following:

(a) to find the respondent's return adequate to establish lawful custody of Terry by him, on the merits considering the welfare of the child and to quash the writ. *Re Westacott* (1914) 5 O.W.N. 924; *Re Goldsworthy* (1876) 2 Q.B.D. 75; *Re Carlson* (1943) 3 W.W.R. 104; *Bourassa v. Bourassa* (1940) 47 R. de Jur. 24; *Marshall v. Fournelle* (1927) S.C.R. 48.

(b) to find the material adequate to establish unlawful detention, to quash the return and order attachment in default of delivery of Terry to the appellant forthwith. *Rex v. Barnardo* (1889) 23 Q.B.D. 305, *aff'd.* (1892) 10 A.C. 326; *Smith v. Reid* (1914) 17 D.L.R. 59.

(c) to find the material insufficient in one particular respect and to direct an issue as to that precise point with a report back to him. *Re Mott*, *loc. cit.*; *Re Gibson* (1907) 15 O.L.R. 245; *Re Andrews* (1873) L.R. 8 Q.B. 153.

(d) to find the material insufficient to warrant a summary disposition and to direct an all-embracing issue as to the entire matter before him. *Re Lawlor* (1921) 20 O.W.N. 140.

p. 888, ll. 3-11.
See also Hogg,
J.A., p. 899,
l. 29-p. 900, l. 21
p. 882, ll. 1-12.

It is submitted that in directing the issue he did Smily, J. adopted the fourth alternative. The learned Chief Justice of Ontario held that Wells, J. had no authority to proceed as he did. If indeed there was any technical defect in procedure, such defect cannot be permitted to vitiate the result of a full trial on the merits. *Stevenson v. Florant*, *loc. cit.* The learned Chief Justice of Ontario held that only the sufficiency of the respondent's return was before Smily, J. for consideration. If so, and if Smily, J. did not find patent unlawful detention, as he obviously did not do, the writ of Habeas Corpus should have been quashed forthwith leaving the appellant to her remedy of an application under the Infants Act, *loc. cit.* The matter having been argued fully, Smily, J. adopted the practical alternative of regarding such motion as having been made. *Re Smart Infants* 11 P.R. 482; 12 P.R. 312, 435; S.C.O. Rules 183, 233. The issue having been directed the whole question which was before Smily, J. became merged in or succeeded by the issue and the Habeas Corpus proceedings as such were then at an end subject to rights of appeal. These rights were sought and refused. It is submitted that the Infants Act, *loc. cit.*, at least as far as general principles are concerned, is a code as to matters of custody in Ontario and that applications for custody are necessarily brought thereunder and subject thereto. At the opening of the trial the appellant, pursuant to leave by Smily, J. formally moved for custody and it is submitted that such conduct constituted a recognition and acceptance by the appellant of the applicability of the Infants Act.

p. 25.

p. 26, p. 40, ll.
3-27, p. 860,
ll. 1-3.

SECTION V.—AS TO ISSUES ON THE FACTS:

(a) AS TO RESPONDENT’S DOMICILE AND RESIDENCE:

Vide Section III, Supra.

(b) AS TO THE CIRCUMSTANCES OF TERRY’S ARRIVAL IN ONTARIO:

p. 230, l. 12-
 p. 233, l. 18,
 p. 242, ll. 21-4.
 p. 243, l. 19-
 p. 244, l. 9 Ex.5.
 p. 22, ll. 29-34.
 p. 863, ll. 6-33.
 p. 890, ll. 11-22.

(i) For the appellant it is argued that the respondent should not have custody of Terry because he removed Terry to Ontario in violation of the California decree. Even assuming the California order to be valid and binding on the respondent the evidence establishes that at the time Terry came to Ontario he was in the lawful custody of the respondent even according to the law of California as found by Smily, J., and Wells, J., and Hogg, J.A. 10

p. 456, ll. 15-25.

Although a Michigan attorney for the appellant was present during 9 days of the 13 day trial there was not a tittle of evidence adduced as to the law of Michigan by way of supporting the appellant’s argument that the respondent removed the child from Michigan to Ontario in order to evade the California order. It is respectfully submitted that the learned Chief Justice of Ontario erred in assuming that the 1945 California order was valid and binding in Michigan. In the absence of any evidence as to foreign law it is assumed to be the same as ours (Dicey, op. cit., 859, 863-6, 886) by which the California order would only have had evidentiary value in the courts of the respondent’s then residence and domicile. Moreover, there are several cases in which even 20 an obviously or apparently contumacious removal of an infant for the sole purpose of evading jurisdiction was at most considered a matter of evidence in determining the best interests of the infant. Re Harding 63 O.L.R. 518; Woodworth v. Spring, loc. cit.; Stuart v. Moore, loc. cit.; In re B’s Settlement, loc. cit.; Re Ethel Davis, loc. cit.

Ex. 3, p. 731.

(ii) It is further argued for the appellant that the respondent brought Terry to Ontario in breach of his own agreement and reference is made to the Property Settlement agreement dated September 4th, 1941. In the first place, it is submitted for the respondent, that this agreement as its name indicates was concerned primarily if not solely with matters of property and that 30 the question of custody was not dealt with at all save for what inference may be drawn from the provisions at so payment of maintenance for Terry. Secondly, while the original divorce judgment ratified the Property Settlement agreement, it is submitted that such ratification was limited to the arrangements as to alimony for and the separate property of the appellant. The award of custody to the respondent in that judgment and the alteration in the terms as to maintenance during the 3 months Terry was to spend each year with the appellant are necessarily so inconsistent with any provisions in or to be implied from the said agreement relating to custody that such provisions must be regarded as having been abrogated.

Case References

Thirdly, it is submitted for the respondent that by the law of Ontario as a matter of public policy no agreement as to custody is binding on the parties thereto or operative to the prejudice of the best interests of the child. Roberts v. Hall (1882) 1 O.R. 388; Barrett v. Barrett (1906) 4. W.L.R. 7; Re Armstrong (1915) 8 O.W.N. 567; Re Orr, loc. cit.; Rex. v. Barnardo, loc. cit.; Cody v. Cody, loc. cit.

See Wells, J. at
p. 869, ll. 31-6.

It is perhaps not unworthy of note that an intention to take a child out of the jurisdiction has been held to be of no consequence in an application for custody. Re Bell (1920) 18 O.W.N. 241.

In any event, it is submitted that any such breach of agreement by the respondent is only a matter of evidence to be considered in determining with which parent Terry's best interests lie. The learned trial Judge gave full consideration to this conduct of the respondent. It is respectfully submitted that the learned Chief Justice of Ontario erred in rejecting the opinion of the trial Judge as to the respondent's credibility and in basing his entire judgment on an alleged breach of contract by the respondent which even admitting it to be true, can only be one of many factors, in determining the respective fitness of the parties as parents which, as held by Hogg, J.A. cannot over-ride Terry's welfare as the paramount consideration.

p. 869, ll. 21-31,
ll. 36-41.

p. 886, l. 47-
p. 887, l. 13.
p. 887, l. 41-
p. 888, l. 2.

p. 897, l. 47-
p. 898, l. 14.

(c) AS TO THE WELFARE OF THE INFANT:

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It is respectfully submitted that the overwhelming weight of the evidence indicates that the respondent is a fitter person than the appellant to have custody of Terry and that the child's best interests and welfare lie in his being left with his father. There was ample evidence to support the finding of Wells, J. that Terry has received proper care and attention while with the respondent: p. 278, l. 33-p. 283, l. 14; p. 307, ll. 27-39; p. 308, ll. 19-30; p. 319, l. 1-p. 322, l. 28; p. 346, l. 43-p. 347, l. 34; p. 358, l. 19-p.365, l. 5; p. 448, l. 21-p. 450, l. 24.

p. 872, ll. 46-48.
p. 873, ll. 26-34.

Despite scandalous allegations by the appellant in California, Wisconsin and Ontario no court in the United States or Ontario has ever made any finding against the respondent's good morals and character or that he is other than a fit father for this child: p. 744, ll. 20-28; p. 746, l. 36-p. 754, l. 14; p. 755, ll. 1-16; ll. 27-30; p. 755, l. 44-p. 756, l. 3; also Wells, J., p. 872, ll. 14-44.

There was abundant evidence as to the unfitness of the appellant to have custody of this child. In the first place, the evidence indicated clearly that she was living in an unsettled condition which would be most unsatisfactory for the bringing up of a young boy. Ney v. Ney (1913) 4 O.W.N. 935.

p. 67, l. 21-
p. 75, l. 19.

Secondly, her whole course of conduct indicated what can only be termed as extremely cavalier attitude towards both American and Canadian courts

and a design to abuse the processes of such courts in any way that might suit her desires. She laid a serious criminal charge against the respondent in Ontario when it was patent that there was no evidence to support such charge and then after several weeks' delay she withdrew the charge. The Criminal Code, R.S.C. 1927, Chapter 35, Section 316:

p. 78, l. 43-
p. 79, l. 43,
p. 367, ll. 9-28.

“316. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully,

- (a) takes or entices away or detains any child; or 10
- (b) receives or harbours any such child, knowing it to have been unlawfully taken, enticed away or detained with intent aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.”

She brought an action against the respondent in the courts of Wisconsin for custody of Terry and to declare the 1942 judgment invalid in which she made statements under oath as to the residence of herself and the respondent in 1942, directly contrary to her sworn testimony at the 1942 trial in California and in which she made most serious charges against the integrity of the California judiciary and bar and the morals of the respondent with no credible knowledge or information of any kind to support them. 20

See Wells, J.,
p. 861, ll. 11-29.

P. 771, l. 43-p. 773, l. 18; p. 773, l. 34-p. 780, l. 20; p. 785, l. 23-p. 786, l. 37; p. 344, ll. 35-44; p. 108, l. 24-p. 109, l. 11; p. 782, l. 1-p. 785, l. 21; p. 786, l. 39-p. 787, l. 31; p. 113, ll. 8-11; p. 113, l. 34-p. 114, l. 27; p. 116, l. 24-p. 118, l. 10; p. 119, l. 14-p. 122, l. 34; p. 123, ll. 1-34; p. 127, ll. 5-47; p. 365, ll. 41-5; p. 383, ll. 10-26; p. 385, l. 9-p. 386, l. 15; p. 128, l. 1-p. 132, l. 23; p. 787, l. 33-p. 790, l. 40; p. 737, ll. 10-20.

Further, no credible evidence was adduced by the appellant at the Ontario trial to afford the slightest support for any of the serious charges against the respondent's character to which she had sworn in the Wisconsin action. 30

p. 132, l. 24-
p. 134, l. 20.
Wells, J.,
p. 861, ll. 39-44.

She then consented to the dismissal of the Wisconsin action with prejudice or on the merits virtually as a term of obtaining the 1945 order.

Wells, J., p.869,
l. 43-p. 870, l.20

It is submitted that the learned trial judge properly found that the appellant's allegations in the Wisconsin action reflected on the appellant's judgment and the opinion he was required to form as to her fitness to have custody of Terry.

p. 870, l. 45-
p. 871, l. 14. The evidence establishes a course of conduct existing right up to the time of the trial involving relations with men which indicates clearly, as found by Wells, J., that the appellant, if not a person of immorality is at least lacking in that stability of mind and action so essential to the proper raising of a child.

P. 92, l. 44-p. 93, l. 46; p. 94, ll. 26-35; p. 98, ll. 9-14; p. 744, l. 30-p. 746, l. 35; p. 764, ll. 31-9; p. 626, l. 25-p. 660, l. 15; p. 679, l. 20-p. 695, l. 26; p. 705, l. 9-p. 707, l. 4; p. 713, l. 43-p. 730, l. 24; p. 341, l. 33-p. 342, l. 13; p. 753, ll. 10-40; p. 99, ll. 20-27; p. 99, l. 40-p. 100, l. 3; p. 101, l. 35-p. 102, l. 1; p. 103, ll. 8-15; p. 104, ll. 29-30; p. 660, l. 17-p. 664, l. 3; p. 669, l. 42-p. 670, l. 26; p. 708, l. 16-p. 712, l. 4; p. 501, l. 10-p. 512, l. 42; p. 558, 10 ll. 43-48; p. 589, l. 22-p. 593, l. 47; p. 563, l. 1-p. 573, l. 12; p. 105, ll. 31-44; p. 106, ll. 30-45; p. 664, l. 4-p. 667, l. 39; p. 434, l. 36-p. 438, l. 21; p. 438, ll. 37-44.

p. 871, ll. 15-43. As found by the learned trial Judge one's faith in the appellant as a proper mother is shaken by the hysterical publicity in which she indulged and which she encouraged and by the disturbances she fomented in the presence of the child:

P. 299, ll. 4-34; p. 300, ll. 5-17; p. 301, ll. 4-45; p. 305, ll. 4-27; p. 360, ll. 5-24; p. 369, l. 25-p. 370, l. 13; p. 149, l. 8-p. 151, l. 5; p. 152, l. 41-p. 153, l. 12; p. 156, l. 9-p. 158, l. 6; p. 168, l. 23-p. 169, l. 34; p. 176, l. 22-p. 177, l. 26; 20 p. 477, ll. 27-44; p. 479, l. 18-p. 480, l. 33; p. 481, l. 8-p. 482, l. 13; p. 484, ll. 33-45; Ex. 10-18 (not copied).

As to certain points of importance in determining the question of custody reference is made to the following cases: *Graham v. Graham* (1923) 23 O.W.N. 560; *Re Fleet* (1920) 18 O.W.N. 14; *Sutcliffe v. Sutcliffe* (1935) 2 D.L.R. 645; *Re Holden* (1942) 3 W.W.R. 670.

p. 887, ll. 14-31. It is respectfully submitted that the learned Chief Justice of Ontario placed too great weight on the admission by counsel for the respondent at the trial that the appellant had been a good mother to the respondent's other children. The learned trial Judge, it is submitted, properly interpreted the 30
p. 872, ll. 5-12. evidence when he found that the appellant's subsequent misconduct outweighed her previous good motherhood.

p. 868, ll. 21-25. In result, it is submitted that there was a preponderance of evidence to support the trial Judge's discretion in awarding custody to the respondent.
p. 868, ll. 25-39. Despite the fact that he found the 1945 California order invalid he nevertheless gave it the greatest weight in arriving at his judgment. Wells, J. properly
p. 864, ll. 10-13. based his decision on the broad principle that his paramount concern was the
p. 869, ll. 15-20. welfare of the child.
p. 872, ll. 36-44.
p. 873, ll. 36-40.

All of which is respectfully submitted.

GEO. H. LOCHÉAD,

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of Counsel for the Respondent.