

9, 1951

In the Privy Council.

No. 44 of 1950.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARK T. McKEE (Defendant) - - - - - *Appellant*

AND

EVELYN McKEE (Plaintiff) - - - - - *Respondent.*

Record of Proceedings - Vol. 5

Pages 801-933

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PAUL

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.

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to the grounds for divorce, what Mr. McKee had done and what Mr. McKee had said, and a general statement of the previous understanding and agreement between Mr. McKee and Mrs. McKee and Mr. Linnard.

Q. Was that in writing or oral?

A. That was oral.

Q. Was there a written property settlement agreement at that time?

10 A. There was not.

Q. Can you fix that date in August?

A. I believe it was around the 5th, but I wouldn't say for certain. It was the early part of August.

Q. Your understanding was that Mr. Linnard had been endeavoring to settle the case for Mrs. McKee?

A. My understanding was that Mr. Linnard was a friend of the family, both of Mr. and Mrs. McKee, and they had met on several occasions, not only in Los Angeles but in Las Vegas, Nevada, and attempted to settle the case.

20 Q. What part did Mr. Linnard play in it, so far as you were told at that time?

A. Just trying to arrange a financial settlement.

Q. For Mrs. McKee?

A. For Mrs. McKee and Mr. McKee, yes.

Q. You mean he was representing both sides?

A. He was more or less arbitrating between the two of them, yes.

Q. Didn't Mrs. McKee tell you at that time that he was trying to work out a settlement for her?

30 A. No.

MR. SCOTT: We object to the question on the ground that it is incompetent, irrelevant and immaterial, and hearsay. Even if this is an attempt to set aside a case that we have insisted is res adjudicata in this state, you cannot by introducing hearsay and incompetent testimony upon the ground of fraud deprive this man of his right to be protected under the rules governing the admission of testimony in California. We object to the question as incompetent, irrelevant, immaterial, 40 hearsay, not binding in any way upon the defendant.

MR. STICKNEY: I think the record shows he has already answered it.

MR. SCOTT: I just want counsel to bear my view in mind, because I am going to object to these conversations with other people outside of Mr. McKee's presence. The record in Milwaukee, as I read it, was full of that type of testimony.

MR. STICKNEY: We will expect you to object.

MR. STICKNEY Q: Mr. Haumesch, were you retained that evening by Mrs. McKee?

A. I was.

Q. Did she pay you anything at that time?

A. She did not.

Q. What was the first thing you did about the case after being retained by Mrs. McKee?

10 A. The first thing I really did in the case was that a secretary they used to have working for them took a car that Mrs. McKee claimed was her car, and we went out and had a warrant sworn out for the theft of that automobile.

Q. What was the next thing?

A. The next thing was that Mrs. McKee brought back some property settlement agreement that had been drawn up at Mr. Scott's office, and I went through the property settlement agreement, and from the conversation  
20 had the agreement that was drawn up did not comply with the wishes of Mrs. McKee, and I advised Mrs. McKee not to sign it until I took the matter up with Mr. Scott's office.

Q. By the way, what was the name of this party for whom a warrant was sworn out?

A. I really can't think of it.

Q. Was it Charles Watt?

A. Charles Watt; that's right.

30 Q. Did you get a copy of the property settlement agreement?

A. Did I get a copy of it?

Q. Yes.

A. Yes.

Q. From whom?

A. From Mrs. McKee.

Q. Did she give it to you?

A. Yes, she gave it to me.

Q. When?

A. At her home, and I believe it was that same  
40 evening, or may have been the following evening. I couldn't say, but I believe it was that same evening.

Q. Did you discuss it with her?

A. I did.

Q. Was that the property settlement agreement which was eventually signed?

A. No, it was not.

Q. Did you then have a talk with Mr. Scott?

A. I did. We had consultations at Mr. Scott's office with reference to the property settlement agreement.

Q. Covering what period of time?

A. I think we had consultations off and on - I would say about four or five different occasions, perhaps more,

Q. Do you remember when the property settlement agreement was signed?

A. I don't recall the date.

10 Q. About how long was it after you first talked with Mrs. McKee?

A. I believe a period of maybe a month or a month and a half.

Q. It was quite a while?

A. Yes, it was.

Q. How many drafts of it were made?

A. About six different drafts before we finally got down to the property settlement agreement that was originally signed.

20 Q. Were those all made in Mr. Scott's office?

A. No.

Q. Where were the drafts made?

A. Part of the drafts were made in Mr. Scott's office and part of the drafts were made in my office.

Q. Was Mr. Solomon associated with you at that time?

A. Mr. Solomon was associated with me after the first consultation with Mr. Scott, yes.

Q. In the conversations with Mr. Scott was the custody of the child discussed?

30 A. No, the custody of the child was not discussed. well, it was discussed in this manner - we could not make any provision for the custody of the child, since the custody of the child would depend upon the court.

Q. You are aware of the fact that a provision was put in the property settlement agreement requiring Mr. McKee to pay to Mrs. McKee \$125.00 a month for the support of the child?

A. That is correct, during such time as the care, custody, and control was with Mrs. McKee.

40 MR. SCOTT: Read that answer.

(The answer was read by the reporter.)

MR. STICKNEY Q: That was put in the agreement, was it?

A. The amount was provided. I don't say it was set out in those words in that agreement; however, the agreement did provide for the payment of \$125.00 a month for the support and maintenance of the minor child.

Q. Period?

A. That's right.

Q. There was nothing in there about custody?

A. No.

Q. It was assumed that Mrs. McKee was to have the custody of the child, wasn't it?

A. It was assumed that she would have the custody of the child, yes.

10 Q. That is, during all of those conversations?

A. That's right.

Q. Do you remember during the trial you went up to Mr. Scott's office with Mr. Solomon to discuss a settlement?

A. We did.

Q. And that Mr. Scott told you that if Mrs. McKee would let her husband have the custody of Terry Alexander for three months in the summer Mr. McKee would pay her \$25,000.00?

20 A. Well, he said he believed that Mr. McKee would settle for \$25,000.00 or \$35,000.00.

Q. Cash, providing he could have the custody of Terry Alexander during the three summer months; is that right?

A. That's correct.

Q. Did you ever have any other conversations with Mr. Scott about the custody of the child, other than that one?

30 A. No - well, we did have during the course of the trial; there were discussions that came up on two or three different occasions.

Q. Tell us about them, will you?

A. It was just a general discussion that they were trying to settle this matter out of court.

Q. And all of those discussions had to do with Mrs. McKee having the custody of the child?

A. That's correct.

40 Q. Did you ever have any discussion with Mr. Scott about Mr. McKee being given custody of the child for any period of time other than the three summer months, and then only upon the payment of some \$25,000.00 or \$35,000.00 cash?

A. The only discussions we had with Mr. Scott after the property settlement agreement was entered into with reference to the custody of the child or any other settlement were during that period of trial, the first few days in trial, when we had those discussions.

Q. And in all of the negotiations on the property settlement agreement it was assumed that Mrs. McKee would have custody of the child?

A. More or less so. That was my understanding.

Q. No contention was made by Mr. Scott that custody should be in Mr. McKee during those discussions regarding the property settlement agreement?

A. No, there was no understanding of that kind.

10 Q. When did you first meet Mr. McKee?

A. I met Mr. McKee about two years prior to that, I would say, the first time.

Q. Prior to 1941?

A. Yes.

Q. Where?

A. In Azusa, in either 1939 or 1940, I met Mr. McKee.

Q. What was the occasion of that meeting?

A. Mr. Reese used to work for Mr. McKee, and Mr. McKee had some horses stabled down at Mr. Reese's place.  
20 That's where I first met Mr. McKee.

Q. What was the subject of your conversation at that time?.

A. There wasn't any conversation, but just a meeting; I was introduced to Mr. McKee by Mr. Reese, and the conversation just was about horses. etc.

Q. Nothing pertaining to business?

A. No, it was not pertaining to business, but just pertaining to horses - general conversation.

Q. You did not represent Mr. McKee in any manner?

30 A. No.

Q. He did not discuss any business or legal matters with you at that time?

A. No.

Q. When did you next meet him?

A. The next time I met Mr. McKee was when we took depositions back in Milwaukee.

Q. Did you meet him back there, or did you meet him out here first, prior to going there?

A. I met him back there.

40 Q. Did you have any talk with Mr. McKee back there?

A. Nothing more than just bidding the time of day.

Q. Were you engaged in any social activity with him back there?

A. No.

Q. You did not go out to any restaurant or bar or anything of that sort with him at any time?

A. No.



Q. By the way, how long were you back there taking the deposition?

A. We started taking the deposition about 10:00 o'clock in the morning, and I think we completed the deposition about 1:00 o'clock that afternoon, between 12:00 and 1:00, some time along there.

Q. Then you returned to Los Angeles?

A. I returned to Los Angeles.

10 Q. Mrs. McKee had turned over to you some documents at that time?

A. What kind of documents?

Q. Documents relating to the case.

A. Letters and telegrams - yes, she had.

Q. Did she turn over to you the transcript of testimony before the Civil Aeronautical Authority in Washington, D.C., taken in 1940, in which Mr. McKee was interrogated regarding his interest in three different transportation companies?

20 A. She had not.

Q. She did not turn that over to you?

A. No.

Q. You never saw it?

A. No, I never saw it. You are speaking of the transcript?

Q. Yes.

A. No, I never have seen it.

Q. Did you know about it?

A. No.

30 Q. When I mention it now it is the first time you ever heard of it?

A. No, I heard about Mr. McKee being interrogated in some matter. Mrs. McKee was telling me about it.

Q. Do you recall any letters or telegrams which were turned over to you by Mrs. McKee which passed between Mr. McKee and Louis Johnson of the Department of War, in reference to lobbying concerning Vultee and Stimson?

40 A. I don't recall any such telegrams or any letters. There were telegrams and letters. Who they were from I couldn't say. I don't recall any by the name you mention, Mr. Johnson.

Q. Where are those documents now?

A. They were all turned over - what were not introduced in evidence at the time we were in the case were turned over to Mr. Connell.

Q. Mr. Connell?

A. That's right.

Q. You do not have any of those left at all?

A. No, we do not.

Q. We are about to take an adjournment, Mr. Haumesch, and would you be good enough to bring with you this afternoon such file as you have in this matter?

A. My file was turned over in this divorce case to Mr. Connell.

Q. Everything?

10 A. Everything, yes.

Q. You did not keep anything?

A. Nothing pertaining to the divorce case, no.

Q. Or the property settlement agreement?

A. No, not a thing. It was all turned over to Mr. Connell.

Q. Even your correspondence?

A. Everything, with the exception that there may be some correspondence that I had with Mr. Scott's office with reference to certain payments that were not made  
20 on time by Mr. McKee.

Q. Well, whatever you have in the way of a file will you bring it this afternoon?

A. I will be very happy to bring it over.

Q. Would you also look up your ledger to determine what moneys you have received, from whom and how much, on account of this case?

A. On account of this divorce case?

Q. And the property settlement agreement - anything concerning the McKee matter.

30 A. Yes.

(At this point, 12:15 p.m., a recess was taken.

At the hour of 3:30 o'clock p.m. of the same date, at the same place, the same parties appearing, the taking of the deposition of E. G. Haumesch was resumed.)

DIRECT EXAMINATION (Resumed)

40 BY MR. STICKNEY:

Q. Mr. Haumesch, did you look up the matters I asked you to look up?

A. I did.

Q. Did you find the file?

A. I found one or two pieces of correspondence that I had in the office pertaining to the McKee divorce case.

Q. You now have some papers in your hands, and do those constitute all of your file record in this matter?

A. That constitutes all the record I have with reference to the McKee divorce case.

Q. And the property settlement agreement?

A. That is correct.

Q. Do you have any objection to my looking at them?

10 A. I have no objection if you wish to look at them, no.

Q. Everything else you had was turned over to Mr. Connell?

A. To Mr. Connell. May I state for the purpose of the record at this time I understand Mrs. McKee is taking this deposition, and that she waives all rights to any privileged communication between counsel and client.

20 MR. STICKNEY: That is correct. Mr. Solomon made the same inquiry this morning.

Q. I was particularly interested, Mr. Haumesch, in seeing the letter or agreement signed by Mrs. McKee authorizing you to employ associate counsel. I don't see that in these papers.

A. I have that document here. That's a copy of the document (indicating).

Q. Is this the one (indicating)?

30 A. This is a copy of that document, yes. There were three copies of that signed. One of them I gave to Mr. Solomon after I associated him in the case, one of them was kept by Mrs. McKee, and the original is in my safe.

Q. This letter a copy of which you have handed me bears date of August 19, 1941. Was it signed on the date it bears?

A. It was signed on the day it bears, yes.

Q. In your office?

A. No, it was signed at Mrs. McKee's home.

Q. By the way, where is your branch office located in Azusa?

40 A. My branch office in Azusa at the time I had it there was located at the Valley View Ranch.

Q. Was that your home?

A. No, it was not.

Q. Whose ranch is that?

A. That was a ranch owned by Mrs. Craft.

Q. Well, that law office was at a ranch, and not in the down town district?

A. That is correct. In other words, it was in an estate matter, and there was an office located in the residence which I occupied as a branch office. That branch was in an estate matter.

Q. That you were closing?

A. That's right.

Q. How many days after you first saw Mrs. McKee was this letter prepared?

10 A. That would be hard to say. I would say within about a week and a half.

Q. There were a number of conferences with her during that week and a half?

A. There were.

Q. How soon after you first talked with Mrs. McKee did you talk to Mr. Scott? Was that the next day?

A. I am not certain whether it was the next day or a couple of days thereafter.

Q. It was very soon afterward?

20 A. Shortly after, yes.

Q. If this letter bears date of August 19th then you were consulted by Mrs. McKee before August 10th, were you not?

A. I would say yes, to the best of my recollection.

Q. Then it would be before August 15th that you had your first talk with Mr. Scott?

A. To the best of my recollection I would say yes.

Q. You told Mr. Scott that you were representing Mrs. McKee?

30 A. That's right.

Q. At your first talk with Mrs. McKee did she not tell you that Mr. Scott had been representing her?

A. No, she did not. She said Mr. Scott was representing Mr. McKee.

Q. No conversation was had along the line that Mr. Scott had been her attorney?

A. No, sir.

Q. Did she make any such statement as that at any time to you?

40 A. Not to my knowledge. She did not to me, no, sir.

Q. She told you, did she not, that there had been some discussions between Mr. Linnard and Mr. Scott and Mr. and Mrs. McKee looking toward a settlement?

A. That is correct. She told me there was a discussion between Mr. Linnard and Mr. McKee and her in Mr. Scott's office, and Mr. Linnard was representing her interests.

Q. Mr. Linnard was representing Mrs. McKee's interests?

A. That is correct.

Q. And that Mr. Scott was representing Mr. McKee's interests?

A. That is correct.

Q. And they did not get together; is that it?

A. They could not get together; that's correct.

10 MR. STICKNEY: We ask that the copy of this letter of August 19, 1941, be attached to and made a part of this deposition, and marked for purposes of identification as Exhibit 1.

Q. You have no objection?

A. No objection whatsoever.

Q. Would you like it back after Mr. Noon makes a copy of it?

A. No, you can have this copy. That's the reason I made a copy of it, in case you wanted it.

20 (The instrument in question is annexed hereto, marked Plaintiff's Exhibit 1 by the Notary Public.)

MR. STICKNEY: Q. Did you receive a copy of a proposed property settlement agreement early in these proceedings?

A. The first proposed property settlement agreement that I received was a copy that Mrs. McKee took in Mr. Scott's office, she informed me, and brought it out to her ranch.

30 Q. I think you testified this morning that there were some six modifications of that?

A. Yes.

Q. Some in your office and some in Mr. Scott's office?

A. Yes.

Q. Until the final draft was made?

A. That's correct.

40 Q. I was questioning you also this morning about documentary evidence, and I mentioned this transcript of the testimony before the Civil Aeronautical Authority in Washington, D.C., letters and telegrams to and from Louis Johnson, Undersecretary of War, regarding the lobbying carried on by Mr. McKee for Vultee and Stimson, and I believe you told me you did not recall ever having seen or ever having had in your possession any of those documents?

A. I have never had any such documents in my possession - a transcript of any interrogation of

Mr. McKee, nor do I recall any letters or telegrams from either one of the parties you mentioned. However, whatever I had was turned over to Mr. Connell.

Q. I wondered whether your recollection had been refreshed, or whether you now recall anything different from what you did this morning?

A. No, I do not.

10 Q. One reason I asked that question is this: do you recall having in your possession or seeing letters or telegrams, or copies of letters or telegrams, that Mr. McKee had with Victor Emanuel of the Aviation Corporation?

A. I don't recall whether there were any as to the Aviation Corporation, but it strikes me that there was a letter or a telegram, which I turned over to Mr. Connell, from Victor Emanuel.

Q. Just one?

A. Just one or two, as I recall.

20 Q. I believe you mentioned that the first item of work you rendered for Mrs. McKee was having Charles Watt arrested?

A. No, sir, the first item I had with Mrs. McKee was that Mrs. McKee told me that Charles Watt had stolen her car, and I had a warrant issued for his arrest.

Q. That's what I meant.

A. Yes.

Q. He was an employee in the McKee home?

A. That is correct, as I understand it.

30 Q. Do you recall that Mrs. McKee turned over to you a letter from Mark McKee to Charles Watt offering him work and other remuneration in consideration of his testifying?

A. I don't recall any such letter that Mr. McKee had written Charles Watt, or any such letter that Mrs. McKee has turned over to me containing the statements that you mentioned.

Q. Or any statements to that effect?

40 A. There was some correspondence, I believe - letters that Charles Watt had received. I couldn't say that they were from Mr. McKee or who they were from. However, those letters were turned over to Mr. Connell likewise.

Q. There was some letter bearing a remark that Mr. McKee never forgot a friend, or something like that?

A. Some similar thing to that.

Q. Do you recall seeing or having in your possession a letter written by Beulah Miller to Mark McKee in which

she thanked him for permitting her to use Mrs. McKee's pass on the railroad?

A. That letter I believe we introduced in evidence at the time of trial; we either introduced it or it was turned over to Mr. Connell, one of the two. I believe we introduced that letter in evidence at the time of trial.

10 Q. You did not get any receipt from Mr. Connell for these various bits of documentary evidence?

A. No, we did not, because Mr. Connell came in the case that morning, he got over to the office that noon, and I turned everything over to Mr. Connell in Mr. Solomon's presence in my office. He wanted the file and everything.

Q. Did you and Mr. Solomon make an offer to Mr. Connell to help him in any way you could?

A. We did.

Q. Did he take advantage of that offer?

20 A. He did not.

Q. Both you and Mr. Solomon were ready and willing to confer with him, and take whatever time was necessary upon the substitution of attorneys to acquaint him with what had happened?

A. We were.

Q. You made that offer to him?

A. Yes, we did.

Q. Did you look up the money which you have received for your services in this case?

30 A. I did.

Q. Will you tell us how much you received, the dates, and from whom?

A. On October 14, 1941, through Mr. Scott's office, I received a check from Mr. McKee in the sum of \$1200.00.

Q. What did that cover?

A. That covered attorneys' fees and costs expended in the case.

Q. Suit had been filed at that time?

40 A. Yes, it had.

Q. \$200.00 was for costs, and \$1000.00 for fees - or just how was it distributed?

A. It was broken up, but I don't recall just how it was. Anyway it was the sum of \$1200.00.

Q. That was when in October?

A. October 14, 1941. On October 2, 1942, I received a check through Mr. Scott's office from Mr. McKee in the

sum of \$190.00.

Q. What date was that?

A. October 2, 1942. November 24, 1942, I received a check through Mr. Scott's office from Mr. McKee in the sum of \$1200.00.

Q. What did that cover?

A. That covered counsel fees and additional work that we put in the case from the time of entering into the  
10 property settlement agreement, including the contested divorce action.

Q. That was after the conclusion of the trial, wasn't it?

A. That was just about after the conclusion of the trial; however, before judgment had been rendered.

Q. While the findings were still pending?

A. That's right.

Q. I am informed that the actual taking of testimony concluded and the oral decision was rendered November 20,  
20 1942.

A. I don't recall when the oral decision was rendered.

Q. You had made a motion in court at the start of the case for fees?

A. For additional attorneys' fees.

Q. And the court pursuant to custom had taken it under advisement, and announced that he would render a decision at the close?

A. That is correct.

30 Q. Did you ever take it up with Judge Clarke?

A. I never have.

Q. You never took it up to renew your motion?

A. Not until after the conclusion of the trial, and then the matter of attorneys' fees was settled out of court, and the motion was never renewed. It was stipulated in court at the time the hearing was set that the matter had been settled out of court as to attorneys' fees, and the motion was never heard any further.

40 Q. Was a statement made in court as to the amount?

A. I don't recall whether a statement was made in court as to the amount or not, although I am inclined to believe that it was.

Q. That was at the time of the conclusion of the testimony?

A. As near as I can recall it was after the conclusion of the testimony.



Q. The agreement, then, as to the amount was reached several days before the fees were paid?

A. It was not. It was reached, I think, that same day, or the day before.

Q. I was prompted to ask you that question because of the interval of four days between the date of the conclusion of the testimony and the date you stated you received the money. Testimony was concluded on  
10 November 20th, if I am correctly informed.

A. I don't know what date it was concluded. I believe testimony was concluded the day before.

Q. And the money was paid the next day?

A. No, as I recall it the court had concluded the taking of the testimony that evening, and our motion was to be heard the next morning, and it was the day before, if I recall, that we reached an agreement as to the settlement of attorneys' fees.

Q. That was reached in Mr. Scott's office?

20 A. Well, no, it was not reached in Mr. Scott's office; it was by telephone communication between his office and our office.

Q. Then the money was paid the next day, the \$1200.00?

A. I believe it was. However, that's the date that my book shows the money was paid - November 24th.

Q. As is customary in most of these cases, Mr. Haumesch, there was discussion from time to time about a possible settlement, was there not, with counsel, that  
30 is, Mr. Scott and Mr. Risse?

A. Oh, yes, we had several consultations.

Q. Was any mention ever made of these conferences respecting a proposed settlement to the court?

A. To the court?

Q. Yes, to Judge Clarke.

A. Not that I recall, with the exception that on the first day of trial there was a statement made and a motion made in the judge's chambers prior to trial for a closed court, and Judge Clarke wanted to know whether  
40 we could not get together on this matter, and I believe Mr. Scott stated at that time that Mr. McKee was willing to give Mrs. McKee custody of the child for nine months of the year, and he wanted it for three months of the year, and we stated that Mrs. McKee would not accept the offer.

Q. That is just what I had in mind, Mr. Haumesch. That occurred in Judge Clarke's chambers at the start of

the case.

A. At the start of the case, yes.

Q. That statement was prompted by an inquiry made by Judge Clarke as to whether the people could not get together on some sort of a settlement or adjustment of the action?

A. That is correct.

Q. Who suggested a closed court for the trial?

10 A. Mr. Solomon and myself. Mrs. McKee did not want any reporters in the court, and we suggested that we have a closed court.

Q. What else was said at that time about the possibility of the parties getting together?

A. As I recall that's about all that was said.

Q. Mr. Scott stated that Mr. McKee would be willing to let Mrs. McKee have the child for nine months if he could have it for three months?

20 A. As I recall it that was the statement that was made.

Q. You had talked it over with Mrs. McKee, and that was not satisfactory with her?

A. We had. I think Mr. Solomon and I spent all of one Saturday from approximately 10:30 in the morning until about 3:00 or 3:30 in the afternoon with Mrs. McKee, talking the matter over.

Q. Prior to this hearing in chambers?

A. That is correct.

30 Q. Then there were from time to time other discussions about a possible settlement. I think you mentioned one this morning where Mr. Scott said that in addition to letting Mrs. McKee have the child for nine months of the year, if Mr. McKee could have it for three months, he was also willing to pay Mrs. McKee a substantial amount, say \$25,000.00 or \$35,000.00?

A. In lieu of the property settlement agreement; in other words, we would cancel out the property settlement agreement and make a cash settlement all the way through and make arrangements for the custody of the child.

40 Q. That property settlement agreement never did work, did it?

A. As far as I know it did after the first couple of months. We had quite a little difficulty the first couple of months, but after that as near as I can recall the terms and conditions of the property settlement agreement were complied with.

Q. I note in this letter to Mr. Scott of September 21, 1941, you complain ---

A. That's right.

Q. --- that Mr. McKee was not living up to it, but Mrs. McKee was.

A. That's right.

10 Q. With reference to this second proposed settlement, which I assumed from what you say did not pass beyond the conversational stage, where a substantial cash payment was to be made, wasn't that also discussed at some time informally with Judge Clarke?

A. To my knowledge it was never discussed with Judge Clarke.

Q. What happened in this hearing in the chambers that morning after you made the statement that the proposition would not be agreeable to Mrs. McKee? Did Judge Clarke say anything then?

20 A. I don't recall his exact words, but it was a comment like "Well, then we will have to go to trial".

Q. He expressed a desire to get the parties together on a settlement if he could ---

A. That's correct.

Q. --- and avoid a trial; is that right?

A. Well, he expressed his desire to get the parties together, but I couldn't say he tried to avoid a trial.

Q. That would have been the result of it, in any event?

A. Yes.

30 Q. You put a different interpretation on it than I meant. Among all of these papers or documentary evidence turned over to you was there a picture of a nude woman that Mr. McKee had?

A. No, not that I recall. I don't recall any picture of any nude woman that Mr. McKee had.

Q. Not any pictures of nude women?

A. No. There were letters and telegrams, things of that kind.

40 Q. There was one relating to Happy Tubbs, wasn't there?

A. Yes, I believe there was one or two of them although I don't recall them relating to Happy Tubbs.

Q. That was a woman who was supposed to live in New Orleans?

A. Where?

Q. New Orleans or somewhere down south.

A. I don't recall where she lived. However, I

believe we introduced that letter or telegram, whatever it was, into evidence.

Q. When did you turn this documentary evidence over to Mr. Connell?

A. On the same day that he was substituted in the case. When I say substituted in the case, the first instance ---

Q. There was an association?

10 A. There was an association, because Judge Clarke would not grant a substitution at that time.

Q. Was Joe Fainer ever in the case?

A. To my knowledge Joe Fainer never was in the court room - not during the time we were there, at least, Joe Fainer never was in the court room.

Q. This association was an association by Mr. Connell, and not Joe Fainer, was it not?

20 A. The association was only by Mr. Connell. However, Mr. Connell stated that morning when he came in the case that he and Joe Fainer were being substituted in place of Mr. Solomon and myself.

Q. Joe Fainer never appeared?

A. To my knowledge he did not. However, I don't know what happened after we were relieved and off of the case.

Q. You were in the court room on that Friday morning when Mr. Connell was associated, were you not?

A. Yes, I was.

Q. You heard Mr. Connell make a motion for a continuance?

30 A. Yes.

Q. Upon the ground that he had not had any opportunity to confer with Mrs. McKee, or with you and Mr. Solomon?

A. Yes, I believe he made such a motion.

Q. In fact he did not know anything about the case until the day before, did he?

A. I don't know.

Q. So far as you knew he did not; that is, the first thing you knew about Mr. Connell having anything to do with the case was that morning?

40 A. That is correct.

Q. Or the night before?

A. No, it was that morning. Mrs. McKee called me the night before and told me she was going to substitute Joe Fainer in the case.

Q. Then the next morning Mr. Connell appeared?

A. That's correct.

Q. You heard Mr. Joseph Scott object to any

continuance to give Mr. Connel an opportunity to become prepared, didn't you?

MR. SCOTT: In my opinion that is not a fair interpretation of the record, - The record will disclose and give the reason why we did not want a continuance - because these two boys had to go back home to school, and I wanted their testimony to be taken.

10 MR. STICKNEY: I would appreciate it, Mr. Scott, if you will just make your objection, and not argue or try to testify.

MR. SCOTT: I am not testifying.

MR. STICKNEY: You will have a chance to testify tomorrow. I just asked the witness if he recalled that when this motion for a continuance was made by Mr. Connell, to give him an opportunity to become acquainted with the facts, Mr. Joseph Scott objected to the continuance.

20 THE WITNESS: As I recall Mr. Scott did object to a continuance, but why I wouldn't say without referring to the record.

MR. STICKNEY: Q. I did not ask you why; I just asked you if it is not a fact that an objection was made, and further is it not a fact that Judge Clarke sustained the objection and ordered the trial to continue?

A. Judge Clarke sustained the objection and ordered the trial to proceed.

30 Q. The witness who was on the stand at the time was removed, and these two boys, one in the morning and one in the afternoon, were put on the witness stand on that Friday?

A. I don't recall who was on the stand at that time.

Q. Whoever it was, that witness was removed?

A. I believe those boys did testify, however. Mr. Connell took charge of the case from there on, and we considered ourselves out, that's all.

Q. You and Mr. Solomon remained in the court room that day?

40 A. We did.

Q. Under order of the court?

A. That's right, I think we stayed there for a couple of days under order of the court.

Q. You took no part in the proceedings?

A. We took no part in the proceedings.

Q. And did not confer, consult or advise with anyone?

A. No. We offered to consult and advise, but our

offer was not accepted.

Q. These two boys were cross-examined by Mr. Connell? I mean you and Mr. Solomon took no part in that?

A. We took no part in it, no, sir.

Q. Was there any evidence that you had, documentary evidence or otherwise, which you intended to present or thought should be presented for Mrs. McKee, which was  
10 not presented?

A. Not as long as we were in the case, However, I do not know what documentary evidence was presented after we got out of the case.

Q. Had the plaintiff rested at that time?

A. No, I don't believe we had rested.

Q. You had Mr. McKee on then under Section 2055?

A. I think we had Mr. McKee on under Section 2055.

Q. That section gives an attorney the right to produce  
20 and cross-examine at the trial the adverse party?

A. Yes, that's correct.

Q. I mention that because this deposition is being taken in the Wisconsin action, and while we all know what Section 2055 is, they probably do not back there.

A. That's correct.

Q. So you had called Mr. McKee as an adverse witness and were cross-examining him in your case in chief?

A. That's correct.

Q. And his cross-examination was suspended in order to put on these two boys from Milwaukee immediately after  
30 the order of association of counsel was made?

A. To my recollection that's the way it was.

Q. I am interested in the provision of the property settlement agreement which limits Mr. McKee's liability for attorneys' fees to the first \$1200.00 that was paid. Do you know how it happened that Mr. McKee was prevailed upon to pay an additional \$1200.00?

A. For the additional work that was done in this case. We moved the court for additional attorneys' fees im-  
40 mediately at the commencement of the trial, covering additional work we had to put in and the number of hours spent in the first part of the adjustment, in having Mr. McKee comply with the terms and conditions of the property settlement agreement.

Q. That notwithstanding the provision in the property settlement agreement as follows:

"It is understood and agreed that the party of the second part" - Mr. McKee - "shall not be liable for any further costs of court or attorneys' fees in any action that may be brought by the party of the first part, save and except, however, that said party of the second part shall hold himself liable for any attorneys' fees or costs of court should it be necessary for the party of the first part to employ counsel to enforce the terms of this agreement."

10

A. That's correct.

Q. Mr. McKee had no further legal liability to pay you anything beyond the first \$1200.00, did he?

A. We contended that he did, because it was necessary at the outset here even to go so far as to issue an attachment against some property that Mr. McKee had in California to enforce the terms and conditions of the property settlement agreement.

20

Q. The trial of the lawsuit was not to enforce the terms of the property settlement agreement, was it?

A. The trial of the lawsuit was not, no, but then it was our contention that as to additional hours we put in there on one thing and another we were entitled to additional attorneys' fees.

Q. Let me give you back these documents, Mr. Haumesch. I think they are all there (indicating). Now, did Mrs. McKee later ask you how much you had been paid by Mr. McKee for your additional services?

30

A. She did.

Q. Did you tell her?

A. I did.

Q. What did you tell her?

A. I told her at the time of the conclusion of the case I received an additional \$1200.00 as and on account of attorneys' fees.

Q. Where did that conversation take place?

A. I believe it took place in the court room that morning when we went up there on the motion, after the

40

conclusion of the trial.

Q. Do you remember who were present at that time?

A. Mr. Connell I believe was present, Mrs. McKee, Mr. Scott, Mr. Risse, Mr. Solomon and myself, and Judge Clarke. There were other people in the court room, but I don't just recall who they were.

Q. Was that statement made in front of Judge Clarke?

A. I don't know whether it was made in the presence

of Judge Clarke or whether he heard it, or anyone else, but it was a conversation which Mrs. McKee had with me. When I walked into the court room she said " How much additional attorneys' fees did you get?" and I told her. Mr. Connell asked me the same question. Now, it was either in the court room or Mrs. McKee called me by telephone, but I know Mr. Connell was there and I told him we had settled the matter of attorneys' fees out of court, and there would not be any further argument on the motion.

10 Q. Are you sure Mrs. McKee was there and you were there in the court room and had that conversation?

A. As I recall I think Mrs. McKee was in the court room, but I wouldn't say for certain whether she was there or whether she called me on the telephone and asked me, but one of the two things occurred, because I told Mrs. McKee that same day what we received as additional attorneys' fees, and I told Mr. Connell, 20 As a matter of fact, Mr. Solomon and I both told Mr. Connell.

Q. Did you sign a promissory note to Mrs. McKee for \$650.00 at the early stages ---

MR. SCOTT: That is objected to ---

MR. STICKNEY: The reporter can't write this down when we are both talking.

MR. SCOTT: I thought you had finished. Pardon me.

MR. Stickney: Q. At the early stages of the proceedings did you execute a promissory note to Mrs. 30 McKee for \$650.00 ---

A. I did not.

Q. --- or any agreement to repay her \$650.00?

A. I did not.

Q. Wasn't there \$650.00 received by her from an auction or sale of some of her property?

A. Not that I recall. When she sold the property she received \$13,000.00 for her home at the auction sale, and I don't recall how much the mortgage was against it, but I would say approximately around \$7000.00 of a 40 mortgage against the property, and that adjustment was made and the mortgage was satisfied.

Q. This was before the trip to Milwaukee to take depositions. Is it not a fact that the auctioneer on the sale received a check for \$1300.00 as a deposit on the sale of the property for \$13,000.00?

A. I don't recall just how much it was, but I would assume that would be the amount. He generally takes ten



per cent of the sale price down.

Q. And one check for half of that, or \$650.00, was made out to you?

A. Some amount like that, yes. If you are referring to the \$650.00 that Mrs. McKee paid me, that was paid on account for other work than this divorce action that I handled for Mrs. McKee.

Q. What did that cover?

10 A. That covered the dissolution and adjustment of creditors of a hat shop that Mrs. McKee had out here with Mrs. Vanderbilt, in partnership with Mrs. Vanderbilt; it covered the adjustment of two automobile accidents; it covered a matter which I took care of for Mr. de la Fuente with reference to a narcotic case, which Mrs. McKee asked me to put on her bill, and also additional matters which I took care of for Mrs. McKee in Azusa, in the adjustment with some creditors and with the holder of the note as to the payments on her  
20 premises and the sale of her premises, and all of that.

Q. Did you render a statement to Mrs. McKee?

A. I rendered Mrs. McKee statements on several occasions.

Q. Did you render a statement for \$650.00?

A. I rendered Mrs. McKee statements, and I think the first statement I rendered Mrs. McKee was \$700 and some odd dollars.

Q. Do you have a copy of the statement for \$700.00 which you say you rendered?

30 A. I believe I can dig it up in my files. There were several statements rendered to Mrs. McKee.

Q. I thought you brought the whole file here.

A. I didn't bring the bills over. I have those monthly statements in another file. I didn't know you wanted them. If I had I would have gladly brought them.

Q. This \$650.00 was in payment of that statement of \$700.00?

40 A. It was on account, yes, that was a payment on account. As a matter of fact I think there is a small balance of \$37 and some odd cents due yet on that account.

Q. What is this de la Fuente matter you mentioned?

A. That was a matter in which Mrs. McKee called me over to her home when she was living on El Molino Street, and Mr. de la Fuente was there, and he was quite perturbed because the secretary in his office - I believe

it was his secretary in the consulate office - was implicated in a narcotic matter, and there was a doctor involved in the narcotic matter due to the fact that this secretary had misrepresented to the doctor that he had migraine headaches and needed some narcotics in order to take care of it, and I went over there and we worked on that matter in order to adjust things and clear the doctor and clear Mr. de la Fuente from any  
10 stigma on his office. That was from around 6:00 o'clock that evening until 2:00 o'clock Sunday morning.

Q. How much did you charge for that?

A. \$75.00.

Q. Did you charge the doctor anything?

A. Yes, I did.

Q. Did you charge the secretary anything?

A. No.

Q. Did you charge Mr. De la Fuente anything?

A. That was the \$75.00 which I charged Mr. de la  
20 Fuente, and Mrs. McKee told me to put it on her bill.

Q. To put it on her bill?

A. Yes.

Q. Who were present at the time she told you that?

A. Mrs. McKee, Mr. de la Fuente, and myself.

Q. When was that?

A. I couldn't recall the exact date when that was.

Q. Was that before or after you received the  
\$1200.00 from Mr. Scott?

A. That was before. You are speaking about the  
30 \$1200.00 which we received in November, I take it.

Q. When was this house sold?

A. This house was sold - I believe it was in the  
month of July.

Q. What year?

A. 1942.

Q. That was after this suit was started?

A. Oh, yes, the house was sold long after suit was  
started.

Q. Then you held up rendering any bill until then?

A. Oh, no, Mrs. McKee received statements from me  
40 right along from about October or November, 1941; she received statements from me as to work that I had done for her outside of anything pertaining to this divorce matter.

Q. You got the commissioner to divide up this  
\$1300.00 and make out one check to you for \$650.00?

A. No, that was not the way of it at all, The commissioner or the auctioneer - it is my understanding he makes out a check to whoever represents clients, and I took both checks down to Mrs. McKee.

Q. You mean two checks for \$650.00 each?

A. No, he only made one check.

Q. For \$1300.00?

A. Yes.

10 Q. You said you took two checks to her?

A. I did; I took the check from the escrow, after the thing had cleared escrow, I picked up that check at the Bank of Azusa, and I picked up this other check from the auctioneer; I took them both over to Mrs. McKee

Q. How much were those two checks for?

A. Well, the one check - I forget how much it was, but it went up into the thousands. It was the difference between the escrow charges and the note that was on the premises and \$13,000.00.

20 Q. And the other check was for \$1300.00?

A. No, the other check was less the real estate man's commission.

Q. Off of the \$1300.00?

A. That's right.

Q. Both checks were payable to Mrs. McKee?

A. I don't recall whether they were or whether they were not.

Q. Were they made payable to you?

30 A. I wouldn't say without refreshing my memory as to the checks.

Q. What did you do with the two checks?

A. The one check I gave to Mrs. McKee, and the other check - I don't know whether it was made in Mrs. McKee's name or whether it was made in both of our names; however, Mrs. McKee handed me the one check as payment on account of moneys which I had coming.

Q. How much was that check?

A. 600 and some odd dollars. I don't recall just how much it was.

40 Q. That had nothing to do with your expense in going to Milwaukee, or expenses of going into the matter with Mr. Solomon, or fees in connection with that, or to apply on the matter of collecting money from Mr. McKee?

A. No, sir, not at all.

Q. It had nothing to do with that at all?

A. No, sir, nothing to do with it whatsoever.

Q. And nothing to do with the collection of the outstanding bills which Mr. McKee owed to the servants?

A. That money had nothing to do with any work that was done pertaining to the divorce case. That was money for fees which I charged Mrs. McKee for her own personal services, other than anything pertaining to the divorce case.

10 Q. I may be confused, but I understood you had not met Mrs. McKee or done anything for Mrs. McKee until you were consulted by her about August 10, 1941, in connection with the divorce action.

A. That is correct, and from there on there was continual legal service rendered to Mrs. McKee.

Q. Did you keep two separate ledger accounts on it - or do you keep a ledger?

A. We kept a ledger account on the work which we rendered for Mrs. McKee. There was not any ledger account for the work done on the divorce case at that time.

20 Q. Do you still have that ledger account?

A. For the personal services that I rendered to Mrs. McKee, yes.

Q. You then segregated these items - those connected with the divorce action and those connected with the personal matters?

A. That's correct.

Q. Did you ever give her an itemized statement covering those services?

30 A. I don't recall that I ever gave her an itemized statement. I don't think I did. I just merely mailed her a statement for legal services rendered. However, we discussed the statements time and time again, and Mrs. McKee seemed to be well satisfied with them.

Q. Those statements aggregated \$700.00, you say ?

40 A. I believe a little more than \$700.00 all told. If I recall correctly, I think Mrs. McKee paid me on one occasion \$100.00, then on another occasion, when she sold these premises, she paid me \$600 and some dollars. The exact amount I don't know. There is a balance due on that bill yet.

Q. What did the doctor pay you on this narcotic charge?

A. I sent the doctor a statement for \$25.00.

Q. Did he pay it?

A. He did.

(A discussion was had off the record.)

MR. STICKNEY: Q. I will just ask you a few more questions now, Mr. Haumesch. We may have to ask you to come back for a few minutes some time tomorrow, at your convenience, if it can be arranged. Now, do you know an attorney in Los Angeles by the name of F. Millar Cloud?

A. Yes, I do.

Q. Is it not a fact that Mr. Cloud wrote you a letter requesting the return of this \$650.00?

10 A. I wouldn't say unless I checked my file. However. Mr. Cloud and I had a conversation about the \$650.00.

Q. Did you not tell him that that money which you had received, \$650.00 or thereabouts, included the adjustment of the closing of the hat shop only?

A. No.

Q. You did not write him a letter to that effect?

A. I don't think I wrote Mr. Cloud a letter to that effect. I think I wrote Mr. Cloud a letter, or may have written him a letter - I can check that - mentioning  
20 the closing of the adjustment of the hat shop matter.

Q. And that that's what this covered, this \$650.00?

A. Part of it, yes.

Q. Didn't you say it was all covered by the \$650.00?

A. I don't think I did.

Q. Wasn't it?

A. No, it was not.

Q. Did you receive money from Mrs. McKee from time to time in other amounts? Didn't you receive one of the alimony checks?

30 A. The only moneys that I recall receiving from Mrs. McKee were that she paid me \$100.00 on one occasion, and then the \$650.00 in this check. Without referring to my records, those are the only moneys that I know of that I received from Mrs. McKee. I will take that back - I think Mrs. McKee did advance \$42.00 on one occasion for the taking of a deposition. I wouldn't recall whose deposition that was. However, Mrs. McKee is credited with that money on her statement.

40 Q. I would like to have you present your ledger account, and any statements or copies of any statements you rendered to her, and a complete record of all the moneys which you have received. You mention this \$650.00 and this \$100.00, and what was this \$100.00 for?

A. That was paid on account.

Q. For what work?

A. That was at the time when we were adjusting the hat shop, and other business I had done with her, and

she paid \$100.00 on account. I think that was either in February or March, 1942.

Q. Was any statement rendered to her for that \$100.00, showing what it covered?

A. Only as we went along; in other words, we rendered statements every month to Mrs. McKee.

Q. Do you keep copies of your statements?

A. Yes, I have copies of my statements.

10 Q. You have no objection to bringing copies of the statements you have and a copy of your ledger account with Mrs. McKee?

A. No, absolutely not.

Q. What was the name of the auctioneer?

A. Dean S. Bedillion.

Q. Wasn't it a fact that one of those checks was made payable to you and not to Mrs. McKee?

20 A. It may have been. I couldn't recall whether it was made payable to me or made payable to Mrs. McKee and myself; I don't know.

Q. Now, what time will it suit you tomorrow to produce these things? Do you start the trial of a case at 10:00 o'clock?

A. 9:30.

Q. How long will that take?

A. That's hard to say. We should finish that matter in the morning; however, tomorrow afternoon I have a matter coming up before the Industrial Accident Commission, so I will be engaged all day tomorrow.

30 Q. Could you find time at 1:00 o'clock?

A. No, because the matter before the Commission comes up at 1:30, and I have a client coming in at 1:00 o'clock. It may be that I might finish sooner in the morning, and be able to come down here about 11:00 o'clock.

Q. That would be fine. Then we will leave it this way: you come from court; even if you leave there at 12:00 o'clock will you come right down here after 12:00?

A. That's agreeable.

40 Q. If you put your records in your brief case when you go to court you can come right here, and bring them along with you, if that is satisfactory with you.

A. Yes.

MR. STICKNEY: Is that agreeable with you, Mr. Scott?

MR. SCOTT: It's all right with me. That concludes his testimony now?

MR. STICKNEY: I thing so. Of course I don't guarantee, Mr. Scott, that I will not think of something over the adjournment. I think that occurs with all of us.

10 (Whereupon a recess was taken until the following day. At the hour of 11:45 a.m. the following day, September 6, 1944, at the same place, the taking of the deposition was resumed, the same parties appearing, with the exception of J. Howard Ziemann, Esq., of counsel for defendant.)

DIRECT EXAMINATION (Resumed)

BY MR. STICKNEY:

Q. You were going to produce some of your records at this adjourned hearing. Do you have them with you?

A. I do.

20 Q. Do you have a copy of your letter of December 23, 1942, addressed to Mrs. Evelyn McKee, 1350 South Molino Avenue?

A. No, I don't have it.

Q. I will show the original, which I now have, and which I did not have with me yesterday. Will you look at it, please?

MR. SCOTT: Let me see it, please.

MR. STICKNEY: Yes. (Handing document to Mr. Scott).

Q. You have read the letter of December 23rd that I have just shown you?

30 A. Yes.

Q. Does that refresh your recollection as to the matter about which I inquired yesterday, that \$650.00 loan; that is, that Mrs. McKee maintained it was a loan and you maintained it was not?

A. That is correct.

Q. There was a dispute between you over that?

40 A. There wasn't any dispute over that until after the judgment had been rendered in Mrs. McKee's case. She called me on the telephone and asked me if I could make her a loan, and I said "No, I am in no position right now to make you a loan." She said "Well, I wish I hadn't paid you the \$650.00." I told her at that time "What was the idea of telling Mr. Connell that you loaned me \$650.00?" She said she did not tell Mr. Connell she loaned me \$650.00, but that she paid me \$650.00. That was after judgment had been rendered in her case.

Q. That was the first discussion you had about this money, as to whether it was a loan or not?

A. That was the first discussion ever had about this money being a loan.

Q. She maintained and contended that it was a loan, and you maintained and contended that it was a payment on account of services rendered?

10 A. At that particular time, yes, but when the money was paid over Mrs. McKee did make a payment on account of her bill.

Q. Your recollection is that subsequent thereto, then, this dispute occurred, or this discussion where in she said it was a loan rather than payment on the bill?

A. That's correct.

Q. That is what I was asking you about yesterday, Mr. Haumesch. Now, I notice in your letter of July 28, 1942, you enclose a statement of Mrs. McKee's account. I think you have a copy of that.

20 A. Yes, this (indicating) appears to be the original or a copy that I have here.

Q. There is nothing in this statement which refers to the matters that you talked about yesterday, is there?

A. It is not itemized as to the matters, no.

Q. It refers to a balance as of October 3, 1941, in the sum of \$605.00?

A. That should be as of October 30th.

Q. Do you have that itemized statement?

30 A. I have that here, showing the work that was done, the number of hours put in and the amounts charged, which accounts were discussed with Mrs. McKee at the time, and were agreed upon as a reasonable amount to charge as and for attorney fees for services rendered.

Q. Was a statement sent to her setting forth those items which were in the paper you have in front of you?

A. Not an itemized statement, no.

Q. That is something you have recently made up?

40 A. This according to my ledger sheet, but that statement which you hold in your hand there was fully discussed with Mrs. McKee a day or two after it was mailed.

Q. That is the one of July 28, 1942?

A. That is correct.

Q. The one you have written out there, you have obtained that ---

A. From the ledger.

Q. You have written that since the deposition



yesterday?

A. Yes, that's correct.

Q. But a copy of it was never sent to Mrs. McKee. was it?

A. Itemized like this? No.

Q. You say it was discussed with Mrs. McKee?

A. Yes.

Q. When and where?

10 A. At her home on several occasions; for instance, when this closing up or winding up of her hat shop, etc., came up, the fees were discussed at that time with Mrs. McKee, and she agreed that the amount charged was a reasonable amount.

Q. Where did that conversation take place?

A. That conversation took place on Prospect Circle in Pasadena, at her home.

Q. At her home?

A. Yes.

20 Q. Was anyone else present?

A. Not that I recall. I don't recall anyone else being present. Maybe Mr. de la Fuente happened to be in there - I don't know - but that was discussed at that time. I don't recall anybody being present.

Q. What was the charge for closing up that hat shop?

A. A total charge on consultation under date of September 10th and the closing and winding up of the business, adjustment to creditors, one thing and another \$400.00 - a total of \$430.00.

30 Q. What did you do to wind up the hat shop?

A. There were numerous creditors which had to be satisfied, the lease had to be sold to another party, and it was a general wind-up of the partnership business; in other words, Mrs. McKee and Mrs. Vanderbilt were more or less in partnership, and there was one contract out where they were to pay a certain amount of money in case they sold the business before a certain date, and that had to be adjusted and settled.

Q. She adjusted that herself, didn't she?

40 A. She did not.

Q. You did that?

A. I did. That was adjusted in my office.

Q. What did the total of the creditors claims amount to?

A. Somewhere in the neighborhood of \$4200.00.

Q. Where they all paid?

A. They were all adjusted, yes, and satisfied.

Q. Mrs. Vanderbilt had an attorney, didn't she?

A. She did.

Q. Over what period of time did that work continue?

A. I would say it went over a period of approximately three or four weeks from the time Mr. Cradick and I started in until we finally wound up the business.

Q. Who?

A. Mr. Cradick.

10 Q. Who is he?

A. An attorney in Los Angeles.

Q. For whom?

A. He was attorney for Mrs. Vanderbilt.

Q. What is your room number in the Chester Williams Building?

Q. 712.

Q. It was 705?

A. It was 705, yes.

20 Q. Did you keep any time record of how much time you spent on these matters?

A. On some cases I do and some cases I don't.

Q. Did you do so in connection with the closing up of the hat shop?

A. No, I did not. That was an agreed fee between Mrs. McKee and myself.

Q. Beforehand?

A. Beforehand, yes.

Q. Who was present at the time she agreed to that?

A. Mrs. McKee and I.

30 Q. Just you two?

A. Yes.

Q. That was at Prospect Circle?

A. Yes, I believe it was; yes, that was at Prospect Circle.

Q. May I see that statement, please?

A. Yes (handing document to counsel).

Q. These other items totaling \$275.00 refer to what?

40 A. That was different matters that occurred there, consultations with Mrs. McKee with reference to business matters. We discussed that matter, the question of the fee, and she asked how much she owed me, and I told her the approximate number of hours I put in in handling all these matters, and the consultations we had, in order to come to some agreed fee, and I asked Mrs. McKee at that time what she thought would be reasonable, and she said "I don't know, What is your usual charge?" I said "My usual charge is \$5.00 an hour," and I said "If it is

satisfactory as an agreed fee I will charge you \$275.00 for the work done". She said "That's all right".

Q. So all of these items on this list represents an agreed fee?

A. Yes, they do.

Q. I noticed you have down here that on August 1st you received - is that Mr. McKee - \$650.00

A. That's Mrs. McKee.

10 Q. It looks like "Mr." Is that a mistake? It looks like "Mr. McKee" at the bottom there.

A. That's Mrs. McKee. I could make it more plain if you like (indicating).

Q. Do you remember now whether the check was made out payable to you or to Mrs. McKee - that one for \$650.00?

20 A. I wouldn't recall, with the exception that reading that letter now would indicate to me the check was made payable to me. However, the check was delivered to Mrs. McKee, together with a memorandum letter from Mr. Bedilion, which Mrs. McKee signed, signifying she had received the check, and Mrs. McKee in turn gave me the check.

MR. STICKNEY: We ask the notary to mark, for purposes of identification, as Exhibits 2, 3 and 4, the following: first, the letter of December 23, 1942; second, the statement of account of July 28, 1942, and third, the longhand statement which Mr. Haumesch transcribed on yellow foolscap from his ledger.

30 (The instruments in question are annexed hereto, marked respectively Plaintiff's Exhibit 2, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 by the Notary Public.)

MR. STICKNEY: Q. Did you ever send Mrs. McKee a statement for \$500.00?

A. I don't think I ever did.

Q. I think something was said about that yesterday, was there not?

40 A. No. I think I ever sent one to Mrs. McKee. I may have - I don't know. As the account went along naturally I sent her statements, but I don't recall ever sending her a statement for \$500.00.

Q. It is your recollection at this time that you had not sent her such a statement?

A. It would be my recollection at this time that I did not send her a statement for \$500.00.

Q. As to all other matters on this list, those charges were fixed by you, with Mrs. McKee's concurrence and agreement?

A. That is correct.

Q. Each one?

A. Yes.

Q. And each month?

10 A. I wouldn't say each month. I wouldn't say we discussed these matters each month, but when there was a charge made the matter was discussed with Mrs. McKee, and the fee was agreed upon, and that fee set up. However, I do recall a specific discussion with Mrs. McKee with reference to the statement mailed her under date of July 28th.

Q. That was just on the eve of your going back to Milwaukee to take depositions?

A. No, I didn't go back to Milwaukee to take depositions until October, 1942.

20 Q. Was it in October?

A. I believe it was in October, 1942, that we went back to Milwaukee to take depositions.

Q. The trial started October 28, 1942, I believe.

A. It was just in the early part of October, as I recall, that we went back to Milwaukee to take depositions.

30 Q. You have checked your ledger record and you have told us that all payments which you received from all sources in connection with any matter in which Mrs. McKee was interested?

A. That is correct.

MR. STICKNEY: That is all.

CROSS-EXAMINATION

BY MR. SCOTT:

40 Q. In regard to the sale of the house in Azusa, do you recall a conversation with me and discussing the question as to what Mr. McKee was willing to take it off of Mrs. McKee's hands for?

A. I do.

Q. Do you remember what that figure was?

A. \$17,500.00.

Q. What did Mrs. McKee finally sell it for?

A. She finally sold it for \$13,000.00.

Q. Did Mr. de la Fuente have anything to do or say in connection with the offer of Mr. McKee to Mrs. McKee

to take that property off her hands?

A. On the day of the sale, when the auction was had, when we first started out we couldn't get a bid on it, and after some other stuff was sold then the property was put up again and we got a bid on the place - the highest bid was \$13,000.00. I went to Mrs. McKee and I told Mrs. McKee not to permit the property to be sold for that figure, because we could get that amount  
10 of \$17,500.00 for it, and Mr. de la Fuente spoke up and said "We will give it away before we will let Mr. McKee buy it."

MR. SCOTT: That is all.

REDIRECT EXAMINATION

BY MR. STICKNEY:

Q. Was Mrs. McKee there?

A. She was, yes.

20 Q. What did she say then?

A. She said "Yes. Sell It," then I authorized the auctioneer to do it.

Q. You did not have an offer from Mr. McKee of \$17,500.00 for the house at that time, did you?

A. I had an offer from Mr. Scott's office, which presumably came from Mr. McKee, and which I conveyed to Mrs. McKee, in the sum of \$17,500.00.

Q. When did that offer come in?

30 A. About a week before the sale, then on the day of the sale, I believe, we received a telegram - no, it wasn't a telegram we received, but I believe I had my secretary call Mr. Scott's office, and the message was conveyed that the offer was still good.

Q. Was the property in Mrs. McKee's name as her sole, separate property?

A. The property at that time was in Mrs. McKee's name as her sole, separate property.

Q. Did you advise her what to do, or did you just leave it up to her to make a decision?

40 A. I advised her what to do.

Q. What did you tell her?

A. I advised her to sell the property for the highest figure she could get, which was \$17,500.00.

Q. What did she say?

A. She conferred with Mr. de la Fuente, and Mr. de la Fuente made the remark I have just related.

Q. Didn't Mrs. McKee tell you that she had no

confidence in any offers made by Mr. McKee because he had reneged on so many promised he had made?

A. No, she did not.

Q. She had told you that, had she not?

A. When we first discussed the offer from Mr. McKee Mrs. McKee said "How do I know he will pay for it?" I said "We know he will pay for it because we will have the money before we go into escrow."

10 Q. It was not going to be all cash, was it?

A. No, a certain amount cash and a trust deed on the balance.

Q. When you did sell it you sold it for all cash?

A. We sold it for cash, yes.

Q. You have found out, as I notice from one or two of your letters, that Mr. McKee did not keep any of the promises or commitments he made in the property settlement agreement?

20 A. That's true as to the outset of the case; he did not.

Q. So his offer to buy anything in your opinion would not be as good as a bona fide cash offer from some stranger who was there with the money?

A. It would under those circumstances, because the amount of cash to be paid down and a trust deed on the premises for the balance was just as good as cash. The property was always security for any note he might sign.

30 Q. It would have to be a second trust deed, because there was already an encumbrance against it?

A. There was an encumbrance against it, but my understanding, as I recall it now, is the first mortgage would have been satisfied on it, and Mrs. McKee was to receive \$1000.00 in addition thereto.

Q. The down payment by Mr. McKee was just enough to satisfy the first mortgage and ---

A And \$1000.00 to her.

Q. Then a mortgage back from Mr. McKee?

A. That's correct - a first T. D.

40 Q. Then you would have had the expenses of the sale, all expenses leading up to and connected with it, to pay out of that \$1000.00?

A. You would have your regular escrow charges to pay.

Q. You definitely advised her to take Mr. McKee's offer, did you?

A. I did.

MR. STICKNEY: I think that is all.

RECROSS-EXAMINATION

BY MR. SCOTT:

Q. You are familiar with values out in that section?

A. At that time I was fairly familiar with values out there, because of my association with other groves out there, estates that I was probating.

Q. You think \$13,000.00 was not a good sale for Mrs. McKee?

A. I do not think it was.

MR. SCOTT: That is all.

REDIRECT EXAMINATION

BY MR. STICKNEY:

Q. You advised her to auction it off, didn't you?

A. That's right, I advised Mrs. McKee to auction it off. She wanted to sell the property, we couldn't get any buyers for it, and I advised her to auction it off, and we had set a figure which the place had to bring before it could be sold by the auctioneer.

Q. What was that figure which was set?

A. I believe \$16,000.00.

Q. Why did you take the bid of \$13,000.00?

A. Mrs. McKee also authorized it.

Q. You were the one that selected the auctioneer, were you?

A. I suggested the auctioneer, and he consulted with Mrs. McKee.

Q. You made all arrangements with the auctioneer, didn't you?

A. Only as far as the legal work was concerned. Mrs. McKee and the auctioneer and myself were together, and we consulted about the terms and conditions under which the property would be sold, and an agreement was drawn up, which is the usual form of agreement by auctioneers, which agreement I explained to Mrs. McKee and told her that he could not sell for a lower figure. Mrs. McKee fully understanding the agreement, then signed the agreement.

Q. You had power of attorney from her to act in this matter, didn't you?

A. I did not have power of attorney as to the auctioneer, no. I had power of attorney to act for

Mrs. McKee with reference to the leasing of the premises.

Q. If you did not have power of attorney from her how did it happen that this check for \$650.00 came in your name?

A. I cannot say that the check did come in my name, but if it did come in my name it was by authorization or order. It is a usual custom for an auctioneer to make  
10 a check out in an attorney's name and send the statement along with the check to the owner of the premises.

Q. You say that's the usual custom, for auctioneers to do that?

A. I mean it may be the usual custom.

Q. Do you know?

A. I don't know; I couldn't say.

Q. You really cannot tell us why the check came in your name, if it did come in your name, can you?

A. No, I can't give any real explanation of why it  
20 would be made out in my name, However, it may have been because Mr. Bedilion sold several pieces of property for me.

MR. STICKNEY: That is all.

MR. SCOTT: That is all.

(It was stipulated and agreed by and between counsel that the foregoing deposition may be signed before any Notary Public, with the same force and effect as though read and  
30 signed in the presence of the Notary Public before whom it was taken.)

---





Copy of Plaintiff's Exhibit No. 1 - P. S. Noon,  
Notary Public.

Los Angeles, California  
August 19, 1941.

10 Mr. E. G. Haumesch,  
215 West Fifth Street,  
Los Angeles, California.

Dear Sir:-

Re: McKee vs McKee

With reference to the proposed action for divorce in which I expect to become the plaintiff and my husband defendant, it is understood that you will undertake full representation of my interest upon the following basis:

20 1. That you will try to obtain an amicable settlement of my property rights with Mr. McKee, and that you will require payment of your fee from him as an incident to such an agreement.

That should you be unable to accomplish this, and action is necessary in my behalf, that you will seek an order to show cause in which you will apply for such attorney's fees as are reasonable under the circumstances from Mr. McKee.

30 That if a trial of such action is necessary, that you will likewise make every effort to obtain from Mr. McKee such additional attorney's fees as may be entailed.

That in such orders, if any, or such settlement, if accomplished, you will also obtain such cost and expense as may have been incurred so that I will not be personally liable therefor.

2. In the event you find it necessary to associate other counsel, it is understood that you may do so without obtaining any further authorization, but such extra expense, if any, shall not devolve upon me except as subject to the express terms herein provided.

40 3. Should, during the progress of your negotiations with Mr. McKee's counsel, or if any action be undertaken, it is determined by me to associate other counsel of my selection, said association shall be undertaken at my own expense, and if your services shall no longer be required at any time by me, it is understood, and I hereby agree that I will reimburse you for any cost incurred or any expense advanced in my behalf,

whether for investigation or otherwise, and that in addition thereto I will pay you personally and become personally responsible for the payment of the reasonable value of your services in the sum of Thirty-five hundred Dollars which is the agreed value for said services.

Very truly yours,

10

(Signed) EVELYN McKee

Copy of Plaintiff's Exhibit No. 2 - P.S. Noon,  
Notary Public.

E.G. HAUMESCH  
Attorney At Law  
Los Angeles, California.  
December 23, 1942.

20

Mrs. Evelyn McKee,  
1350 So. El Molino Avenue,  
Pasadena, California.

Dear Mrs. McKee:

Your communication written under date of December 17th, 1942 and mailed under date of December 21st, 1942 duly received and the contents noted.

30

Kindly be advised that I have conversed with Mr. Cloud with reference to your case under date of December 16th, at which time I informed him that he could depend upon my wholehearted co-operation in this matter.

40

Referring to paragraph 2 of your said letter, kindly be advised that said papers and documents of which you speak therein has been heretofore to your request delivered to Mr. Connell upon his substitution in the case during the course of trial. The only documents that I have in my possession are the rough draft of the Property Settlement Agreement which I will be very happy to turn over to Mr. Cloud, also the original agreement drawn by Mr. Scott at the outset of the case.

Referring to paragraph 3 of your letter with reference to the Donnelly matter. You will recall in our numerous discussions regarding this that this matter was turned over to Mr. Jacob L. Feinfeld, attorney at law,

- 721 Chester Williams Building, for settlement and collection. This was done during the month of September, last, and I understand from Mr. Feinfeld that he had Mrs. Donnelly executed an installment note in the amount of \$300.00 to be payable \$25.00 on the 15th day of September and \$15.00 a month thereafter until the total sum had been paid. After conversing with Mr. Feinfeld approximately ten days past, I understand from him that
- 10 no sum or sums have been collected on the said note, and it was his intention to write Mrs. Donnelly once more and in the event she failed to pay or reply to his said communication that he was going to proceed with the institution of an action against her. Up to the present time I do not believe however that such action has been instituted, in that Mr. Feinfeld has not mentioned this fact to me. Hence, I suggest if you desire Mr. Cloud to handle this collection that Mr. Cloud communicate with
- 20 Mr. Feinfeld regarding this transaction.
- I was indeed surprised to learn that you informed your attorney Mr. Cloud to the effect that you loaned me \$650.00. I am at a total loss to understand how you figure this \$650.00 payment on your account as a loan to me, when your account at that time was in excess of \$700.00 and had been past due for some time. If you will recall, we had numerous discussions from time to time with reference to the amount you owed me, and on each said occasion you said the bill would be paid upon the completion of the escrow on the sale of the premises.
- 30 At the time the money was placed in escrow you advised me that the one check would be made payable directly to me and that the said sum would be applied on my account. This was done and an itemized statement mailed you regarding same. Since said time you have received monthly statements showing the balance due me in the sum of \$36.50, which said balance is still due, owing and unpaid. You will further recall that no part of this said amount had any relation with reference to your domestic action but was for legal services rendered to you from
- 40 time to time as to your own private matters.
- Within the next day or so I shall communicate with your attorney, Mr. Cloud, and deliver to him all of the said documents that are in my possession, as per your request, together with the Theater Guild stocks mentioned in your letter.
- Again reiterating, and you may rest assured that I shall lend every assistance and co-operation to

Mr. Cloud that is within my power to do. At this time permit me to extend to you the Seasons Greetings.

Sincerely yours,

(Signed) E.G. HAUMESCH

10 EGH:ree

Copy of Plaintiff's Exhibit No. 3 - P.S. Noon,  
Notary Public.

E.G. HAUMESCH  
Attorney At Law  
Los Angeles, California

July 28, 1942

20

STATEMENT OF ACCOUNT

Mrs. Evelyn McKee  
1350 So. El Molino  
Pasadena, California.

Balance as of Oct. 3/41- - - - - -\$705.00

Les Feb. 2/42 Credit- - - - - 100.00

30 Balance carried forward- - - - - -\$605.00

DEBITS:

Legal Services rendered in connection with sale  
of Premises, - escrow, etc.

102 hours at nominal charge- - - - - -\$150.00

Deposition of Iris Hart 26.50

Deposition of Jo Ann McKee 43.75

TOTAL DEBITS: \$825.25

40

CREDITS:

Rent of swimming pool, July 5/42 \$16.00

Sale of Heaters 25.00

Cash received from Evelyn  
McKee July 15/42 14.00

Received from attorney Manuel  
Avila in/re deposition of

EXHIBIT 26

843

Iris Hart July/23

\$13.50

68.50

TOTAL BALANCE DUE

\$756.75

10

20

30

40

EXHIBIT 4

844

LAW OFFICES  
J O S E P H S C O T T

June 25, 1945

Mr. F. Millar Cloud  
Mr. Jerome J. Mayo  
Attorneys at Law  
10 6564 South Normandie  
Los Angeles, California

RE: McKee -vs- McKee

Gentlemen:

This will advise you that we will take an appeal from Judge Schmitd's order in the above entitled matter as soon as the same is signed.

20

Because an appeal from an order of modification of the custody of the minor child keeps the original order in status quo, we will deliver Terry Alexander McKee to Mrs. McKee on July 1, 1945, and will expect Mrs. McKee to return him to Mr. McKee on October 1, 1945.

You are requested to let us know where you wish the child to be delivered next Saturday, the 30th of June, and we will be governed accordingly.

30

Very truly yours,



40

EXHIBIT 24

State of Wisconsin: Circuit Court: Milwaukee County

845

EVELYN McKEE

MARK T. McKEE

Plaintiff

-vs-

Defendant

FILED

June 28, 1945

Leonard A. Grass Clerk

10

Consolidated

Action No. 189-287

Now come the plaintiff above named by her attorneys and upon the affidavit of Martin R. Paulsen annexed hereto, and upon all the records, filed and proceedings herein, moves the court to dismiss the above entitled action, including all causes of action therein alleged, upon its merits (i.e. with prejudice) and without costs to either party.

20

Dated this 28th day of June 1945.

SHAW MUSKAT & PAULSEN

Attorneys for plaintiff

30

The above motion having come on for hearing before the court on the 28th day of June 1945, plaintiff appearing by attorney Martin R. Paulsen and defendant appearing by attorney Michael Levin, and the court having heard the statements of counsel, NOW THEREFORE,

IT IS HEREBY ORDERED that the above entitled action, including all causes of action therein alleged, be and the same is hereby dismissed upon its merits (i.e. with prejudice) without costs to either party.

40

Dated this 28th day of June 1945.

BY THE COURT:

JOHN C. KLECZKA

Circuit Judge.



IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

EVELYN McKEE

Plaintiff and  
Cross Defendant

10            - vs -

MARK T. McKEE

Defendant and  
Cross Complainant

20

No. D-211536

ORDER DISMISSING ORDER TO  
SHOW CAUSE OF DEFENDANT  
AND CROSS COMPLAINANT IN  
RE MODIFICATION OF CUSTODY  
OF MINOR CHILD; AND ORDER  
GRANTING EXCLUSIVE CUSTODY  
OF MINOR CHILD TO PLAINTIFF  
AND CROSS DEFENDANT: AND  
ORDER GRANTING ATTORNEYS'  
FEES ON APPLICATION OF THE  
PLAINTIFF AND CROSS DEFEN-  
DANT IN RE ORDER TO SHOW  
CAUSE IN RE ATTORNEYS'  
FEES AND COSTS.

The Order to Show Cause in re Modification of Custody  
of Minor Child issued on the application of the defendant  
and cross complainant, Mark T. McKee, on the 24th day of  
May, 1945, by the Honorable William S. Baird, Judge of  
Superior Court, based on the Affidavit of said defendant  
and cross complainant, dated May 21st, 1945, and the Order  
to Show Cause in re Modification of Award of Custody of  
Minor issued on the 18th day of June, 1945, by the  
30 Honorable Samuel R. Blake, Judge Presiding in said  
Superior Court, on the application of the plaintiff and  
cross defendant, and the Order to Show Cause in re  
Attorneys' Fees and Costs, dated June 12th, 1945, issued  
by Honorable William S. Baird, Judge of Superior Court,  
on the application of the plaintiff and cross defendant,  
having been duly and regularly transferred to the above-  
entitled Court, Department 4 thereof, Honorable Ruben S.  
Schmidt, Judge Presiding, and said matters having been  
heard on the following dates, to wit, June 12th, 13th,  
40 14th, 20th and 21st, 1945, said matters being duly and  
regularly continued from time to time until the completion  
on the 21st day of June 1945, and evidence both oral and  
documentary having been introduced in support of said  
Orders to Show Cause and Motions, and the matter having  
been argued and submitted to the above-entitled Court  
for determination, and the Court being fully advised in  
the premises and it appearing to the Court that on or

EXHIBIT 2

847

about the 30th day of June, 1945, the plaintiff and cross defendant caused to be filed in the above-entitled action a duly exemplified copy of the application for an Order of Dismissal dismissing the action of Evelyn McKee, plaintiff, vs. Mark T. McKee, defendant, being proceeding No. 189-287 in and for the Circuit Court of the County of Milwaukee, State of Wisconsin, upon its merits, that is with prejudice, and it appearing to the Court from the  
10 evidence adduced at the hearings of said Orders to Show Cause and Motions that the minor child of the parties, to wit, Terry Alexander McKee, has since approximately the 1st day of October, 1944, been kept by the defendant and cross complainant at his home at Port Austin, Michigan, and that the said minor child is now five (5) years of age, and that the said minor child has been kept in a place not accessible, snowbound in winter, and subject to severe weather conditions; and it further appearing that said minor child has been under the care  
20 and supervision, for most of the time (defendant being frequently absent from the home), of aged employees hired by the defendant and cross complainant; and it appearing that in keeping the said minor child in Port Austin, Michigan, the plaintiff and cross defendant has been deprived of the opportunity of visiting and caring for her child; and it appearing that said place where said child has been kept by the defendant and cross complainant is many miles from adequate transportation and adequate school facilities; and it appearing that  
30 said minor child has reached the age when it is necessary that he attend school; and it appearing to the Court that the mother of said minor child, Evelyn McKee, plaintiff and cross defendant, is a fit and proper person to have the care, custody and control of said minor child, and that the plaintiff and cross defendant has not violated any of the Orders made by the above-entitled Court and heretofore entered in this matter; and it appearing that the plaintiff and cross defendant has complied with all of said Orders heretofore entered in the above-entitled  
40 action and also said Interlocutory Decree, and that the said minor child prior to the 1st of October 1944, never resided in the State of Michigan; and it appearing to the Court that it is for the best interests and welfare of said minor child, Terry Alexander McKee, that he at this time be placed under the care, custody and supervision of his mother, the plaintiff and cross defendant; and it appearing that the sum of \$500.00 is a reasonable sum as

and for plaintiff's attorneys' fees herein; and the said plaintiff and cross defendant, Evelyn McKee, appearing in person and by her attorneys Jerome J. Mayo and F. Millar Cloud, and the said defendant and cross complainant, Mark T. McKee, appearing in person and by his attorneys Joseph Scott and A. H. Risse, and all parties being present in Court during the said proceedings, and the Court being fully advised in the premises,

10

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

That the application of the defendant and cross complainant Mark T. McKee, on the Order to Show Cause in re Modification of Custody of Minor Child be and the same hereby is DENIED.

20

IT IS FURTHER ORDERED that the application of the plaintiff and cross defendant for full custody of the minor child, TERRY ALEXANDER MCKEE, be and the same is hereby GRANTED and the previous Orders and/or Judgments of this Court in this matter are so modified and the plaintiff and cross defendant, Evelyn McKee, is AWARDED the FULL CUSTODY of said minor child, Terry Alexander McKee, with the right of reasonable visitation to the defendant and cross complainant, Mark T. McKee.

30

IT IS FURTHER ORDERED that the defendant and cross complainant Mark T. McKee, is to deliver the said minor child, Terry Alexander McKee, to the plaintiff and cross defendant not later than the 1st day of September, 1945, at Los Angeles, California.

IT IS FURTHER ORDERED that the property settlement agreement shall remain in full force and effect as to the support of the plaintiff and cross defendant and the minor child, Terry Alexander McKee.

40

IT IS FURTHER ORDERED that after said minor child is delivered in the State of California that he shall not be removed from said State of California without an Order of this Court or the consent of the plaintiff and cross defendant and the defendant and cross complainant.

IT IS FURTHER ORDERED that during this summer the defendant and cross complainant may have the custody of said minor child, Terry Alexander McKee, while said child may be in Port Austin, Michigan.

EXHIBIT 2

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IT IS FURTHER ORDERED that the defendant and cross complainant shall forthwith pay the sum of FIVE HUNDRED DOLLARS (\$500.00) as and for attorneys' fee direct to Jerome J. Mayo and F. Millar Cloud, counsel for plaintiff and cross defendant.

DATED this 1st day of August 1945.

10

RUBEN S. SCHMIDT  
Judge of the Superior Court.

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EXHIBIT 6

850

CLERK'S OFFICE, SUPREME COURT  
State Building

San Francisco, California.

December 23, 1946

10

Dear Sir: I have this day filed order hearing denied  
in re I. Qus. No. 15264 in McKee vs. McKee.

Respectfully

WILLIAM I. SULLIVAN

20

Clerk.

(ADDRESSED to Messrs. F. Miller Cloud and Jerome  
J. Mayo)

30

40

April 25, 1947.

Messrs. Brock, Weir & Trott,  
Barristers &c.,  
49 King Street E.,  
Kitchener, Ont.

Attention Mr. G. R. Brock

10 Dear Sirs:

Re: McKee

We are writing to propose that the contentious issue between your client, Evelyn McKee and our client, Mark T. McKee as to the custody of their son, Terry Alexander McKee be settled, once and for all, if possible, on the following terms:

- 20 1. Our client to have custody of Terry at his home here from September 1st in each year to June 30th of the following year, such period designed to coincide roughly with the school term.
2. Terry to spend the months of July and August in each year with your client at her home in California or at any other place where she may be from time to time.
- 30 3. Our client to pay to your client a reasonable allowance by way of maintenance for Terry during the said months of July and August in each year. We suggest that this allowance be the sum of \$100.00 per month as set by the December 1942 Judgment but we are satisfied that this amount be the subject of further negotiation.
- 40 4. Our client will make the necessary arrangements including all expenses to have Terry join your client on the first of July in each year at any place in Canada or the United States specified by your client from year to year. Our client would also make the necessary arrangements including all expenses to call for Terry at any such place on the first of September in each year.
5. Each parent to have right of access to Terry at all reasonable times while he is with the other.

We have made the above proposals in the honest

belief that they are in the best interests of the child and with a view to bringing to a finality the protracted litigation which has been carried on. To this end we would therefore suggest that an agreement be entered into between our respective clients to the effect that the terms of this settlement are not to be varied by application of either party to any court in any jurisdiction except such application as may be reasonably  
10 required or indicated by developments subsequent to the date of such agreement deleterious to Terry's welfare. To this end we would further propose a Consent Order of the Courts of both Ontario and California by way of approval of such settlement and agreement.

Please let us hear from you at your early convenience.

20 Yours truly,

SIMS BRAY SCHOFIELD & LOCHEAD

per

"Geo. H. Lohead"

30

40

May 22nd 1947.

Messrs. Sims Bray Schofield & Lohead,  
Barristers &c.  
Medical Arts Building,  
Kitchener, Ontario.

Dear Sirs:

10

Re: McKee

We received your letter of May 9th, 1947 enclosing copies of the Commission and Letters Rogatory in the above issue and a copy of a letter dated April 25th 1947, the original of which we had received previously. You have insisted that we reply to your said letter so we have discussed its contents with our client.

20 We are advised that Mr. McKee took Terry Alexander McKee from the United States of America into the Province of Ontario within a few days after the Supreme Court of the State of California denied the petition of Mark T. McKee to hear an appeal from the Judgment of the District Court of Appeal of the State of California dismissing his appeal to such Court from the Judgment of the Trial Judge.

30 He did this in spite of the fact that, by the terms of the Property Settlement Agreement, he had agreed that he would not remove Terry from or out of the United States of America without the consent in writing of Mrs. Evelyn McKee and certainly our client had not consented either in writing or otherwise to such act. Also, at the custody trial in California before the Honourable Rueben S. Schmidt in the month of June 1945, Mr. McKee assured the said Trial Judge that he was not going to attempt to circumvent any Order of the Court because the said Trial Judge had not required him to bring the child to California.

40

Our client was given custody of Terry by the Courts of the State of California which jurisdiction your client not only submitted to but invoked. In view of the conduct of your client not only as set out in this letter but throughout the whole proceedings, we are instructed by Mrs. Evelyn McKee that she cannot



PART OF EXHIBIT 19

854

rely on Mr. McKee in this regard.

Yours truly,

BROCK WEIR & TROTT

GRB/

10

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REGISTER OF ACTION SHEETS

SUPERIOR COURT LOS ANGELES  
COUNTY No. D211536

Evelyn McKee	Plaintiff
Mark T. McKee	Defendant
T.M. Cloud	Attorney for the Plaintiff
Joseph Scott	Attorney for the Defendant

Nature of Action    Divorce

1941 Sept. 18	-	Complaint filed - Summons issued.
1941 Oct. 2		1st amended complaint filed.
1942 May 7		Plt's 2nd amended complaint filed.
1942 May 16		Answer to second amended complaint filed.
1942 May 29		Notice of trial, filed.
1942 Sept. 28		Cross-complaint for divorce filed.
1942 Oct. 2		Answer to cross-complaint filed.
1942 Oct. 28		On trial.
1942 Nov. 20		Interl. judgment granted defendant on cross-complaint, order for custody, etc. made, D.6.
1942 Nov. 20		Affidavit of A.H. Risse in lieu of petition for writ of habeas corpus filed. Warrants issued.
1942 Nov. 25		Order re custody made. Warrants discharged.
1942 Dec. 1		Warrant etc. re Cynthia or Evelyn McKee filed.
1942 Dec. 17		Judgment filed.
1942 Dec. 17		Findings filed.
1942 Dec. 18		Judgment entered.
1942 Dec. 21		Judgment docketed.
1942 Dec. 31		Notice of intention to move for new trial and order vacating Judgment filed.
1942 Dec. 31		Substitution of F. Millar Cloud as attorney for the plaintiff filed.
1943 Feb. 4		Motion for new trial heard and submitted.
1943 Feb. 11		Motion for new trial denied.
1943 Mar. 2		Notice of appeal filed.
1943 Mar. 2		O.S.C. in re costs etc.

Exhibit 5  
Not copied in full

856

1943 Mar. 4 Amended notice of appeal to Supreme Court of California by plaintiff and cross-defendant, filed.

1943 May 21 Abandonment of appeal filed.

1943 May 27 Affidavit for order to show cause re modification filed.

1943 June 10 Order made re custody of child on O.S.C. (2) D.6.

1943 June 29 Order fixing period of custody of minor child & etc. filed.

1943 Aug. 23 O.S.C. re modification of custody September 3, 9.30 a.m.

1943 Sept. 23 O.S.C. (2) denied.

1944 Feb. 3 Final judgment filed.

1944 Feb. 3 Judgment entered.

1944 Feb. 4 Judgment docketed.

1944 Sept. 11 Order modify cust. and restraining plaintiff from removing children from the State of California.

1944 Sept. 13 Order re custody filed.

1945 May 24 O.S.C. re modif. of custody, June 8, 9.30.

1945 May 31 Affidavit of B.J. Cunningham filed.

1945 May 31 Notice of Mo. of Deft. and x complaint to modify order re custody, June 8 9.30 a. m. Dept. 8 filed.

1945 June 12 Order re fees and costs filed.

1945 June 21 Order made on O.S.C.

1945 June 29 Notice of appeal by deft. filed.

1945 June 30 Notice of dismissal upon merits with prejudice and cert. copy of Wisconsin dismissal filed.

1945 Aug. 1 Order dismissing O.S.C. and for custody and attorney's fees, filed.

1945 Aug. 4 Notice of appeal, filed.

1947 Jan. 7 Subst. of Mark T. McKee in pro. per for defendant and x-complainant filed.

1947 Jan. 13 Remittitur, order affirmed, filed.

856A

Certificate of Proceedings in the District  
Court of Appeal - State of California

CERTIFIED REGISTER OF ACTION SHEETS  
LOS ANGELES COUNTY No. D211536

Evelyn McKee - Plaintiff  
Mark T. McKee - Defendant

Jan. 23, 1946 Filed Clerks Transcript - two appeals  
from Judgments and orders.  
Jan. 23, 1946 Filed reporters transcript  
Feb. 1, 1946 Transferred from Supreme Court to  
Division One  
May 14, 1946 Filed appellant's opening brief  
July 12, 1946 Filed respondent's brief  
Aug. 9, 1946 Filed appellants reply brief  
Ordered on Calendar Sept. 16, 1946  
Sept. 16, 1946 Argued and noted ready to submit.  
Nov. 1, 1946 Cause submitted.  
Nov. 8, 1946 The order appealed from, granting  
complete custody to the mother, res-  
pondent herein, is therefor affirmed  
Doran J.  
I concur: York P.J.  
I dissent: White, J. (opin)  
Nov. 20, 1946 Filed petition for rehearing.  
Nov. 22, 1946 Rehearing denied. York, P.J. White, J.  
votes to grant the petition.  
Dec. 13, 1946 Petition for hearing filed in the  
Supreme Court.  
Dec. 23, 1946 Hearing denied by Supreme Court.  
Jan. 8, 1947 Remittitur to County Clerk.

I, J.E. BROWN, Clerk of the District Court of Ap-  
peal in and for the Second Appellate District of the  
State of California, do hereby certify that the preced-  
ing and annexed is a true and correct copy of the page of  
of the Civil Register of Actions number 15264 contain-  
ing the appeal of McKee v. McKee, showing all entries  
(with the exception of notations of extensions of time  
to file briefs) made in said register pertaining to said  
appeal as shown by the records of my office.

WITNESS my hand and the Seal of the Court this  
9th day of June, A.D. 1947  
"J.E. Brown"  
Clerk

**JUDGMENT**

**IN THE SUPREME COURT OF ONTARIO**

THE HONOURABLE MR. JUSTICE )  
WELLS ) SATURDAY, the 18th day of  
October, A.D. 1947.

10  
(Seal)

**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**

20  
BETWEEN:

**EVELYN McKEE**

Plaintiff

**AND**

**MARK T. McKEE**

Defendant.

30

The issue directed to be tried by the Order of the Honourable Mr. Justice Smily on the 2nd. day of April, 1947, between the above-named Evelyn McKee, plaintiff, and Mark T. McKee, defendant, coming on for trial before this Court on the 18th and 19th days of September, 1947, at the Sittings holden at the City of Kitchener for trial of actions without a jury, and on the 24th, 25th, 26th, 29th and 30th days of September, 1947, and on the 40 1st, 2nd, 3rd, 8th, 9th and 10th days of October, 1947, at the Sittings holden at the City of Toronto for trial of actions without a jury, in the presence of counsel for both parties, upon hearing read the said Order and hearing the evidence adduced and what was alleged by counsel aforesaid, this Court was pleased to direct the said issue to stand over for judgment and the same coming on this day for judgment

JUDGMENT

858

1. THIS COURT DOTH ORDER AND ADJUDGE that the defendant Mark T. McKee be awarded the sole custody of Terry Alexander McKee, the infant son of the said parties.

10 2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the plaintiff Evelyn McKee have reasonable access to the said Terry Alexander McKee once a week during reasonable hours.

3. AND THIS COURT DOTH NOT SEE FIT to make any Order as to costs herein.

JUDGMENT settled this 3rd day of December, A.D. 1947.

20

"Chas. W. Smyth"  
Registrar S.C.O.

Judgment signed this  
6th day of December,  
A.D. 1947.

30 "G. H. Gillies"  
Local Registrar, S.C.O.  
at Kitchener.

Entered in S.C.O.  
Judg't Book as No.  
204 1947.  
Dec. 6, 1947.

40 "G.H.Gillies"  
per "M.A."

REASONS FOR JUDGMENT

THE SUPREME COURT OF ONTARIO

H.C.J.

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

20 IN THE MATTER OF AN APPLICATION  
OF EVELYN MCKEE as next friend  
and legal guardian for possession  
of her son TERRY ALEXANDER MCKEE

) Copy of Reasons for  
) Judgment of Wells,  
) J., delivered 18th  
) October, 1947.

) Gordon Brock, K.C.  
) replaced during  
) trial on his ill-  
) ness by  
) R.I. Ferguson, K.C.  
) and  
) J. Corti Boland,  
) for the plaintiff  
) Evelyn McKee.  
) G.H. Lohead, for  
) the defendant  
) Mark T. McKee

30 WELLS, J. This is an issue directed by the Hon. Mr.  
Justice Smily under an order made in Chambers on Wed-  
nesday the 2nd day of April, 1947, on the argument of  
a return made on the 25th of March 1947, of a writ of  
habeas corpus directed to Mark T. McKee, William A.  
Ament and Wilhelmina Ament requiring the production of  
an infant, Terry Alexander McKee, issued at the instance  
of Mrs. Evelyn McKee, the boy's mother, asking for de-  
livery to her of custody of the infant from his father,  
Mark T. McKee.

40 Mr. Justice Smily on the hearing of the proceedings  
before him, gave leave to Mrs. Evelyn McKee to make a  
formal application for the custody of her son, Terry  
Alexander McKee, and directed that Evelyn McKee and  
Mark T. McKee proceed to the trial of an issue in which  
she was to be plaintiff and he the defendant. The  
question in the issue is set out in the order and is  
"who is to have the custody of the infant Terry Alex-  
ander McKee as between the said Evelyn McKee and the  
said Mark McKee". It was further directed that his  
order should constitute a record for the trial of the  
issue and pleadings and discovery were dispensed with.

REASON FOR JUDGMENT

860

At the opening of the trial of the issue before me Mrs. McKee, through her counsel, formally applied for the custody of her son, Terry Alexander McKee.

10 The infant was born on the 14th of July, 1940, and at the time of the hearing before me was past seven years of age. The parents of the infant were divorced by a judgment rendered in the Superior Court of California, dated the 17th of December, 1942, when a judgment called an interlocutory judgment of divorce which I gather is somewhat analogous to our judgment nisi was rendered by the Court. In accordance with that judgment it was adjudged that Mark T. McKee was entitled to a divorce from the plaintiff Evelyn McKee after the expiration of one year from the entry of the judgment. By this judgment it was further ordered that the care, custody and control of Terry Alexander McKee be 20 awarded to Mark T. McKee with provision that the infant should spend three months in the summertime with Evelyn McKee, during which period the minor was not to be taken out of nor leave the state of California without the consent of the Court on motion. For the purpose of the hearing before me counsel for both parties admitted that this judgment of the courts of California was valid.

30 Pursuant to it, custody of the infant child, Terry Alexander, was delivered to Mark T. McKee, and he maintained that custody, subject to various applications by Mrs. Evelyn McKee in the intervening years, down to the year 1945. Mr. McKee's evidence, which I accept, was that subsequent to this judgment he moved first to the state of Wisconsin and latterly to the State of Michigan where it would appear that he had both prior and subsequent to the California judgment of 1942, if not during his residence in California, become domiciled. He has apparently maintained a home in the State of Michigan for over thirty years and while he 40 was born in the State of Iowa he went to reside in the State of Michigan at the age of fifteen years and up to the time of his coming to Ontario and even during the years when he was residing with his family in California, prior to 1942, appears to have there maintained a permanent residence. On the evidence, in my view, he had an established domicile in Michigan in the year 1945



## REASON FOR JUDGMENT

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Mrs. McKee was not satisfied with the disposition of the custody of the infant made by the 1942 judgment and brought several applications to the courts in California to modify that order. These were not successful. While Mr. McKee was living in a rented house in Milwaukee, Wisconsin, in the year 1944, she commenced an action there against him in the Circuit Court of Milwaukee County, asking for the custody of the infant. In her complaint filed in the Milwaukee action, among other things, Mrs. McKee made many allegations of what might be described a scandalous nature against her former husband, including allegations that McKee in the 1942 proceedings had caused his children and an employee named Charles Watt to give perjured evidence in his favour; that he had exercised improper influence through his attorneys on the trial judge; that he had secretly entered into collusion with her own attorneys for the purpose of defeating her rights and also had entered into an improper collusive agreement with the trial Judge; that he secretly made payments to her attorneys for the purpose of securing the assistance and co-operation of the attorneys, conniving at her defeat; that he committed a fraud on the Superior Court of the State of California and subjected the trial Judge to his domination and control and prevailed on him to make findings of fact which were not true.

Subsequently, Mark T. McKee while he was domiciled in Michigan and while the infant Terry Alexander McKee was physically resident in the State of Michigan, commenced proceedings in the Superior Court of California for an order to modify the 1942 order as to custody. Mrs. McKee brought a counter proceeding. These proceedings were apparently commenced on the 24th of May, 1945, and the application was heard on several days during the month of June, 1945, the trial concluding on the 21st of June, 1945. In the course of these proceedings and apparently as a result of a term imposed by the trial Judge in California, Mrs. McKee obtained an order from the Circuit Court of the County of Milwaukee in the State of Wisconsin dismissing her action there upon its merits, that is with prejudice. In the result, the Superior Court of California reversed the 1942 decision and gave custody of Terry Alexander McKee to his mother. The basis of this finding is set forth in the formal order of the Superior Court of

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California, an exemplification of which was filed before me. It appears to be as follows:

"it appearing to the Court from the evidence adduced at the hearings of said Orders to show Cause and Motions that the minor child of the parties, to wit, Terry Alexander McKee, has since approximately the 1st day of 10 October, 1944, been kept by the defendant and cross-complainant at his home at Port Austin Michigan, and that the said minor child is now five (5) years of age, and that the said minor child has been kept in a place not accessible, snowbound in winter, and subject to severe weather conditions; and it further appearing that said minor child has been under the care and supervision, for most of the time (defendant being frequently absent from his home), of aged employees hired by the defendant and cross-complainant; and it appearing that 20 in keeping the said minor child in Port Austin, Michigan, the plaintiff and cross-defendant has been deprived of the opportunity of visiting and caring for her child; and it appearing that said place where said child has been kept by the defendant and cross complainant is many miles from adequate transportation and adequate school facilities; and it appearing that said minor child has reached the age when it is necessary that he attend school; and it appearing to the Court that the mother of said minor child, Evelyn McKee, 30 plaintiff and cross-defendant, is a fit and proper person to have the care, custody and control of said minor child, and that the plaintiff and cross-defendant has not violated any of the Orders made by the above entitled Court and heretofore entered in this matter; and it appearing that the plaintiff and cross-defendant has complied with all of said Orders heretofore entered in the above-entitled action and also said Interlocutory Decree, and that the said minor child prior to the 40 1st of October, 1944, never resided in the State of Michigan; and it appearing to the Court that it is for the best interests and welfare of said minor child, Terry Alexander McKee that he at this time be placed under the care, custody and supervision of his mother, the plaintiff and cross-defendant."

From this order Mark T. McKee appealed and prosecuted his appeals to the ultimate limit allowed by the practice in California. The reasons for judgment of the

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Court of Appeal of California are reported in 174 Pacific Reporter at page 18. It was a majority judgment of the Court, one of the Justices in appeal dissenting.

10 In the evidence taken on commission taken under Mr. Justice Smily's order there was included evidence as to California law by a practitioner there. It appears that the effect of perfecting an appeal from a decision of the Superior Court, which is what Mr. McKee did, stays proceedings in the lower court on the judgment or order appealed from and it was said that jurisdiction did not re-attach to the lower court until a document called a remittitur comes down from the appellate court and is filed with the clerk of the Superior Court. It was also said that the effect of an appeal in a custody matter was to permit the minor to stay with the party  
20 who had custody previous to the order or decree or change of award.

It appears from the evidence taken in California that the remittitur from the appellate court in this case was not filed with the Superior Court until the 13th of January, 1946. It would accordingly follow that the child in question was even under California law lawfully in Mr. McKee's custody at the time he brought the child into Ontario, towards the end of  
30 December, 1945, and it is of course quite clear that the physical presence of the child in this province is what clothes this Court with jurisdiction to deal with the matters in issue.

The principles on which I should determine the issue directed by the order of Mr. Justice Smily and the applications for custody made by Mrs. McKee through her counsel, as as I understand it those set out in the Infants Act, are R.S.O. 1937, Ch. 215 s. I. s.s. (1), which  
40 authorizes me to "make such order as the court sees fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father." As I apprehend the law the guiding principle in coming to a decision under this section is the welfare of the infant. It was argued very strenuously before me by counsel for Mrs. McKee that I should give

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effect to the California judgment on the principle that there had been an adjudication there and that any matters prior to that hearing were res judicata. It was also argued that even if there was no jurisdiction in the California Court at the time the order was made in 1945, Mr. McKee was now estopped from denying that jurisdiction, he having invoked it and submitted to it  
10 throughout. What counsel seemed to have overlooked was that in this matter dollars and cents and property rights are not being delat with but the welfare and future care and education of a small boy. As the late Chief Justice Rose stated in his judgment in re E., 19 O.W.N. 334:

"The matter to be determined was not any proprietary right of either of the contending parties but the order that ought to be made regarding the custody of the  
20 infant, having regard to her welfare and to the conduct of the parents and to the wishes as well of the mother as of the father."

The principles on which I apprehend that I should proceed are best set forth in a judgment of the Court of Appeal in the case of Re Gay (1926) 59 O.L.R. 40. Judgment of the Court was given by Mr. Justice Middleton. At page 42 he said:-

30 "The learned Judge bases his judgment almost entirely upon his understanding of the effect of the decision of the Court of Appeal in Rex vs Hamilton (1910) 22 O.L.R. 484. In the judgment of Mr. Justice Rose in Re E (1921) 19 O.W.N. 534, the true effect of the decision in the earlier case is pointed out, but unfortunately the judgment is not fully reported, I have seen a copy of it, and it is there said: 'The kidnapping cases cited by Mr. Greene, e.g., Rex vs Hamilton, do not, as it seems to me, decide anything contrary to what is  
40 decided in Re Ethel Davis. They decide that when a child is in the custody of the parent to whose custody it has been confided by the court of domicile of the parents it is in lawful custody, so that it is an offence for the other parent to take it away, but they do not decide that if the parent to whom the custody has been awarded by the foreign court come to the Court in Ontario seeking the enforcement of the foreign judgment the Ontario Court is bound to lend him its aid, even if

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convinced that if it does so it will not be acting in the best interests of the child.'

10 "The learned Judge of the Surrogate Court is also in error in supposing that in the Hamilton case the Manitoba court had not assumed to deal with the custody of the child, it had, by the first decree, the decree nisi, which only required confirmation so far as it purported to grant the divorce."

"We entirely agree with what is said by our brother Rose.

20 "The decision of Mr. Justice Street in Re Ethel Davis (1894) 25 O.R. 579, followed by the full Court of Appeal in Nova Scotia in Re Chisholm (1913) 47 N.S.R. 250, states the correct principle. The foreign guardian has no absolute right as such under the judgment of the foreign court in this country. The decree of the foreign court is entitled to great weight in determining the proper custody here.

30 "Also, upon a narrower principle I think the judgment of the Michigan Court is not entitled to the effect given it by the judgment in review. It is not in itself, nor upon its face, final. It determines nothing as to the custody of the infants save at the time of its making, for it reserves liberty to either party to apply for variation. No matter what the form, this is necessarily the case in all orders dealing with the custody of children -- they are not in their nature final. The Courts of this country must always exercise the jurisdiction conferred upon them in regard to the custody of infants within this jurisdiction according to the laws of this country.

40 "Under the statute applicable here, the Infants Act, R. S. O. 1914, ch. 153, as amended in 1923 by 13 & 14 Geo. V. ch. 33, the father and mother of an infant are (sec. 3(1) ) joint guardians and equally entitled to the custody, control, and education of the children. Where they are judicially separated or divorced so that they cannot jointly function as guardians, in the absence of an agreement between the parents, either parent may apply to the court for its decision (sec. 3(2) ); and sec. 2 (1) of the statute places the father

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and the mother upon a plane of equality, and casts upon the court the duty of making an order as to the custody of the infants 'having regard to the welfare of the infant, and to conduct of the parents, and to the wishes as well of the mother as of the father'".

10 It is not I think necessary to discuss the decisions prior to this judgment as it simply expresses in a more complete way what earlier judgments had indicated. A great deal of argument was made before me as to the validity of the California judgment. As I view the evidence and accepting as I do Mr. McKee's evidence as to his domicile, I must find as a fact that at the time he brought his application in 1945 in California he was not in fact domiciled there but was domiciled in the State of Michigan and it is trite law that in the  
20 circumstances of this case the child then being lawfully in Mr. McKee's custody, the domicile of the infant follows that of its father. I also find it a fact that at the time the hearing was initiated and concluded, Terry Alexander McKee was not actually within the limits of California. He apparently arrived there under the 1942 judgment for the three months' period for which Mrs. McKee was entitled to have him, about the 1st of July, 1945, and remained there until the end of September when he was returned to his father, pending the outcome of the California appeals. He also spent  
30 three months in California in the year 1946 under the same arrangements and was again returned to his father at the end of September in that year. Terry has not been in California since that time.

As I have indicated the validity and force of the 1945 judgment in California were put to me very strongly by counsel for Mrs. McKee. Whether the court in California had jurisdiction to make the order it did in the 1945 judgment seems to me to be a matter  
40 which is far from clear. If one examines the various authorities on which jurisdiction in respect of custody of infants has been exercised it would seem to be clear that it has always been exercised when the infant was lawfully within the jurisdiction of the court and was not there on a merely temporary visit on the instance of its foreign guardian. There is also considerable authority for indicating a jurisdiction based on domicile of the infant, which in the first place

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10 appears to follow that of its father. The cases dealing with the effect of foreign judgments on the question of infants' custody in Ontario refer only to judgments of the domicile of the infant. In no case have I been able to find a foreign judgment given any weight where it was the judgment of a court in a jurisdiction in which the infant was not domiciled nor physically  
20 resident. One of the best discussions of this problem and of the power of the court to deal with custody when the child is physically found out of the limits of the jurisdiction, is an old judgment of the Supreme Judicial Court of Massachusetts given in the year 1862. It is the case of Woodworth vs Spring and is reported in 4 Allen's Reports, at page 321. The matter is also discussed in many other cases and reference may be made to Nugent v. Vetzera, L.R. 2 Eq., 707 at page 712 and Cody v. Cody (1927) 3 D. L. R. 349, and cases there  
30 mentioned.

It was also argued before me that the fact that Mr. McKee had undoubtedly invoked the jurisdiction of the Court in California in the 1945 hearing estopped him from denying the validity of that judgment before me and it is true that at times courts of equity in England and in Ontario have exercised a personal jurisdiction over persons having the guardianship and control of infants when the infant was not physically within  
30 the jurisdiction. In some of the earlier cases jurisdiction was also apparently asserted on the ground that the infant was a British subject. If these cases are examined however, I think it will be found that in most instances such exercise of jurisdiction was essentially based on what one would now regard as a domicile within the jurisdiction of the court exercising its powers or on the well-known principle that equity acts against the person. In this respect reference may be made to Re Mott, 5 D.L.R. 406, and cases therein cited, and Re  
40 Harding, 63 O.L.R. 518.

As I have already said, in the present case the child was neither domiciled nor resident within the state of California and if the mere submission of the child's guardian to such a jurisdiction created it, then it would be quite possible for McKee to obtain decrees regarding the custody of his child from courts operating in any part of the civilized world. Such a result

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cannot I think be the intention of our law. The rule as to estoppel under these circumstances is succinctly set out in Halsbury, Hailsham ed., vol. 13, page 438, par. 493, where it is said -

10 "In order that estoppel by record may arise out of a judgment the Court which pronounced the judgment must have had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or other wise; and this rule applies even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned".

20 The authority for this statement is a decision of the Privy Council in the case of Toronto Railway Company v. Corporation of the City of Toronto, (1904) A.C. 809. This was an assessment matter but the principle seems to be firmly established by this judgment. I think therefore, I must come to the conclusion with some doubt and hesitation that the 1945 judgment of the Superior Court in California was given without Jurisdiction. In effect however, this view-point of mine is somewhat academic for on looking at the evidence before me and on giving the greatest weight to the California decision which I am naturally disposed to do because it results from a prolonged trial and a consideration of

30 the issues between these parties by a Court of Superior jurisdiction which is entitled to great respect, I am still reluctantly compelled to disagree with the California Court's decision and to take a contrary view as to the proper place for the custody of this child. As I apprehend the law in Ontario, even granting the validity of the California judgment of 1945, it is only one of the factors which I must consider and the overriding factor which must guide me in my final decision is my view on the evidence of the welfare of the infant.

40 It was also argued before me that I was not entitled to hear evidence as to events which had transpired in California prior to 1945, that they were res judicata. In my view this objection has no weight. Obviously, if I am to determine what is in the best welfare of the infant there must be the widest examination of the conduct and capacity of either parent, claiming custody, to properly look after the child in question and there



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10 must also be a general examination of all matters which  
might affect their suitability as a custodian and  
guardian vested with the responsibility of raising and  
educating the infant. It therefore seemed to me that  
I was entitled to entertain the widest investigation  
into the suitability of both these parents. One cannot  
read the various decisions on custody in our courts  
10 without coming to the conclusion that this investigation  
has always been made by the trial Judge and in my view  
it is a very necessary and proper one. I therefore  
admitted the evidence which was tendered which tended  
to show what the character, capacity and general stan-  
dards of either parent were. There is this qualifica-  
tion, however, which I think must exist, and that is  
that I am not concerned with their characters and  
morals as such, but only as they may reflect on the  
character and morals of the child as a result of  
20 training while under their care.

It was argued by counsel for Mrs. McKee and pointed  
out that in the property settlement agreement entered  
into by Mr. McKee in 1941, there was an agreement that  
neither of the parties, that is Mr. and Mrs. McKee,  
should remove the child, Terry Alexander, from within  
the United States of America without the written per-  
mission of the party not so removing or wishing to  
remove the boy from the United States, and it was urged  
30 that Mr. McKee's obvious breach of this agreement was  
a ground which should deprive him of custody. I think  
however, that it is well established by the cases that  
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 and welfare and I must so  
regard Mr. McKee's obligations in this case. I by no  
means wish to be deemed to express approval of an  
obvious and flagrant breach of a solemn agreement on his  
part but despite that as I conceive it, I must consider  
40 and be governed by what I regard as best designed to  
further the child's real welfare.

Various actions of Mrs. McKee were examined on her  
cross-examination by counsel for Mr. McKee and one of  
these was the basis on which she made the serious and  
scandalous claims in her Wisconsin action against the  
court and her own attorneys in California. Whether

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10 there was a proper basis for these charges or not is of  
really very little interest to me but on her cross -  
examination I gained a very strong impression that the  
facts on which she stated she based them would not  
justify their repetition as idle gossip let alone as  
serious allegations of fact in litigation such as she  
commenced in the State of Wisconsin. Doubtless, the  
10 persons accused in this fashion are able to look after  
themselves, but it does in my view reflect very seriously  
on her judgment and capability that she should make  
such scandalous charges on so little evidence and such  
a small basis in fact. This I think merely reflects  
again on the opinion I must form of her as a proper  
person to have alone the care and custody of her infant  
child apart from the counterbalancing influence of the  
father, particularly at a time when his education and  
his proper upbringing become very important and may  
20 well shape his whole after life.

30 During the course of the trial a determined effort  
was made by each of these parents to show the immoral  
character of the other. In respect of Mrs. McKee,  
commission evidence was taken which went to substantiate  
the findings of the trial Judge on the divorce in  
California in 1942 as to her relations with a gentleman  
in Los Angeles. Mrs. McKee denied this in cross-examination  
but the judgment which her counsel admitted is  
30 valid, is clearly based on findings of fact to the  
contrary. As that may be however, it must be remembered  
that this conduct occurred in the year 1942, nearly five  
years ago now, and her evidence was that her friendship  
with the man in question in Los Angeles ceased in that  
year. Other evidence was given of her behaviour with  
other men from which one might infer immoral and  
promiscuous conduct. The evidence was however, chiefly  
of servants and the husband of one of them at a resort  
known as a Dude Ranch, and of private investigators.  
40 It was taken on commission, and I was not able to see  
the witnesses and judge their truthfulness. The cross-  
examination of one of these witnesses, which was submitted  
on Mrs. McKee's behalf, namely Wade Bentley, did  
if anything I think tend to substantiate his story in  
chief. In my view the evidence did not establish immorality  
on Mrs. McKee's part but a looseness of public  
conduct and a lack of personal integrity and dignity  
which I think might provide a very unhappy background

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to the proper upbringing of the child. Evidence was also given of Mrs. McKee's behaviour in a small restaurant in Kitchener by one Rita Eckensviller. Mrs. McKee flatly denied this evidence, but I must say in this case, having seen the witness and heard her evidence, I accept it, and I do not believe Mrs. McKee's denial. Again the conduct complained of, which was  
10 public lovemaking of a reasonably innocuous character, was such which might be understood if not approved in adolescents. It did not tend I think to show immorality as much as a lack of appreciation of any proper standard of public conduct for one of her years, on her part. At the conclusion of her evidence I asked Mrs. McKee whether she wanted custody of her son Terry because she felt she could do better for him than his father or did she want to take him from his father because of her animosity for him. She said in reply:--"I hope you  
20 believe me. I have no animosity toward him. I have really gotten over that. I did feel that way in the beginning but it is not true any more", and she stated that she knew she could do well for the boy and really wanted him. One's belief in this statement is somewhat tempered by the fact that when Mrs. McKee returned to Kitchener to commence the proceedings which culminated in this issue, she visited the Ament home where Terry was being kept by his father, complete with a reporter and news photographer from the Detroit Daily News who  
30 took pictures of her Michigan attorney and herself vainly knocking at the door to see her infant child. One would think that this method of publicizing her difficulties would indicate a sense of drama which had perhaps taken possession of her to the exclusion of any real affection for her son, but of course it may be merely that customs and practices in these matters vary. In any event, conduct of this sort and the rather hysterical publicity which she apparently supplied newspapers in Detroit, Kitchener and Toronto would tend  
40 to shake one's faith in her as a proper person to bring up a boy of seven, whose serious education must now commence and who is entitled to a training inculcating proper standards of morals and decency.

In fairness to Mrs. McKee, it must be said that she apparently very acceptably brought up the younger members of Mr. McKee's family after his first wife's

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10 death and as he very frankly said to me she so established herself in the affection of his family that they believed anything she did was right whether it was right or wrong, and that I think is to be said in her favour as the mother of children. But nevertheless her subsequent actions seem to me in the present case to outweigh these considerations. It should be remembered that during that period she was living with Mr. McKee and the family had the benefit of his influence and judgment.

20 Looking at the matter in a broad way I think I must agree with Mr. Justice Smily who directed this issue, that in some respects circumstances have changed since the judgment of the courts of California in 1945. For one thing, this child is now seven instead of five years old. He is approaching an age when his father's guidance and assistance may well be of more assistance to him than that of his mother. Looking at the matter in a broad way and regarding Mr. McKee's business life and private life as I do, it is very hard to escape the conclusion that in any event and apart from Mrs. McKee's conduct, the boy's best interests and welfare lie in leaving him in his father's custody and training. During the course of Mr. McKee's cross-examination a vigorous attempt, commencing with some of his father's business difficulties when he was fifteen years of age, 30 were made to discredit him in respect of his public and business morals. There were even suggestions of private immorality but in no case was anything established nor was any evidence adduced which I believed, which might lead one to believe that Mr. McKee's conduct had been anything but that of an upright and honest man. Mr. McKee in his testimony also indicated that his business affairs were closely integrated into the life of his own children and that of his brothers and sisters. If Terry is handed over to the custody 40 of his mother there will be a breach of that association which in later years may redound very markedly in his favour in a financial way and in the way of the opening of proper business opportunities to him when he is through his education.

I do not think it can be said that it has been shown that Terry has not been well cared for under Mr. McKee's supervision. An effort was made to show that while the

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10 child was in the custody of Mrs. Ament that he was  
dirty, shabby and nervous, and that he was neglected  
while at Port Austin, Michigan. I disbelieve the evi-  
dence of Joshua Steever on this point and I accept that  
of Mr. McKee and his housekeeper, Miss Eastman. The  
boy may well be nervous because of the altercation  
that has been going on about him for some considerable  
time now, and there was some evidence that this was the  
case. I do not however accept Mrs. McKee's evidence  
nor that of Mrs. Hiller as to the boy's dirty and  
shabby condition. I accept Mrs. Ament's evidence as to  
the care which she gave the child and I disbelieve  
both Mrs. McKee and Mrs. Hiller on this point. I also  
had the advantage of having the child's school teacher  
in the box and his evidence indicated that the boy is  
a bright and intelligent child who is equipped to take  
20 full advantage of a full education. I was very im-  
pressed with the school teacher's attitude towards  
the child and I think he is presently in safe hands  
insofar as his schooling is concerned at the present  
time. He is attending a small country school about  
two miles from his home at Linwood outside of Kitchener.

30 I thought it my duty to see the child and accompanied  
by both counsel I was taken out to the farm where he is  
presently living, which is owned by Mr. McKee and his  
sister. While the equipment of the farm house is simple  
to the point of austerity, it is entirely adequate and  
I am not able to see that the boy is suffering at the  
present time either in lack of domestic care or in  
lack of educational facilities which he may require.  
I think he is being well served in both.

40 Looking at the whole matter his welfare seems in-  
extricably bound up with the care, advice and  
education which his father can now give him, and I think  
his interests will be best served by leaving him where  
he is in the custody of Mark T. McKee. There will  
accordingly be an order on the issue and in the appli-  
cation for custody made by Mrs. McKee awarding the  
custody of the child Terry Alexander McKee to his  
father, Mark T. McKee. I think his mother should have  
access to him however, although I realize that if she  
is living in California this may be somewhat illusory  
I would hope that despite the bitterness which may  
have been engendered by these and other proceedings,

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10 Mr. McKee will be large enough in his outlook to provide facilities for Mrs. McKee to see her son from time to time. I make no order in respect of this but I express the hope that he will work something out in a practical way to enable this to be done. With the hope that this may take place or that Mrs. McKee may find it possible to see her son from time to time the order should provide that she may have reasonable access to the boy once a week during reasonable hours.

20 In respect to the matter of costs, this has given me some concern. A property settlement was entered into between Mr. and Mrs. McKee in the 1942 proceedings in California. The agreement provides that it constitutes a full and complete statement of all rights which either of said parties may have against the other by way of alimony, maintenance or support in any and all financial or pecuniary rights or obligations of any kind or nature, and there are releases of further claims of this sort from both the spouses against the other. Under this agreement, apart from certain provisions for Mrs. McKee's own son, Gerald, and for Terry while he was in her charge, there is a provision for payment of \$300.00 per month to Mrs. McKee until she shall remarry or die. There appears to be no other financial obligation on Mr. McKee. He is not therefore, I think, in any way liable for Mrs. McKee's costs of these proceedings. Nevertheless, under all the circumstances I think this is a proper case in which to make no order as to costs.

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JUDGMENT OF THE COURT OF APPEAL

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IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE THE CHIEF JUSTICE OF ONTARIO ) Thursday, the  
THE HONOURABLE MR. JUSTICE HOGG ) 24th day of  
THE HONOURABLE MR. JUSTICE AYLESWORTH ) June, A.D. 1948.

10 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

20 BETWEEN:

EVELYN McKEE

Plaintiff

AND

30 MARK T. McKEE

Defendant

40 UPON MOTION made unto this Court on the 9th, 10th,  
11th, 12th, 16th and 17th days of March, 1948, by  
Counsel for the Plaintiff, by way of appeal from the  
Judgment pronounced by The Honourable Mr. Justice Wells  
on the 18th day of October, A.D. 1947, in the presence  
of Counsel for both parties, upon hearing read the said  
Judgment, the Reasons therefor, the pleadings and pro-  
ceedings herein and the evidence adduced at the trial  
and upon hearing what was alleged by Counsel aforesaid  
this Court was pleased to direct the said motion to  
stand over for judgment and the same coming on this day  
for judgment,

1. THIS COURT DOTH ORDER that this appeal be and the  
same is hereby dismissed.

JUDGMENT OF THE COURT OF APPEAL

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2. AND THIS COURT DOTH NOT SEE FIT to make any Order as to costs.

"Chas. W. Smyth"  
Registrar S.C.O.

(Seal)

10

Entered O.B. 202 page 302, 303  
July 12, 1948  
"M.K."

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REASONS FOR JUDGMENT OF THE COURT OF APPEAL

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and they have not cohabited since. Terry Alexander McKee, who was then five months old, remained with his mother, the appellant, until December, 1942. On the 4th September 1941 an agreement was entered into between appellant and respondent, which is sometimes referred to in these proceedings as the "property settlement agreement". Its provisions cover other matters than property and financial arrangements. While there is  
10 nothing in the agreement as to the custody of the infant, Terry, clause 5 of the agreement is as follows:-

"(5) It is further understood and agreed that neither of the parties hereto shall remove Terry Alexander McKee, son of the parties hereto, from or out of the United States of America without the written permission of the party not so removing, or wishing to remove said boy from the United States of America."

Provision is also made in the agreement for the pay-  
ment of \$125.00 per month to the appellant for the use  
20 and benefit of the child Terry until he reaches his twenty-first birthday, said payments to be made by the respondent out of the trust created for the infant on December 16th, 1940. It is unnecessary for present purposes to refer to the other provisions of the agreement, further than to say that in addition to confirming the appellant in the ownership of the home at Azusa the respondent undertook to pay to her \$300 per month until she should re-marry or die.

In September 1941 the appellant began proceedings  
30 against the respondent for divorce, in the Superior Court of the State of California. Respondent contested the appellant's suit and filed a cross-complaint against her, claiming a divorce from her. The cause came on for trial in October 1942 and judgment was given in December 1942, by which appellant's suit was denied and respondent's suit was granted. By this judgment custody of the infant Terry Alexander McKee was awarded to the respondent. The judgment also approved the agreement of 1st September 1941. A provision was made in the judg-  
40 ment awarding the respondent custody of the infant Terry Alexander McKee, that the infant spend three months in the summer time with the appellant. The terms of this judgment, in so far as the custody of the infant was concerned, were observed, as was also the provision of clause 5 of the agreement of 1st September 1941, until December 1946.

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In May 1945 the respondent applied in the Superior Court of the State of California in the same proceeding in which he had obtained the judgment for divorce and the order for custody of the infant, Terry Alexander McKee, to modify the order for custody in such manner that complete custody would be granted him. The respondent was personally present in the California Court when this application was heard. Upon this application, and an application instituted by the appellant after she had notice of respondent's application, but heard at the same time, an order was made on 1st August 1945 denying the application of the respondent and granting the application of the appellant for full custody of the infant, Terry Alexander McKee, and directing that the previous orders and or judgments of the Court in the matter be so modified as to give her full custody of the minor child, with the right of reasonable visitation to the respondent. It was further directed that the respondent deliver the infant to the appellant not later than the 1st day of September 1945 at Los Angeles, California, and that the infant, after being delivered in the State of California, should not be removed from the State of California without an order of the Court or the consent of the appellant and respondent.

The respondent appealed from this order of 1st August 1945 to the District Court of Appeal of the State of California. On November 8th, 1946, the Court of Appeal affirmed the order of the lower Court. Respondent then applied for a re-hearing of the appeal. This was denied by an order of 22nd November, 1946. Respondent then applied for a hearing by the Supreme Court of the State of California. This was denied by the Supreme Court on December 23rd, 1946. This exhausted the respondent's rights of appeal. The succession of appeals and application for re-hearing had, however, had the effect of staying the operation of the order of 1st August, 1945, so that custody had remained with the respondent throughout, except for the three months period in each year when the child was with the appellant.

The respondent was at Port Austin in Michigan, and had the child there with him on December 24th, 1946, when he saw in a Detroit newspaper that the Supreme Court of the State of California had refused his application for a hearing. He at once communicated by

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telephone with his counsel in California, who said that he had had no word as yet, but that if it was true, the judgment would not become effective, according to the practice in California, until a remitter was filed. The respondent forthwith took the child Terry out of the United States of America into the Province of Ontario, and arrived in Kitchener, in the Province of Ontario on December 26th, 1946. He says in his evidence that he  
10 had Christmas dinner at Linwood, a village in the north-west corner of the County of Waterloo. Neither before nor after his removal of the infant from the United States of America did he communicate with appellant in regard to it, and such removal was not with the permission of the appellant, nor with her knowledge.

Appellant was then in California and some weeks elapsed before the appellant learned where the child was. On learning that respondent had him in the City of Kitchener, in the Province of Ontario, appellant  
20 came to Kitchener and later, on the 21st day of March 1947, procured an order from Mr. Justice Treleaven for leave to issue a writ of habeas corpus ad subjucendum, directed to the respondent and to William A. Ament and Wilhelmina Ament, at whose home in Kitchener respondent and the child were boarding, requiring them to produce the infant Terry Alexander McKee, before the presiding Judge in Chambers, at Osgoode Hall, on the 25th day of March 1947. The application for this order was supported by the appellant's affidavit, in which she set forth  
30 her relationship and the relationship of the respondent to the infant, the date and place of birth of the infant, and produced a copy of the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, delivered on the 1st day of August 1945, awarding full custody of the infant to her. The affidavit further set forth that on the 22nd day of December 1946 the Supreme Court of California denied the right of appeal of the respondent from the said judgment; that on the 24th December 1946 the respondent, without her  
40 knowledge or consent, and with intent to deprive her of the lawful custody of the infant, brought him to the City of Kitchener, in the County of Waterloo and Province of Ontario, and that the infant is detained and restrained at the dwelling-house of William A. Ament and Wilhelmina Ament of Kitchener, under the directions and instructions of the respondent, and further that the

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respondent and the said William A. Ament and Wilhelmina Ament are determined to carry out their design to deprive her of the lawful custody and possession of the said infant, and have refused to deliver him up to her.

A writ of habeas corpus was issued pursuant to the aforesaid order, and was served upon the parties to whom it was directed. The writ commanded the persons to whom it was directed to have the infant before the presiding  
10 Judge in Chambers at Osgoode Hall, Toronto, on the 25th day of March 1948, together with the day and cause of his being taken and detained. The respondent filed a long affidavit by way of return to the writ, in which he raised the question of the jurisdiction of the California Court to make the order of 1st August, 1945, but did not deny the allegations in the affidavit of the appellant with respect to the making of such order and to the denial of his application to appeal therefrom.  
20 In his affidavit the respondent made allegations reflecting upon the character of the appellant. He further alleged that he and the infant became resident in the City of Kitchener at a date when he had the lawful custody of the infant, and that the effective date of the decision of the Supreme Court of California, which denied him the right of appeal from the order of 1st August, 1945, was not the 22nd December 1946 but was the 13 January 1947. I have not been able to find in the voluminous affidavit of the respondent constituting his return to the writ of habeas corpus served upon him, any  
30 denial of the statement contained in the appellant's affidavit upon which the order for the issue of the writ of habeas corpus was made, that the respondent, without her knowledge or consent and with intent to deprive her of the lawful custody of the said Terry Alexander McKee, brought him to the City of Kitchener, in the County of Waterloo and Province of Ontario.

William A. Ament and Wilhelmina Ament, also named in the writ of habeas corpus, filed affidavits in which they said that the respondent and the infant had been  
40 residing with them temporarily pending the completion of the respondent's arrangements for his own permanent home in the City of Kitchener, and that the infant was not, and never had been, detained in their possession or custody.

On the 25th March 1947, the date fixed by the writ of habeas corpus, the matter came before Mr. Justice

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Smily in Chambers. Some confusion or misunderstanding seems to have prevailed as to the procedure to be followed and as to whether the appellant was not required by the practice to serve a formal notice of motion for custody of the infant under The Infants Act (R.S.O. 1937, c. 215). No notice of such a motion had been given, and in proceeding by way of habeas corpus no such notice of motion was called for. The parties were  
10 in Court and the infant was there in pursuance of the writ. The sufficiency of the return made by the respondent by his affidavit was before the Court for consideration.

Mr. Justice Smily made an order for the trial of an issue in which the appellant should be plaintiff and the respondent should be defendant, and the question to be tried was "Who is to have the custody of the infant, Terry Alexander McKee, as between the appellant and the respondent?" It was directed that the issue be set  
20 down and tried without a jury at the next sittings of the Court to be held at the City of Kitchener, or such other place as might be agreed upon between the parties, or ordered by the Court. It was further ordered that until the trial, unless thereafter otherwise ordered, the infant should remain in the custody of the respondent, upon the respondent filing or depositing with the Court a bond in the sum of \$5,000.00 conditioned for the delivery by the respondent of the custody of the infant pursuant to such order in that behalf as might be made  
30 by the Court. There is no provision in the order, such as might have been made under Rule 233, enlarging, before the Judge at the trial of the issue, the proceeding then pending before Mr. Justice Smily. Notwithstanding the absence of any such provision Mr. Justice Wells, before whom the issue was tried at Kitchener, assumed full jurisdiction to dispose of the whole proceedings, and awarded custody to the respondent by the judgment now in appeal.

Before discussing the merits of the case as presented  
40 upon the trial of the issue, it is important to consider the position of an Ontario Court when such a matter as this comes before it. Both parties to the contest are citizens of the United States of America. They were born there and have always resided there. The infant, the right to whose custody is in dispute, is their son, and was likewise born in the United States, and has

always resided there. He has been brought into Ontario by his father in breach of an agreement made between his parents, the parties to this dispute, that neither of them would remove him from or out of the United States of America without the written permission of the other. The obvious purpose in bringing him out of the United States into Ontario was to evade obedience to the order of the California Court of 1st August 1945, later affirmed on appeal, by which custody of the infant was awarded the appellant, and respondent was ordered to deliver him to her. Neither the infant nor his parents have become residents of Ontario in the ordinary sense, nor have they ceased to be the subjects of, and to owe allegiance to the United States of America.

In the circumstances it is my opinion that the Courts of this Province should leave the dispute regarding the custody of the infant to the Courts of the country to which these people belong. It is not a question of jurisdiction, but rather one of comity between friendly nations. The United States has jurisdiction over its own subjects, whether at home or abroad. The Courts of the Province have jurisdiction over persons while they are within the Province, although they may be the subjects of a foreign power, but in the special circumstances of this case a proper observance of the comity of nations, in my humble opinion, requires that the Courts of this Province should not exercise their jurisdiction over this infant further than to assure his return to the country to which he belongs. I refer to what was said by Lord Cramworth in *Hope v. Hope* (1854) 4 DeG., M. & G. 328 at pp. 345-471 also to *Re Harding* (1929) 63 O.L.R. 518. In *Nugent v. Vetzera* (1866) L.R. 2 Eq. 704, the head-note is:-

"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.

"But the Court refused to discharge an order by which guardians had been appointed over the children in this country: and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the Court of his own country."

And at p. 712, Wood V.C. said:-

"I am now asked in effect to set aside the order of the Austrian Court, and declare that this gentleman so appointed cannot recall his wards who had been sent to this country for the purpose of their education. It would be fraught with consequences of a very serious difficulty, and contrary to all principles of right and justice, if this Court were to hold that when a parent  
10 or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this Court might be of opinion that an English Course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve on the other hand this result, that an English  
20 ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilised communities."

The facts of the present case call much more strongly than did the facts of any of the cases I have cited for the question of the custody of the infant being left to the Courts of the country to which he belongs, and from  
30 which he has been improperly removed.

The respondent attempts to justify his disregard of the order of the California Court by disputing its jurisdiction. It was by the order of the Court, made on his petition in the divorce proceeding in which he was the cross-complainant, that he had custody of the infant, who, up to that time, had been with his mother. Subsequent orders affecting custody were made in the same proceeding. The application to the California Court in 1945 was initiated by the respondent, who, in continuation  
40 of the same proceedings, asked for a modification of the then existing order for custody by eliminating from it any provision giving the appellant the right to have the child at any time. The respondent was personally present in Court at all these proceedings, submitting himself to the jurisdiction of the Court. When, on August 1st, 1945, an order was made against him, he did not ignore it as



an order made without jurisdiction. He appealed from the order. When his appeal was dismissed he asked for a re-hearing and when that was refused he applied for a further hearing to the final Court of appeal available to him in California. He was in the State of Michigan on December 24th, 1946, and had the infant in his custody there. He evidently had little doubt of the jurisdiction of the California Courts, for he did not  
10 consider the State of Michigan any longer a safe place. He fled from Michigan to Canada. He is a qualified attorney in Michigan and should have known his position under its laws.

While the respondent attempts now to put another face upon his conduct in bringing the infant into Ontario, and pretends that it is the consummation of a long-cherished ambition, the facts leave no room for doubt as to his purpose. He learned of the adverse order by the California Court on December 24th while at Port  
20 Austin, in an out-of-the way corner of the State of Michigan. There is nothing to indicate that up to that moment he had any intention of going anywhere, and, least of all, of changing his place of residence to another country. With no other explanation for his sudden decision to take such a journey with a young boy in winter, he set out. He had his Christmas dinner at the Village of Linwood, in the County of Waterloo, Ontario, and arrived at Kitchener the following day, December  
26th. He had no prior arrangements for accommodation  
30 there, but, with the child, put up at an hotel. After a few days he arranged to board with the Aments, where they remained for a matter of months. There is no evidence that anyone expected respondent at Kitchener, or anywhere else in Ontario.

In none of the cases that I have hereinbefore cited were the grounds for non-interference with the jurisdiction of the Courts of the country to which the infant belonged, as strong as in this case. Here there is not only contempt of the Courts of his own country, to which  
40 respondent had applied, but there is a breach of his own agreement with the appellant. That agreement was approved in the divorce decree under which he had custody of the child. It is not suggested that the removal of the child into Ontario was for the benefit of the child. The respondent has always stoutly maintained that Port Austin, Michigan, was unobjectionable as a residence for him.

I cannot too strongly state my opinion that there is 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 this Province in breach of his agreement not to remove the infant from the country to which the infant belongs, and in defiance of, and solely for the purpose of evading the order of the Courts of that country, to which Court respondent had himself submitted the question of custody. Any jurisdiction to deal with the infant that an Ontario Court may have acquired as the result of such conduct, it should exercise only for purpose of returning the child, in proper custody, to the country whose subject he is.

Mr. Justice Wells cited *Re Gay* (1926) 59 O.L.R. 40, in his reasons for judgment. The facts of that case were very different from the facts of the present case. There, the father of the infants was a British subject. He had married in Michigan and the infants were born there, but about two years before the question of their custody arose, the father, with the two infants, had come to Ontario to live with his parents. His wife had apparently remained in Michigan. About two years after the husband had gone to live with his parents in Ontario, taking the children with him, she procured a divorce in Michigan and custody of the infants was awarded to her by the decree. These proceedings by the wife in Michigan were undefended by the husband. There was no taking of the children away to evade the jurisdiction of the Michigan Court, or in breach of any agreement, and the children had already been for about two years, with their father, in the home of his parents in Ontario before the question of their custody was raised.

The trial of the issue before Mr. Justice Wells occupied thirteen days, and in addition there was evidence of nearly 600 pages taken on commission in the United States. In view of my strong opinion that the matter should have been concluded by directing the return of the infant to the United States in safe custody, when respondent's conduct in bringing the infant into Ontario was disclosed, I do not propose to review the evidence. I shall comment on only one or two matters. The learned Judge who tried the issue makes observations as to the rule prevailing in this province that first consideration in determining custody is to be given to the welfare of the infant. I should have thought that one of the chief

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things to consider in that connection is the fact that the respondent has taken the infant, substantially as if he were a fugitive, from his native land, where all his relations live, and has set him down among strangers in a foreign country. The respondent, a man of sixty years, whose business interests are in the United States, cannot give the boy the companionship he needs. It would mean something also to the boy if he were permitted to  
10 grow up in his own country, where his future as a man will probably lie. I know of no case where, in similar circumstances, the Court has exercised jurisdiction as if it was the case of a resident here.

An important admission was made by respondent's counsel during the course of the direct examination of Mrs. Cynthia McKee Pollock, a daughter of the respondent, who is now married. She was one of the members of the respondent's family who were still living at home when the respondent married the appellant. The witness was  
20 telling of what she described as "the sweet and loving and kind manner" in which the appellant took charge of the family home. There had been, according to her evidence, disorder and total lack of discipline after the death of the witness's mother until the coming of the appellant. She says that the appellant saw that they were properly clothed and fed and a great spirit of happiness prevailed throughout the house. In the course of her description of the appellant as a mother in the home, respondent's counsel interjected this state-  
30 ment, "There is not the slightest suggestion that Mrs. McKee has not been a good mother to these children." In the respondent's affidavit filed by way of his return to the writ of habeas corpus he begins, in paragraph 1, with the following, "On or about the 18th day of July 1933 I was married to the said Evelyn McKee, the divorced wife of Lavoy Berry." No doubt the respondent knew of appellant's former marriage for the son of this earlier marriage came with her to respondent's home on their marriage. It seems to me that the quotation I have made  
40 shows clearly the spirit in which the respondent desires to present his case to the Court. A man who would go to the lengths that the respondent did to escape the Courts of his own country, and pay so little heed to his own signed promise not to remove the child from the United States without appellant's consent, is 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

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whole case is tainted by his original misconduct, and should have been viewed with grave suspicion.

I have already referred to the omission from the order directing the trial of an issue, of any reference of the habeas corpus proceeding itself to the Judge trying the issue, and that notwithstanding this omission Mr. Justice Wells has assumed to deal with the whole matter. This, in my opinion, he had no power to do.

10 And for that reason also his order awarding custody to the respondent cannot stand.

In my opinion the appeal should be allowed, with costs, and the order awarding custody to the respondent should be set aside, and there should be an order for delivery of the infant to the appellant upon her undertaking to return with the infant to the United States of America.

HOGG, J.A.: On the 21st March, 1947, a writ of habeas corpus was issued on the application of the appellant, directed to the respondent and others, requiring the production of Terry Alexander McKee, an infant child of the appellant and the respondent. Upon the return of the aforesaid writ, before Smily J., the appellant asked that the child be delivered into her custody, and, as is recited in the formal order made by the learned Judge, such request was treated as an application for an order for delivery of the infant into the custody of the appellant although no formal application had been filed, and leave was given to her to file such  
20 application. The order directed the trial of an issue to determine, as between the appellant and respondent, who should have the custody of the infant Terry Alexander McKee.  
30

The issue was tried at the sittings of the Court held in the City of Kitchener, in September and October 1947, by Wells J., who ordered that the respondent be given the sole custody of the child Terry. The appeal now under consideration is from the said judgment of Wells J.  
40

In an endeavour to obtain a clear understanding of the matter, certain of the salient facts should first be mentioned.

The parties were married on the 18th July, 1933, and the child Terry was born on the 14th July, 1940.

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differences having arisen between the appellant and the respondent, they separated and subsequently have lived apart and in the year 1941 they entered into what is commonly known as a separation agreement, providing, inter alia, that neither of the parties should remove the infant out of the United States of America without the consent of the other.

10 In 1942, the appellant brought an action against the respondent for the dissolution of their marriage, and the respondent set up a counterclaim in which he also claimed dissolution of the marriage and to be awarded the custody of the child Terry.

The action was tried by Mr. Justice Thurmond Clarke, of the Superior Court of the State of California, who delivered judgment on the 17th December, 1942, in favour of the respondent, dissolving his marriage with the appellant and awarding to him the care and custody of the said child, but with the proviso that Terry should  
20 spend three months each summer with his mother.

In the year 1942, a second action or application was brought by the appellant against the respondent who again entered a counterclaim, requesting certain changes in the judgment respecting the award of custody of Terry. As a result of this proceeding, the former judgment was varied with respect to the time when the appellant should have access to the child.

In 1945, the appellant again applied to the aforesaid Court for a change in the former order respecting the  
30 custody of Terry, and again the respondent set up a counterclaim. This application was heard by Mr. Justice Reuben Schmidt, who dismissed the respondent's counterclaim and awarded the full custody of the child to the appellant, with right of access to the respondent. It was also ordered that the child be delivered to the appellant not later than the 1st September 1945, at Los Angeles in the State of California.

The reasons of the learned trial Judge, which were delivered on the 1st August, 1945 for removing the child  
40 from the custody of his father and giving him into the custody of his mother, are that Terry, then of the age of five years, had been kept by his father at his home at Port Austin, in the State of Michigan, that this place was not accessible and was snowbound in winter and subject to severe weather conditions, and that Terry had been under the care and supervision for most

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of the time, of persons hired by his father. Furthermore, that there were no adequate school facilities for the child, and that the appellant had been deprived of the opportunity of visiting him. The learned Judge was of the opinion that the appellant was a fit and proper person to have the custody of Terry, and that it was in his best interest that he be placed in her care.

10 This judgment was affirmed on appeal and a petition for a rehearing was dismissed.

Evidence given upon commission in the present issue was that, according to the rule governing in the State of California, proceedings are stayed in the Court below by an appeal and, as a consequence, the order of Schmidt J. removing Terry from the custody of the respondent and providing that he be given to the appellant, did not become effective until the 13th January, 1946. The child was still in the lawful custody of the respondent in so far as the letter of the law of the  
20 State of California was concerned, when the respondent brought him into the Province of Ontario toward the end of December, 1945, where he has since resided.

The grounds of appeal against the judgment of Wells J., are set out at very considerable length and are many in number, but those which are material, and which were stressed by counsel for the appellant, are as follows:-

(1) That the appellant is a fit and proper person to have the custody of the child and that it is in his  
30 interest that she should have him in her care and custody.

(2) That the judgment of August 1st, 1945, of the Supreme court of the State of California affirmed on appeal, awarding custody of the child to the appellant, should not, in the circumstances present, have been questioned in an Ontario Court.

(3) That the Ontario Court had no jurisdiction to entertain the application for custody.

(4) That the evidence did not show the best interests of the child were served by leaving him in the custody  
40 of the respondent.

It was argued with force by counsel for the respondent that there was good and sufficient ground for holding that the judgment of the California Court pronounced in 1945, was a nullity and of no force or effect, for the reason that the California Court had no jurisdiction to entertain the application when neither the domicile nor

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the residence of the child was, at the time, in the State of California but was in the State of Michigan.

In my opinion, the two main problems which present themselves for solution in this appeal are:-

(1) Has the Supreme Court of Ontario jurisdiction, in the circumstances, to hear the issue and to award custody of the child Terry?

10 (2) If the Court has such right, should it exercise it, and if it should, what, under the circumstances and in the light of the evidence, is best conducive to the welfare and interests of the child Terry?

I do not think it is necessary to consider the question of the validity of the California judgment of 1945.

20 The jurisdiction of the Courts in England and in Canada to entertain and to decide applications for the custody of an infant when a foreign Court has already awarded the custody of such child, has been the subject of judicial pronouncement over a period of many years. In England and in many of the Provinces of the Dominion, the matter of the custody of children has, in more recent times, been the subject of legislation.

In the United States of America, the rule on this subject, as stated in 31 Corpus Juris, 1923 Ed., at p. 988, is said to be:

30 "If the child is actually within the jurisdiction or the Court, although his legal domicile is elsewhere, the Court may determine conflicting claims as to his custody."

In Storey's work on Conflict of Laws, 1883, 8th Ed., p. 697, para. 499, note (a) it is said:

40 "But though a foreign guardian has no absolute rights as such in a foreign jurisdiction, the fact that he is such is entitled to great weight in the courts of another state, when called upon to determine, in their discretion, to whose custody a minor child shall be committed: and if it appears for the best for the child that he should be under the care and custody of a guardian appointed in a foreign state, the court may so decree, even though another guardian has been appointed in the state where the minor subsequently is found."

The case of *Woodworth v Spring* (1862) 4 Allen's Rep. 321, in the Supreme judicial Court of the State of Massachusetts, is a leading authority cited for the

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above mentioned statement of the law by Corpus Juris and by Storey. Edward Spring, a boy of eleven years of age, was brought by the respondent from the State of Illinois to the State of Massachusetts and in the latter state he was appointed guardian of the child. The petitioner had been appointed guardian of the child under the laws of the State of Illinois. A writ of habeas corpus was issued upon the application of the  
10 petitioner for the purpose of asserting his right to the custody of the person of the child. Bigelow C.J., who delivered the judgment of the Court, said at p. 323:-

"Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government . . . . The comity of a state  
20 will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction." And further at p. 324:-

"Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy on which its own government is founded."

In England, the judgment in *Johnstone v. Beattie* (1843) 10 Cl. & Fin. 42, also reported in 8 E.R.657,  
30 laid down the principle which was considered, at that time, should govern. It was held that the English Court had jurisdiction to appoint a guardian for an infant although the Courts of Scotland had already appointed a guardian for the said infant and although her domicile and property was in Scotland and even when the appointment of a guardian in England was requested in order to prevent the return of the child to Scotland.

The decision in the *Johnstone* case was criticized in *Stuart v. The Marquis of Bute*, 9 H. of L. Cas. 440,  
40 where Lord Campbell, in discussing the judgment of Lord Lyndhurst in the former case, said at p. 464:-

"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, is to be treated as a stranger and an intruder. On the contrary, an alien father, whose child had been carried away from him and brought into England, would undoubtedly have the child restored to him in England by writ of habeas corpus; and I believe that the same remedy could be afforded to a foreign guardian standing in loco parentis on the ravishment of his ward."

10 There are several cases on this question of jurisdiction and the manner in which it should be exercised, in this country. In *Re Chisholm* (1913) 13 D.L.R. 811, the custody of infant children had been awarded to their mother by the Court of one of the States of the United States of America.

The judgment of the Court of Appeal of Nova Scotia was delivered by Sir Charles Townsend C.J. who, in the course of his reasons for judgment, said at p. 812;-

20 "We have .... arrived at the conclusion that the prominent consideration in the case must be the welfare of the children and that is the principal thing that we have felt it incumbent upon us to consider .... With regard to the appointment made by the foreign court we think we are not bound. Of course it might be that under certain circumstances it would have considerable weight with us in coming to a decision, but we are not able to see that such circumstances exist in the present case ..... At present we are not satisfied that the mother has made out a case to show that the children  
30 would be any happier or any better looked after if placed in her custody than in the custody of the father and their relatives here. She does not show that she is possessed of more means than the father to pay for their support and maintenance; at any rate nothing has been shown to convince us that the Judge below erred in the exercise of his discretion by leaving the children in the custody of the father."

A case which is perhaps more often cited in our own Courts than any other upon the subject in question, is  
40 *Re Gay*, (1926) 59 O.L.R. 40. A Court of the State of Michigan granted the mother of the infants a divorce from their father and awarded her their custody. Middleton J.A. delivered the judgment of the Court of Appeal and said at p. 42:-

"The decision of Mr. Justice Street in *Re Ethel Davis* (1894) 25 O.R. 579, followed by the full Court of Appeal in Nova Scotia in *re Chisholm* (1913) 47 N.S.R. 250,

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states the correct principle. The foreign guardian has no absolute right as such under the judgment of the foreign court in this country. The decree of the foreign court is entitled to great weight in determining the proper custody here.

10 "Also, upon a narrower principle I think the judgment of the Michigan Court is not entitled to the effect given it by the judgment in review. It is not in itself, now upon its face, final. It determines nothing as to the custody of the infants save at the time of its making, for it reserves liberty to either party to apply for variation. No matter what the form, this is necessarily the case in all orders dealing with the custody of children - they are not in their nature final. The Courts of this country must always exercise the jurisdiction conferred upon them in regard to the custody of infants within this jurisdiction according to the laws of this country."

20 Re Snyder (1927) 3 D.L.R. 151, is a judgment of the Court of Appeal of British Columbia by which it was held that a Canadian Court may award the custody of infants within its jurisdiction to the person to whom it seems in the best interests of the infant to award such custody, notwithstanding the decree of a foreign court awarding the custody otherwise. Macdonald C.J. referring to Storey's work on Conflict of Laws and to Eversley on Domestic Relations, also to Stuart v. The Marquis of Bute, (supra) expressed the following opinion at p. 153:-

30 "Thus it appears that both here and in the U.S. the power and right is recognized of the Court in the country in which the infant is found to appoint a guardian notwithstanding that a guardian may have been appointed in another country. Nor is it disputed that the paramount consideration, paying due respect to the law of nations, is the best interests of the infant."

McPhillips J.A. at p. 155, used the following language:-

40 "Foreign decrees, with the greatest respect to all foreign jurisdictions, cannot be allowed to interfere with the policy of this jurisdiction, as evidenced by our statute law. The view here expressed is well borne out by that admirable and very learned judgment of Bigelow C.J., who delivered the judgment of the Supreme Court of the State of Massachusetts, in Woodworth v. Spring (1862) 4 Allen 321 at p. 322, which well reviews the law of England; and the judgment is in conformity with the law of England and that of this Province."

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Re Ethel Davis (1894) 25 O.R. 579, and Re E (1921) 19 O.W.N. 534, judgments of Street, J. and Rose J. respectively, state the same general principle as to the jurisdiction of the Court.

One of the latest pronouncements by the Courts in England upon the particular question now under discussion, so far as I have been able to find, is the case of Re B-'s Settlement (1940) 1 ch. 54. In this case the father  
10 of an infant was a Belgian National who, upon himself and his wife, the mother of the child, becoming divorced, was entitled under Belgian law to the custody of the child. The mother, who had gone to live in England visited Belgium and having been given the custody of the infant for several days, took him to England and did not return him. After the child's mother had gone to Eng-  
20 land with him, the Belgian Court appointed the father the child's guardian and gave him the custody of the infant and ordered the mother to return the child to the father, which she did not do. An application was made in England by the father requesting the delivery of the child to him. The matter was tried by Morton J., before whom it was argued on behalf of the applicant, that the Court should not interfere with the order of the Belgian Court, for the reason that the infant was a foreign national and it would not be right for the Court to assume jurisdiction over a foreign infant who had already been dealt with by a foreign Court, as to do so  
30 would be contrary to the principles of international law and the comity of nations. It was argued on behalf of the child's mother that in asking for his custody she was thinking solely of his benefit. The child had been living in England with his mother for about two years where he had been attending school. Morton J., expressed the view that he should first consider the welfare of the child and "must treat his welfare as being the paramount consideration." He thought that the best thing, from the boy's point of view, was for him to remain with his mother until further order and continue to attend  
40 the school which he was then attending. Morton J., further said at p. 59:-

"At the moment my feeling is very strong that, even assuming in the father's favour that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England, for the time

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being .... I think that at the present time, whatever may have been the position before the Act of 1925, this Court is always bound to exercise a judgment of its own when dealing with the custody of a ward. In my view, under s. 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any  
10 views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country."

The judgment then goes on to state that no general rule is laid down as to the weight which the Court should attach to the orders of a foreign Court in dealing with the custody of a child who is a foreign national but  
20 that the weight to be attached to such orders "might depend upon the circumstances of the particular case which the Court has to decide."

The fact that the paramount principle which should govern the determination by the Court in a matter of concern to the future life of a child is its welfare and best interests, was the basis of the decision of the Judicial Committee of the Privy Council in *Ward v. Laverly*, 1925, A.C. 101. Viscount Cave said that -

"It is the welfare of the children which, according  
30 to the rules which are now well accepted, forms the paramount considerations in these cases .... in the more recent decisions and especially since the passing of the Guardianship of Infants Act 1886, section 5 of which Act shows the modern feeling in these matters, the greater stress is laid upon the welfare and happiness of the children."

This judgment was followed by the Court of Appeal in *Re Laurin* (1927) 60 O.L.R. 409.

In *Re Armstrong* (1915) 8 O.W.N. 567, Middleton J.,  
40 expressed the opinion that no agreement between parents could absolve the court from considering the child's welfare which was paramount.

By section 1, subsection 1 of the Infants Act, R.S.O. 1937, ch. 215, it is declared that the Court may make such order as it sees fit "regarding the custody of the infant and the right of access thereto of either parent,

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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 ...."

A further point to be considered in connection with this appeal in determining the effect in Ontario of the judgment of the Superior Court of the State of California of 1945, is that this judgment is not final in the sense that it is not unalterable by the Court which pronounced

10 it.

In *Nouvion v. Freeman* (1889) 15 H. of L. A. C. 1, it was held by the House of Lords that an English Court is not bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. Lord Watson said at p. 13, "It must be final and unalterable in the Court which pronounced it."

*Harrop v. Harrop* (1920) 3 K.B. 386, is a later case again affirming that same principle and it was one of the reasons for the judgment in the *Gay* case (*supra*).

20 See also *Dicey on Conflict of Laws*, 5th Ed. p 467.

This point is of minor importance in connection with the present appeal.

For the above stated reasons, my opinion is, that the Supreme Court of Ontario, in the circumstances of this case, has and had jurisdiction to hear the issue and to award the custody of the child Terry.

The governing principle in more modern times, or what is termed by the authorities, the paramount consideration in cases concerning the custody of a child, being its

30 welfare, there remains to be considered what is in the best interests of Terry in the light of the evidence before the Court.

During the two years which, at the date of the judgment of Wells J., had elapsed since 1945, when the Superior Court of the State of California altered their former judgment and awarded the custody of the child Terry to his mother, the circumstances had changed.

Upon a review of the evidence, I have formed the opinion, which coincides with that of the trial Judge, the reasons

40 for which he has set out in his well-considered and well-expressed judgment, -that it is in the best interests of Terry, who is over seven years of age, having regard to his welfare, not only from the view point of his present life and education, but as well in the light of his future prospects, that he should be left in the custody of his father.

Stress was laid by counsel for the appellant upon the

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fact that it is a proper inference to be drawn, that the respondent had brought Terry to Ontario in anticipation that the judgment of the Court of California would deprive him of custody of the child, and as a consequence our Courts should not contenance such an act. But even in such case, I think that the weight of authority is to the effect that such circumstances cannot be held to override the paramount consideration in cases of this nature, namely, the welfare of the child. It is to be recalled that Terry was not taken out of the hands of his guardian and brought into Ontario and that the circumstances are not the same as those spoken of by Lord Campbell in the Marquis of Bute case.

A question was raised on the hearing of this appeal as to whether the proper procedure had been followed; whether the habeas corpus proceedings before Smily J., had come to an end; whether Wells J. had jurisdiction to make an order determining who should have the custody of the child, and whether, having regard to the procedure adopted, this Court should give effect to the order so made.

Upon the return of the writ of habeas corpus, Smily J., was of the opinion that an application should have been made by the appellant for the custody of the child Terry, in addition to the proceeding under the writ, and he allowed the appellant to make such application as is shown by the order as entered, to which I have already referred. On the opening of the trial of the issue counsel for the appellant made formal application to Wells J. for the delivery to her of the custody of the child and at the conclusion of the trial, Wells J. made the order regarding custody. No further steps were taken in the habeas corpus proceedings, beyond an unsuccessful application for leave to appeal from the order of Smily J. Both of the learned Judges apparently were of the opinion that the matter of custody could be determined at the trial of the issue, upon the application made by the appellant as provided by the Infants Act, independent of and without further reference to the former proceedings by way of habeas corpus.

Bailey, on Jurisdiction, in speaking of the writ of habeas corpus in its relation to the custody of children, says at p. 514;-

"Although denominated proceedings in habeas corpus and possessing elements that are incident thereto, they are in some respects unlike the ordinary proceedings for

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the release of a party held on a criminal charge."

The report of the appeal of *Smart v. Smart*, (1892) A.C. 425, to the Privy Council from this Court sets out that where a writ of habeas corpus had been applied for by a husband against his wife in respect of their three children, it was arranged during the course of the proceedings that he should also present an application for the custody of the children and that the questions in  
10 both proceedings be tried simultaneously.

In *Re Harding*, 63 O.L.R. 518, a case relating to the custody of a child, Orde J.S. said that relief under the Infants Act "while in a sense an alternative to that available by way of habeas corpus, is neither dependent upon nor co-incident with that form of relief."

The judgment in the New Zealand case of *Re J.H. and L.T. Thomson (Infants)*, (1911) 30 N.Z.L.R. 168, is to the effect that where a father asks for a writ of habeas corpus to take a child out of the custody of its mother,  
20 the Court is not confined to granting or refusing the writ but can give effect to the provisions of the Infants Act 1908, although no application under that statute has been made by the mother.

Part 1 of the New Zealand Statute No. 86, of the consolidated Statutes of 1908, gives the Court, in effect, the same jurisdiction to be exercised upon the same principles regarding the custody of children, as is found in our own Infants Act.

The question of a defect in proceedings for the custody of a child, where the matter had been decided upon the merits, as in the case now the subject of this appeal, was considered in *Stevenson v. Florant*, (1927) A.C. 211, where it was held that an objection to the form of the proceedings should not be allowed to prevail after it has been concluded that one of the parties to such proceedings should have the custody of the child. There, one of the questions before the Judicial Committee was whether an application under the Code of Civil Procedure of the Province of Quebec was proper for the purpose of  
40 determining the question of the custody of an infant, such proceedings being in substance of the same nature as an application for a writ of habeas corpus. Sir Thomas Warrington, who delivered the judgment of the Judicial Committee, after stating that their Lordships had come to the conclusion that the authority of the mother and her right to the custody of the child ought to prevail, said at p. 216: "They (their Lordships) would

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not be disposed to treat these proceedings, in which the whole question has been considered on the merits by three Canadian Courts, as ineffective by reason of a defect in procedure, and to require the respondent to institute proceedings in another form which (according to their Lordships' view) would end in the same result.

10 If there be a valid technical objection to the form of proceedings, and if they ought to have been instituted by an ordinary writ of summons, the Court would properly in the interests of both parties and acting under act. 3 of the Code of Civil Procedure set aside the objection and make the order which would have been made if the form had been strictly correct."

20 I do not think this Court should, even if it be assumed there was a defect in procedure, "treat these proceedings in which the whole question has been considered on the merits,....as ineffective", to use the language of Sir Thomas Warrington in the Stevenson case, but should, "make the order which would have been made if the form had been strictly correct."

For the reasons I have set out, I have concluded the appeal should be dismissed but, under the circumstances, without costs.

AYLESWORTH J.A. agrees with Hogg J.A.

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SOLICITOR'S CERTIFICATE

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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

10 IN THE MATTER OF an application of Evelyn McKee as next  
friend and legal guardian for possession of her son  
Terry Alexander McKee.

B E T W E E N:

EVELYN MCKEE,

(Plaintiff) Appellant,

20

-and-

MARK T. MCKEE,

(Defendant) Respondent.

I, Robert Irvin Ferguson hereby certify that I  
have personally compared the annexed print of the case  
in appeal to the Supreme Court of Canada with the  
originals, and that the same is a true and correct re-  
30 production of such originals.

Solicitor for the Appellant.

The case herein is hereby approved as printed.

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Solicitor for the Respondent

9, 1951  
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**PART V.**

No. 1.

**FORMAL JUDGMENT.**

**IN THE SUPREME COURT OF CANADA.**

Tuesday the 6th day of June, 1950.

Present :

- The Honourable Mr. Justice KERWIN.
- The Honourable Mr. Justice TASCHEUREAU.
- The Honourable Mr. Justice KELLOCK.
- The Honourable Mr. Justice ESTEY.
- The Honourable Mr. Justice LOCKE.
- The Honourable Mr. Justice CARTWRIGHT.
- The Honourable Mr. Justice FAUTEUX.

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**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 :**

Between EVELYN MCKEE - - - - - Appellant

and

20 MARK T. MCKEE - - - - - Respondent.

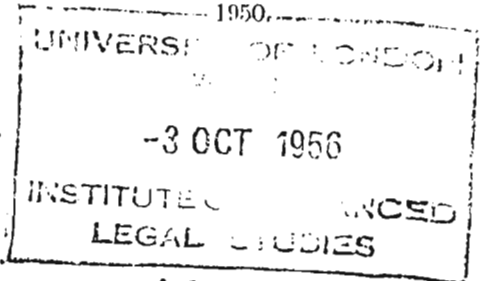
The appeal of the above-named Appellant from the Judgment of the Court of Appeal for Ontario pronounced in the above cause on the 24th day of June in the year of Our Lord One Thousand Nine Hundred and Forty-eight affirming the Judgment of the Honourable Mr. Justice Wells rendered in the said cause on the 18th day of October in the year of Our Lord One Thousand Nine Hundred and Forty-seven following the trial of an issue directed by the order of the Honourable Mr. Justice Smily dated the 2nd day of April in the year of Our Lord One Thousand Nine Hundred and Forty-seven, having come on to be heard before this

30 Court on the 15th, 16th, 17th, 20th and 21st days of March in the year of Our Lord One Thousand Nine Hundred and Fifty in the presence of counsel as well for the Appellant as for the Respondent whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment, THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed and that the said Judgment of the Court of Appeal for Ontario and the said Judgment of the Honourable Mr. Justice Wells should be and the same were reversed and set aside.

40 AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the Appellant, having undertaken that she will forthwith return with the above-named infant, Terry Alexander McKee, to the United States of America and that she will keep the Respondent fully advised as to the said Infant's whereabouts, should and do have the custody

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*continued.*

of the said infant and that the Respondent should and do deliver the said infant into the custody of the Appellant at the office of the Registrar of the Supreme Court of Ontario at Osgoode Hall, in the City of Toronto in the Province of Ontario, on Wednesday the 14th day of June in the year of Our Lord One Thousand Nine Hundred and Fifty between the hours of 10.00 and 11.00 o'clock in the forenoon, Eastern Standard Time.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the Respondent should and do pay to the Appellant her costs of this appeal including the costs of the motion by the Respondent to this Court to quash the said appeal (but excluding the costs of the motion 10 by the Appellant to this Court to extend the time for completing her appeal, with respect to the costs of which motion this Court did not see fit to make any order) and the costs of all proceedings had and taken herein in the Supreme Court of Ontario including the costs of the issue and service of the Writ of Habeas Corpus, of the issue and execution of the commission or commissions to take evidence herein, of the proceedings before the Honourable Mr. Justice Smily and of any interlocutory proceedings the costs of which have not already been disposed of.

AND THIS COURT DID FURTHER ORDER AND DIRECT that in taxing the costs of the motion to quash consideration is to be 20 given to the fact that at the time the said motion was launched the Respondent was entitled to move on the ground of delay in completing the appeal.

"PAUL LEDUC,"

Registrar.

No. 2.  
Reasons for  
Judgment.  
(a) Cart-  
wright, J.  
(concurring  
in by  
Kerwin,  
Estey and  
Locke, JJ.).

No. 2.

REASONS FOR JUDGMENT.

(a) CARTWRIGHT, J. : (Concurred in by Kerwin, Estey and Locke, JJ.)

This is an appeal from the judgment of the Court of Appeal for Ontario dismissing an appeal from an Order of Wells, J., made in habeas 30 corpus proceedings, awarding the custody of Terry Alexander McKee, an infant child of the parties, to the Respondent.

The Appellant is the mother and the Respondent is the father of the infant. The Respondent is an Airlines Executive and has been for more than thirty-three years an attorney of the State of Michigan. The Appellant and the Respondent are American citizens. They were both born in the United States of America and, until the Respondent came to Ontario in December, 1946, in the circumstances to be mentioned hereafter, had always lived there. They were married in Vermont in 1933. The infant was born in the State of California on the 14th of July, 40 1940. The parties separated in December, 1940, and have not resided together since that date. Under date of the 4th of September, 1941, the parties executed an agreement which is referred to in the proceedings as

a Property Settlement agreement. This agreement does not make specific reference to the question of the custody of the infant, but it contains the following paragraph :—

“ It is further understood and agreed that neither of the parties hereto shall remove Terry Alexander McKee, son of the parties hereto, from or out of the United States of America without the written permission of the Party not so removing, or wishing to remove said boy from the United States of America.”

10 On September 18th, 1941, the Appellant commenced an action for divorce in the Superior Court of the State of California in and for the County of Los Angeles. The Respondent entered a cross-complaint for divorce. After a trial which occupied sixteen days and concluded on November 20th, 1942, the Honourable Thurmond Clarke delivered judgment on December 17th, 1942, dismissing the Appellant's complaint and granting the Respondent a divorce on his cross-complaint. This judgment awarded the custody of the infant to the Respondent, but directed that the infant should spend three months each summer with the Appellant. The judgment also affirmed and approved the agreement above referred to. It was conceded before us that this judgment was  
20 valid, and that the Court had jurisdiction to pronounce it.

Subsequently, there were applications by both parties to the Superior Court of the State of California for modification of this Order and certain minor modifications were made.

In May, 1945, the Respondent made an application to the same Court in California in the proceedings in which the Order of December 17th, 1942, as to custody had been pronounced, asking for a modification of the terms of that Order as to custody. The Appellant delivered a cross-application and the two applications were heard together before the Honourable Ruben S. Schmidt in June, 1945. The hearing occupied  
30 five days. By Order, dated August 1st, 1945, the previous orders of the Court were modified to provide that full custody of the infant be awarded to the Appellant with the right of reasonable visitation allowed to the Respondent. It appears that the infant was not in the State of California in May, 1945, when the application for modification was commenced by the Respondent, but was in that State while the hearing was proceeding. The Order of August 1st, 1945, permitted the Respondent to have the infant in Port Austin, Michigan, until September 1st, 1945, on which date it was ordered that the infant be delivered to the Appellant in Los Angeles, California. From this Order, the Respondent appealed to  
40 the District Court of Appeals in California and the appeal was dismissed in November, 1946. The Respondent applied for a re-hearing which was denied, and then applied for leave to appeal to the Supreme Court of California and this application was denied on the 23rd of December, 1946. Evidence was given that under the laws of the State of California these appeals had the effect of staying the operation of the Order of August 1st, 1945, until the filing of a remittitur, following their final disposition. In the result the Order of August 1st, 1945, did not become effective until the 13th day of January, 1947, so that the infant continued to be in the custody of the Respondent except that he spent three months with the  
50 Appellant during the summer of 1946.

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(a) Cart-  
wright, J.  
(concurrent  
in by  
Kerwin,  
Estey and  
Locke, JJ.),  
*continued.*

*In the  
Supreme  
Court of  
Canada.*

No. 2.

Reasons for  
Judgment.  
(a) Cart-  
wright, J.  
(concurring  
in by  
Kerwin,  
Estey and  
Locke, JJ.),  
*continued.*

On or about the 24th of December, 1946, the Respondent who was then residing with the infant at Port Austin, Michigan, received word that his final appeal had failed, and he thereupon proceeded with the child into the Province of Ontario. He did this without the permission or knowledge of the Appellant. The Appellant was not able to discover the whereabouts of the Respondent and the infant until some time in the month of February, 1947. She then instituted habeas corpus proceedings in the Supreme Court of Ontario seeking to have the infant delivered to her. Her application was supported by her own affidavit setting out the relationship of the parties, the place and date of the infant's birth, the delivery of the judgment of the Honourable Ruben Schmidt, and the denial of the Respondent's appeal. The affidavit further stated that on or about the 24th day of December, 1946, the Respondent without any knowledge or consent on the part of the Appellant and with intent to deprive her of the lawful custody of the infant had brought him to the city of Kitchener and was there detaining him. A copy of the judgment of the Honourable Ruben Schmidt was made an exhibit to this affidavit. 10

A Writ of Habeas Corpus was issued on 21st March, 1947, pursuant to the Order of Treleaven, J., and the return came before Smily, J., on the 25th day of March, 1947. 20

By way of return to the Writ, the Respondent filed a lengthy affidavit. In this he stated that at the date of his marriage to the Appellant he was domiciled and ordinarily resident in the State of Michigan and had continued to be domiciled and ordinarily resident there until December, 1946, when he had moved to Ontario, and that he intended to make his permanent home in Ontario. He made numerous allegations reflecting on the character of the Appellant. He questioned her fitness to have the custody of the infant and stated that in his opinion it was better for the infant to be in his custody than in that of the Appellant. He claimed that the Order of the California Court of the 1st of August, 1945, was made without jurisdiction, and would not be enforceable in the State of Michigan. As pointed out by the learned Chief Justice of Ontario, the affidavit contained no denial of the statement in the Appellant's affidavit that the Respondent without any knowledge or consent on her part and with intent to deprive her of the lawful custody of the infant had brought him to the city of Kitchener. 30

Smily, J., reserved the matter and on 2nd April, 1947, gave judgment directing the trial of an issue. The question directed to be tried was "Who is to have the custody of the infant, Terry Alexander McKee, as between the said Evelyn McKee and the said Mark T. McKee"? This Order did not in terms refer the final disposition of the proceedings on the Writ of Habeas Corpus to the judge trying the issue as it might have done under the provisions of Rule 233. An intention to so refer the matter may perhaps be implied from the term in the Order providing that the costs of the motion for the Writ of Habeas Corpus and of the hearing before Smily, J., should be disposed of by the Judge trying the issue. Wells, J., before whom the issue came on for trial, proceeded as if the final determination of the whole matter had been referred to him. I do not think it necessary to decide whether the practice which was followed was technically correct. I agree with the majority of the Court 40 50

of Appeal that, the matters in dispute having been fully investigated on the merits, no technical defect in procedure should now be allowed to render the proceedings abortive.

On behalf of the Appellant it was urged before Wells, J., as it had been before Smily, J., that in view of the facts as to the citizenship, domicile and residence of the parties set out above, and as the custody of the infant had been awarded to her by the Courts of California after a full hearing in proceedings instituted by the Respondent, and as it was obvious that the Respondent had brought the infant to Ontario to avoid compliance with the Order of the Court whose jurisdiction he had himself invoked, custody of the infant should be given to her. Wells, J., however, was of the view that he was bound by authority to investigate the whole matter at length and to reach a determination as to what, in his view, would be in the best interests of the infant without being in any way bound by the California Judgment, although, as he expressed it, that Judgment was entitled to be given the greatest weight.

The trial before Wells, J., occupied eleven days. Wells, J., reserved Judgment and later gave Judgment awarding custody of the infant to the Respondent, and giving the Appellant the right of access once a week. The Appellant appealed to the Court of Appeal, and the appeal was heard by Robertson, C.J.O., Hogg and Aylesworth, J.J.A. The hearing of the appeal occupied six days. The appeal was dismissed, Robertson, C.J.O., dissenting. The Appellant then appealed to this Court.

Some of the matters which were fully argued before us appear to present little difficulty. I think that there is no doubt that the Ontario Court had jurisdiction to hear and determine the question as to which of the parties was entitled to the custody of the infant. Indeed, under the circumstances, there was no way in which the Appellant could obtain the custody of the infant who was in fact physically present in Ontario other than by application to the Ontario Courts. Counsel for the Appellant did not question the jurisdiction of the Ontario Court, and there is nothing in the dissenting Judgment of the learned Chief Justice of Ontario to suggest that he entertained any doubt that such jurisdiction existed. The question to be determined is how a jurisdiction admittedly existing should have been exercised in this particular case.

Much argument was addressed to us and reference was made to many authorities on the question whether the judgment of the California Court of August 1st, 1945, was binding upon and enforceable in the Courts of Ontario. I do not think it necessary to examine the authorities. I think they make it clear that the California judgment is not binding upon the Courts of Ontario in the sense that a judgment for payment of a sum certain in money pronounced by a foreign Court, which according to the rules of Private International Law recognized in Ontario had jurisdiction over the parties, will be enforced in an action brought on such judgment in the Courts of Ontario.

In my view, it was rightly held by Wells, J., and the Court of Appeal that the judgment of a foreign Court as to the custody of an infant need not as a matter of binding obligation be followed in our Courts, although great weight must be given to it. For this reason it is in my opinion of

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Kerwin,  
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No. 2.

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Judgment.

(a) Cart-  
wright, J.  
(concurrent  
in by  
Kerwin,  
Estey and  
Locke, JJ.),  
*continued.*

little importance to discuss whether, according to the rules of Private International Law recognized by the Courts of Ontario, the Superior Court of California had jurisdiction to pronounce the Judgment of August 1st, 1945; because even if that Court had jurisdiction in such sense, its judgment would not be conclusive in our Courts but only of great persuasive effect.

No doubt in Ontario the well-established general rule is that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant. In my respectful opinion, however, no case to which we were referred is authority for the proposition for which Counsel 10 for the Respondent was forced to contend; that where, as in the case at bar, an infant and both of his parents are citizens of a friendly foreign State in which they all are domiciled and have always resided, when the question of such infant's custody has been fully litigated in the Courts of such State, and those Courts after full and careful hearings have reached a decision that one of the parents is to have custody, the other parent upon such decision being given, by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the Judgment of the Court whose jurisdiction he himself invoked and in breach of his own agreement which had been 20 ratified by such Court, becomes entitled as of right to have the whole question re-tried in our Courts, and to have them reach a new and independent Judgment as to what is best for the infant.

It seems to me that to give effect to such an argument would bring about a state of confusion in matters of custody. It is now our duty after hearings in the Courts of this country which have consumed a total of twenty-two days to give the custody of this infant to one or other of the parties. If by our judgment we should approve the proposition set out above and the disappointed party should be able, by stealth or otherwise, to carry the child over the border into the Province of Manitoba, 30 the Courts of that Province would be bound by our Judgment, not to order that the child be handed back to the party to whom custody had just been awarded, unless and until, after re-investigating the whole matter, as Wells, J., did, from the time of the birth of the infant, they were of opinion that this was the course most likely to advance the infant's welfare. Such a result would mean that any parent, possessing ample financial means and sufficiently lacking in respect for the orders of the Courts and for his own undertakings, could, by moving from Province to Province prolong litigation as to an infant's custody until such infant 40 attained his majority.

I do not mean by anything that I have said that I disagree with the view expressed by Morton, J., in *Re B—'s Settlement* [1940] 1 Ch. 54, that the Courts of this country are not bound blindly to follow the Judgment of the Court of a foreign State as to the custody of an infant who is a citizen of such State. No doubt cases have arisen in the past and may arise in the future where it would be the duty of our Courts to refuse to follow what had been decided by the Courts of a foreign country as to the proper custody of an infant who is a subject of such foreign country. Nothing would, I think, be gained by suggesting examples of such cases. In my opinion the case at bar is not one of them. 50

It seems to me that the following considerations are sufficient to dispose the case at bar. The infant and both of his parents are citizens of the United States and have always lived in that country. By an agreement entered into between them, they covenanted that neither of them would remove the child from the United States without the consent of the other. This agreement was confirmed by the Courts of California in a judgment which both parties concede to be a valid one. The Courts of California in 1942 gave the custody of the infant to the Respondent, but clearly did not regard the Appellant as being an unfit person to have the custody of the child, as she was allowed custody during three months in each year. The Courts of the same State, in an application made by the Respondent, in 1945, after a full hearing, came to the conclusion, not only that the Appellant was a fit person to have the custody of the child, but that it was better for the child that she should have its custody than that it should be left in the custody of the Respondent. It appears that in both of these judgments the welfare of the infant was regarded as of primary importance. The Respondent does not appear to have suggested in any of the proceedings in the Courts of the United States that it is to the advantage of the infant that he should reside and be brought up in Ontario rather than in the United States, the country of which he is a citizen and in which his future would seem to lie, except that up to the present in Ontario the Respondent has been able to retain the infant in his custody. It is clear on the evidence that the Respondent removed the child to Ontario without intending any benefit to the child, other than the supposed benefit which the child would derive from remaining in the custody of the Respondent. Wells, J., did not find that the Appellant is an unfit person to have the custody of the child. After reviewing the evidence including that as to the Respondent's business interests and the material prospects of the child, the learned Judge reached the conclusion that the interests of the infant would be best served by leaving him where he is in the custody of the Respondent, but there is nothing in his reasons or in the evidence to suggest that the welfare of the child would be endangered by his returning in the custody of his mother to his own country. Wells, J., while observing on the practical difficulties of giving effect to such an order, directed that the mother should have access to the infant once a week.

It does not, I think, lie in the mouth of the Respondent to suggest that the Appellant is not a fit person to have the custody of the child, although he stoutly maintains his own greater fitness. This is shown, in my view, by the letter of the 25th of April, 1947, written by the Respondent's solicitors to the solicitors for the Appellant while the Ontario proceedings were pending, and which counsel for the Respondent introduced in evidence before Wells, J. This letter was written in an effort to bring about a settlement and one of the proposed terms was that the infant should spend the months of July and August in each year with the Appellant "at her home in California or at any other place where she may be from time to time," and that she should have the right of access to the infant at all reasonable times during the remainder of the year.

If this litigation had arisen between persons and in respect of a child who had a normal and bona fide residence in Ontario, and a trial Judge

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had reached the conclusion that on weighing up the various advantages and disadvantages it was on the whole more beneficial for the infant to remain with one parent, and this finding had been affirmed by the Court of Appeal, we should, I think, be very hesitant to disturb it. In my opinion, however, the matter should be very differently approached when it is obvious that one of the parties has brought the child into this Province in the final moments of a protracted litigation in his own country for the purpose of avoiding obedience to the Judgment of its Courts, and in deliberate disregard of his own agreement.

I think there is no difference in principle on the facts of this case 10 from the case, suggested in argument, of a citizen of the United States fleeing that country on the day that a Judgment as to custody was pronounced against him, bringing the infant with him and being served with a Writ of Habeas Corpus issued in Ontario on the following day. There was no avoidable delay on the part of the Appellant in invoking the aid of the Ontario Courts. The delay which did occur was caused by her inability to discover the whereabouts of the Respondent and the infant.

Even apart from these considerations, I would think it gravely doubtful whether the Order now in appeal is one which is really for the 20 benefit of the infant. In view of the attitude of the Respondent, as shown by his conduct, it would have the effect of virtually exiling the infant from his own country during his minority. It would make it substantially impossible for him to spend any time with his mother, with whom he has spent part of every year since his birth up until the year 1947.

I respectfully agree with the views expressed by the learned Chief Justice of Ontario when after discussing the cases of *Hope v. Hope* (1854), 4 De G., M. & G. 328, *Re Harding* (1929), 63 O.L.R. 518, and *Nugent v. Vetzera* (1866), L.R. 2 Eq. 704, he says :—

“ The facts of the present case call much more strongly than did 30 the facts of any of the cases I have cited for the question of the custody of the infant being left to the Courts of the country to which he belongs, and from which he has been improperly removed.”

and further where he says :—

“ I cannot too strongly state my opinion that there is 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 this Province in breach of his agreement not to remove the infant from the country to which the infant belongs, and in defiance of, and 40 solely for the purpose of evading the order of the Courts of that country, to which Court respondent had himself submitted the question of custody. Any jurisdiction to deal with the infant that an Ontario Court may have acquired as the result of such conduct, it should exercise only for purpose of returning the child, in proper custody, to the country whose subject he is.”

There is no appeal before us from the Order of Smily, J., but because similar cases may arise in the future I desire, with the greatest respect, to express my opinion that that learned Judge should not, in the circum- 50 stances of this case as disclosed in the material before him, have directed

an issue but should have directed that the child be delivered into the custody of the Appellant on her undertaking to return with him to her home in the United States.

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I think it desirable to say a few words in regard to the Judgment of Morton, J., in *Re B—'s Settlement* [1940] 1 Ch. 54. Counsel for the Respondent relied upon this case as supporting the judgment in appeal, and laid particular stress on the following passage, which appears to have been approved by the majority of the Court of Appeal in the case at bar :—

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10 “ In my view, under s. 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country. If there are any observations in the two cases cited (*Nugent v. Vetzera*, L.R. 2 Eq. 704 and *Di Savini v. Lousada*, 18 W.R. 425) which state or imply  
20 a contrary view, these observations ought not, in my view, to be followed at the present day.”

In my view the facts in that case are dissimilar from those in the case at bar. The following important differences may be noted. In that case, the mother of the infant was before her marriage a British national. Following divorce proceedings in Belgium she had returned to live in England, and had a bona fide residence there. The order of the Belgian Court granting custody to the father was an interlocutory order. Morton, J., laid emphasis on this fact, and stated that he did not know how far, if at all, the matter had been considered by that Court on the footing of  
30 what was best for the child or whether it had been regarded as a matter of course that the father being the guardian by the common law of Belgium and the only parent in Belgium, should be awarded custody. This interlocutory order was made on October 5th, 1937, at which time the child was apparently already in England, but was not served upon the mother until December 6th, 1938, more than a year after it was made. There was no agreement between the parties that the child should not be removed from Belgium. While the report does not set out the findings of fact made by Morton, J., and we are left to speculate as to their precise nature, they were such as to move that learned Judge to say : “ At the  
40 moment my feeling is very strong that even assuming in the father's favour, that there is nothing in his character or habits which would render him unfit to have the custody of the child, the welfare of the child requires in all the circumstances as they exist that he should remain in England for the time being.” Morton, J., laid considerable stress on the wording of Section 1 of the Guardianship of Infants Act, 1925, which differs substantially from that of the corresponding section of the Infants Act of Ontario.

The judgment of Morton, J., has been the subject of some comment and criticism (see the *Journal of Comparative Legislation and International Law*, vol. 22, Third Series, page 234 ; 21 *British Year Book of International*

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Law, pages 204-205 ; 4 Modern Law Review, page 64 ; and Cheshire on Private International Law, 3rd edition (1947), pages 537 and 538). In Schmitthoff on Conflict of Laws (1945), at page 285, the judgment is treated as one explaining and depending upon the terms of Section 1 of the Guardianship of Infants Act, 1925, referred to above. While I think that, on the facts, this case is clearly distinguishable from the case at bar, I think it desirable to state my opinion that the proposition laid down in the passage quoted above should not be held to state the law of Ontario applicable to such a case as the one now before us.

I venture to think that neither Wells, J., nor the majority of the 10 Court of Appeal attached sufficient importance to the agreement between the parties providing that the child should not be removed from the United States without the consent of both parties. This agreement appears to me to be reasonable as between the parties and in the best interests of the child. As mentioned, it received the approval of the Superior Court in California in a judgment admitted to be valid. I do not think that any case was made out to warrant the Court sanctioning what the learned trial Judge properly describes as an obvious and flagrant breach of this agreement on the part of the Respondent. I do not find anything in the record to suggest that it was to the advantage of the 20 infant that he should be taken out of the United States of America.

In the result, in my opinion, the appeal should be allowed and an Order should be made reciting the undertakings given by the Appellant at the hearing that she will forthwith return with the infant, Terry Alexander McKee, to the United States of America and will keep the Respondent fully advised as to his whereabouts and directing that the Appellant do have the custody of the said infant and that the Respondent do deliver the said infant into the custody of the Appellant at the Office of the Registrar of the Supreme Court of Ontario at Osgoode Hall, Toronto, on Wednesday the 14th day of June 1950, between the hours of 10 and 30 11 o'clock in the forenoon, Eastern Standard Time.

No doubt the Respondent should be allowed reasonable access to the infant, but I do not think that any useful purpose would be served by our seeking to define in this Order the terms on which such access shall be had. The primary purpose of the proposed Order is that the infant may be taken back to his own country, from which, in my opinion, he ought never to have been removed. No doubt, if the parties cannot agree, the Courts of his own country will make whatever order appears desirable as to access. No reference to access should be made in the formal order of the Court. 40

The Appellant should have her costs throughout, including the costs of the motion to quash the appeal to this Court, the issue and service of the Writ of Habeas Corpus, the proceedings before Smily, J., the issue and execution of the commission or commissions to take evidence, and any interlocutory proceedings the costs of which have not already been disposed of other than the Appellant's motion to this Court for an order extending the time for completing the appeal as to which there should be no order as to costs. In taxing the costs of the motion to quash, consideration should be given to the fact that at the time that motion was launched the Respondent was entitled to move on the ground of 50 delay in completing the appeal.

(b) KELLOCK, J. (concurring in by Taschereau and Fauteux, JJ.).

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The Appellant seeks to set aside the judgment of the Court of Appeal for Ontario affirming the judgment at trial of Wells, J., dismissing her application for judgment awarding her the custody of the infant here in question as against the Respondent, the husband and father. Counsel for the Appellant, in his argument before this Court, rested his case primarily upon (1) a Judgment of the Superior Court of the State of California, dated the 1st of August, 1945, and (2) an agreement of the 4th of December, 1941, made after the parties had separated, in para-  
10 graph 5 of which it was agreed that neither of the parties would remove the infant in question out of the United States without the written permission of the other. The findings of the learned trial Judge as to where the interests and welfare of the child lay were not and could not be, in my opinion, seriously challenged.

The position of the Appellant is that, because the parties to the proceedings and the infant are citizens of the United States of America and were domiciled and resident therein at all times prior to December, 1946, when the Respondent brought his son to Ontario (it is said to avoid the effect of the California judgment affirmed on or about the 23rd of  
20 December, 1946, but not effective prior to the 13th of January, 1947), the Courts of Ontario, as a matter of comity, ought not to exercise their jurisdiction over the infant further than to ensure his return to "his own country." The actual order which the Appellant seeks is one awarding her the custody of the infant on her undertaking that she will forthwith return with him to the United States, and its primary purpose is not that it should be made from the standpoint of the welfare of the child, but merely to effect his removal from Ontario, not necessarily to California, but to one of the States of the Union. The question, therefore, which  
30 lies at the threshold of this case is as to whether the Courts of Ontario, in the circumstances of this case, have a discretion enabling them in effect simply to deport the child, or whether they must apply the ordinary law of Ontario relating to custody of children.

It is not irrelevant to observe at the outset that the contention put forward on the part of the Appellant involves an effect being given to the California judgment which would appear to be beyond the effect which, as stated in "Ruling Case Law," vol. 9, page 477, sec. 293, would be given to it, in the circumstances here present, in any of the States of the Union even under the full faith and credit clause of the federal constitution of the United States. The authors there point out that the  
40 authorities in the United States are in conflict as to the extraterritorial effect of a judgment awarding the custody of the children upon the divorce of the parents (which is the type of judgment in question in the case at bar), some cases holding that, while the judgment is *res judicata* in the State of its rendition and elsewhere so far as the parents are concerned, it is not *res judicata* as to the right of some other State where the children may subsequently be to determine the custody of the children as their welfare may require, while other authorities sustain the proposition that where a decree of divorce fixing the custody of the children of the marriage is rendered in accordance with the laws of another State by a Court of  
50 competent jurisdiction, such decree will be given full force and effect in

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other States so long as the circumstances attending the adoption of the decree remain the same. According to the above text, it is clear on the authorities that, whatever may be the ruling adopted, a foreign decree or order of the character under consideration is not a bar to a subsequent proceeding looking to its modification because of altered conditions since the time of its rendition, where such altered conditions make modification desirable and for the better welfare of the child. A glance at some of the authorities is instructive.

In *Re Bort*, 25 Kansas, 308, the parents were divorced in Wisconsin where they both resided, the father being awarded custody of the children. 10  
Pending the proceedings, the wife removed the children to Kansas where the father took habeas corpus proceedings invoking the Wisconsin judgment and the full faith and credit clause of the federal constitution. The judgment of the Court was given by Brewer, J., later a member of the U.S. Supreme Court, who pointed out that the claim of the petitioner appeared to rest on the assumption that parents have some property rights in the possession of their children, which doctrine had been repudiated by the Courts in Massachusetts. The Court did not put its judgment on that basis, however, but proceeded on the basis that as between the parents, the Wisconsin judgment was a finality, but that— 20

“ we understand the law to be, when the custody of children is the question, that the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that . . . In a divorce suit the Court is limited to the question : which of the two parents is the better custodian of the children ? The decision only determines the rights of the parties *inter se*, but in this proceeding the question is : what do the best interests of the children require ? ”

In *Allen v. Allen*, 17 New York 611, 105 New York App. 628, the wife commenced an action for divorce in the Supreme Court of Illinois 30  
in which the husband appeared. In the course of the proceedings, the latter was enjoined from keeping the children of the marriage out of the State until the further order of the Court. The judgment in the action awarded the custody to the mother who subsequently took habeas corpus proceedings in New York to obtain custody of the children. It was found as a fact that when the parties separated, custody of the children remained by agreement with the father upon the understanding that he would not remove them from Illinois without giving the mother notice of his intention so to do and an opportunity to visit them. This undertaking had been violated by the defendant. In the course of his judgment, Haight, J., 40  
said at page 620 :

“ To our mind, the constitution covers the question under consideration, and it is our duty to give full faith and credit to the decree of the Illinois Court. We do not, however, regard the decree of that Court as binding upon the infants, but it is binding upon the parents, the parties to the action. The infants at the time, being of such tender years as to be unable to choose for themselves as to their custodian, became the wards of the Court, and it was the duty of the Court to choose for them. The Court, in choosing

for them, was required to consider the best interest and welfare of the children. This decision became binding upon the children only for the time being, and as soon as the circumstances of the custodian changed, or other circumstances arose which would make it for the best interests of the children that there should be a change, it would be the duty of the Court in which the decree was originally made, or of any Court having jurisdiction, to make such change. But as between the parties to the action, the parents of the children, they are bound by the matters adjudged and determined in the action, and cannot again re-try the question therein determined.”

10

Upon the merits, the mother was awarded custody.

The Court of Appeal dismissed an appeal of the father :

“ for the reason that the Courts below, upon the view of all the existing facts related to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children ; and in so doing, gave to the Illinois decree not the force of an estoppel or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it.”

20

In *Slack v. Perrine*, 9 App. D.C. 128, the Court of Appeal of the District of Columbia had to consider a judgment rendered in the Court of Chancery in New Jersey in proceedings instituted at a time when that Court had jurisdiction over the parties, but during which proceedings the infants in question had been removed to Washington. The Court held that the New Jersey Court did not lose jurisdiction merely by the removal, and pointed out that otherwise the Court of the District of Columbia itself would lose jurisdiction if the children were again spirited away into another State where the same contention would be open. It was therefore held that the judgment of New Jersey was binding but its conclusive effect was limited to the parties. Insofar as the infants themselves were concerned, their rights could not be concluded or prejudiced by it, their welfare being the matter of paramount consideration at all times and under all circumstances.

30

Coming to the law of Ontario, it is worth noting at the outset, the position of an alien within the King's Dominions. In *Johnstone v. Pedlar* [1921] 2 A.C. 262, Viscount Finlay said at page 273 :

“ The subject of a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance . . . ”

40

At page 274 :

“ *Prima facie* the subject of a State at peace with His Majesty is, while resident in this country, entitled to the protection accorded to British subjects . . . ”

Viscount Cave, page 276 :

“ But so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations.”

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Lord Sumner, page 291 :

“ As soon as it is found to be settled, as the law of our Courts, that they are open to aliens as well as to subjects, I think it follows that they are presumably equally open to them, so far, that is, as actions are brought in support of such civil rights as are recognized in aliens from time to time.”

Lord Phillimore, at page 296 :

“ But an alien *ami* is never *exlex*, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text-books, or in decided cases. The alien *ami*, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalised subject.” 10

At page 297 :

“ From the moment of his entry into the country, the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance.” 20

In *Porter v. Freudenberg* [1915] 1 K.B. 857, Lord Reading, C.J., said at page 869 :

“ Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King’s Courts.”

At page 883 :

“ Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King’s Courts in the administration of justice.” 30

There is not, therefore, one law to be applied to an alien and another to a subject. Both are entitled to the protection of the same law. Appellant, in the present case, by taking proceedings here has invoked that law, and it is the Respondent who is sued. As stated by Lord Reading in the case cited, at page 883 :

“ . . . he is entitled to have his case decided according to law, and if the Judge in one of the King’s Courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the Judge of first instance or other tribunal as any other defendant.” 40

In *Hope v. Hope*, 4 De G. M. & G. 327, which was a proceeding as to custody, Lord Cranworth, L.C., said at 346 :

“ The reason why such a jurisdiction exists over foreign children in this country is, because foreign children, like adult foreigners, while here, are to a certain extent the subjects of the Crown of England, and it has been decided that they are so for many purposes.”

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At page 347 he said :

10 “ There might be cases in which it would be improper that I should attempt to exercise it, as, for example, where both the parents should be abroad, and there should be no property here ; . . . I should in all probability not make an order, because the parties would not be within my control, and they might disobey . . . But here it is to be observed that these circumstances do not exist. The father is within the jurisdiction ; the mother, who though living at Paris yet is a party and has appeared . . . and she is therefore, for this purpose, within the jurisdiction, and a person, therefore, whom an order of this Court may reach ; and being here, I am not to assume that she will disobey any order that may  
20 be made upon her. Therefore, I shall not abstain from making an order upon her merely because she happens to be residing at Paris. That no order could be made on a person abroad would be a dangerous principle to recognise in this country, where there are such facilities for travelling, and where a person may in a few hours get out of the jurisdiction by leaving almost any part of the kingdom, and as easily return again.”

So far as the Courts of Ontario are concerned, their jurisdiction in matters relating to infants stems from R.S.O., 1897, cap. 51, sec. 26, which reads as follows :

30 “ The High Court shall also, subject as in this Act mentioned, have the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say :

\* \* \* \* \*

2. In all matters relating to . . . infants . . . and their estates.”

Section 27 :

40 “ The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England in like cases on the 4th day of March, 1837.”

Section 40 :

“ The High Court shall also have jurisdiction—

\* \* \* \* \*

3. In respect of . . . infants and their property and estates, as provided by the Act respecting . . . infants.” (Then R.S.O., 1897, cap. 68 ; now R.S.O., 1937, cap. 215.)



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It is well settled that where jurisdiction is conferred, the Court is required, rather than merely permitted, to exercise it.

In *The Queen v. Bishop of Oxford* (1879), 4 Q.B.D. 245, Cockburn, C.J., referred at page 259 to what had been said by Jervis, L.C.J., in *MacDougall v. Paterson*, 11 C.B. 755, as follows :

“ When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application.”

10

In *Re Gay*, 59 O.L.R. 40, Middleton, J.A., in delivering the judgment of the Appellate Division, said at page 43 :

“ The Courts of this country must always exercise the jurisdiction conferred upon them in regard to the custody of infants within this jurisdiction, according to the laws of this country.”

In *Re Kinney*, 6 P.R. 245, both parents of the infant there in question were not only citizens, but also resided in the State of Michigan. The child in question had been brought into Ontario for temporary purposes by the husband, and it was alleged by the wife that this had been done in order to place it beyond the jurisdiction of the Courts of Michigan in which cross-actions for divorce and custody were then pending between the parties. The proceeding in the Ontario Court was a habeas corpus proceeding instituted by the mother. After pointing out that the husband and wife were citizens of a foreign country and that their domicile, including that of the child, was foreign, Wilson, J., said at 247 :

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“ 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.”

30

That which is involved in the present case is a matter of custody. The Appellant, under the guise of custody proceedings, asks for an order for which there is no authority outside the Extradition Act or the deportation provisions of the Immigration Act. Even if it could be said that such authority resides in the executive, it has not been committed to the Courts : *Attorney-General v. Cain* [1906] A.C. 542, at 546. In my respectful opinion, there is no jurisdiction in the Courts of Ontario or in this Court to make such an order as the Appellant seeks or to do otherwise than to apply to the circumstances of this case the ordinary law of Ontario as to custody, giving due weight, of course, to the California decree.

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It is always to be remembered that, whatever the position of the Respondent, the infant itself is entitled to rely upon the protection of the Court and the law of Ontario relating to custody of infants. In my opinion, to grant what the Appellant asks would be to ignore these rights. No vestige of authority has been referred to to substantiate such a course.

Since the case of *Re Ethel Davis*, 25 O.R. 579, which received the approval of the Appellate Division in Ontario in *Re Gay (supra)*, it has been authoritatively determined that the motive of a person in coming to Ontario to avoid the results of an anticipated judgment as to custody does not enable the Courts of Ontario to refuse to apply to such a case the ordinary law. The question then is as to what effect is to be given under the law of Ontario to a foreign decree dealing with the custody of children. That law was authoritatively laid down in the Appellate Division by Middleton, J.A., in *Re Gay*, already cited, where, in approving of the previous decisions in *Re E*, 19 O.W.N. 534, and *Re Ethel Davis (supra)*, he said at page 42 :

“ The kidnapping cases cited by Mr. Greene, e.g., *Re v. Hamilton*, do not, as it seems to me, decide anything contrary to what is decided in *Re Ethel Davis*. They decide that when a child is in the custody of the parent to whose custody it has been confided by the Court of the domicile of the parents, it is in lawful custody, so that it is an offence for the other parent to take it away, but they do not decide that if the parent to whom the custody has been awarded by the foreign Court come to the Court in Ontario seeking the enforcement of the foreign judgment the Ontario Court is bound to lend him its aid, even if convinced that if it does so it will not be acting in the best interests of the child . . .

The foreign guardian has no absolute right as such under the judgment of the foreign Court in this country. The decree of the foreign Court is entitled to great weight in determining the proper custody here.

Also, upon a narrower principle I think the judgment of the Michigan Court is not entitled to the effect given it by the judgment in review. It is not in itself, nor upon its face, final . . . No matter what the form, this is necessarily the case in all orders dealing with the custody of children—they are not in their nature final. The Courts of this country must always exercise the jurisdiction conferred upon them in regard to the custody of infants within this jurisdiction according to the laws of this country . . .

Owing to the course adopted in the Court below, the question of the welfare of the infants and the conduct of the parents is not ripe for discussion. This must be determined by oral evidence, and the case is remitted to the Surrogate Court to be dealt with upon oral evidence and in accordance with the provisions of the Statute ” (the Infants Act) “ to which reference has been made.”

In *Re Ethel Davis*, the appellant, while formerly resident in Ontario, had gone to Buffalo, New York, in the year 1890. There the husband filed a declaration in 1891 in which he swore that it was his bona fide intention to become a citizen of the United States of America and to renounce forever all allegiance to Her Majesty. In February, 1892, his wife left him, taking with her the child in question, alleging drunkenness and neglect on his part. She lived apart from him with the children until July, 1893, when, during her absence, he possessed himself of the children and placed them in an orphanage in Buffalo. In September, 1893,

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she instituted proceedings for divorce in the Superior Court at Buffalo upon the ground of his adultery. He appeared in these proceedings and the Court found all the material facts charged against him as true and granted the wife divorce and custody. Shortly before the judgment was pronounced on December 15, 1893, the husband left Buffalo, taking the infant in question with him into Ontario and it was expressly found by the learned trial Judge, Street, J., that this was done "with the apparent object of escaping the consequences of the impending judgment." The mother then came to Ontario and instituted habeas corpus proceedings. This was obviously very shortly after the judgment in the Buffalo Court 10 as the judgment in Ontario was pronounced on May 18, 1894.

The learned trial Judge found that the father had gone to Buffalo intending to reside there permanently and that he was domiciled there. Accordingly, he held that the Court in Buffalo had jurisdiction over the parties which it did not lose merely by reason of the father having left with the object of escaping the consequences of the anticipated judgment. He held, however, that the foreign guardian had no absolute rights as such under the foreign judgment in Ontario, but the fact of her appointment by the Court in Buffalo was entitled to "great weight in determining the proper custody here." On a consideration of all the circumstances, 20 including the conduct of both spouses throughout, the learned Judge held that the interests of the child lay in awarding custody to the mother.

In *Re B's Settlement* [1940] 1 Ch. 54, the application for custody of the infant there in question was by the father, a Belgian national. The mother had been granted a divorce by the Belgian Courts, but the judgment was reversed and the father became entitled to custody by the common law of Belgium. The mother, who had gone to live in England, visited Belgium and was, by a stratagem, enabled to obtain possession of the infant in September, 1937, and took him to England. The father instituted divorce proceedings in Belgium and pending the proceedings, on October 5, 30 1937, was appointed guardian and given custody, the mother being ordered to return the infant within 24 hours of the service of the order on her, which order she did not obey. There was no question in this case, any more than in the case of *Ethel Davis*, but that the foreign Court had jurisdiction over the parties.

The father then came to England and applied for custody, the mother in the meantime having obtained an order making the infant a ward of the Court in England. In these circumstances, Morton, J., at page 58 asked himself :

"From what angle ought I to approach the case, and how far is 40 there any restriction imposed upon the course which I should take by reason of the order of the Divorce Court in Belgium of October 5, 1937, giving custody to the father ?"

With regard to the order of the Belgian Court, the learned Judge said at page 62 :

"I do not think it would be right for the Court, exercising its jurisdiction over a ward who is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937."

The learned Judge was of the opinion that, since the Guardianship of Infants Act, 1925,

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10 “ whatever may have been the position before the Act of 1925, this Court is always bound to exercise a judgment of its own when dealing with the custody of a ward. In my view, under section 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national.”

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In considering the weight to be attached to the judgment of the Belgian Court the learned Judge thought that he could not disregard the fact that it had been made nearly two years before, and he had to deal with the position as it existed at the end of that time. The learned trial Judge in October, 1947, had also to deal with the situation existing over two years later than the California decree of May, 1945.

20 In *Johnstone v. Beattie*, 10 Cl. & F. 42, the House of Lords had to consider an application for the appointment of an English guardian for a Scottish child which had been brought to England after the death of the father for a temporary purpose (see 9 H.L.C. at 464, *per* Lord Campbell). At the time of these proceedings the mother was also deceased. It was held that the Scottish guardians had no authority over the infant in England nor entitled to be confirmed or appointed in England.

In the course of his judgment, Lord Cottenham said at page 113 :

30 “ It was urged, that the Court must recognize the authority of a foreign tutor and curator, because it recognizes the authority of the parent of a foreign child. This illustration proves directly the reverse ; for, although it is true that the parental authority over such a child is recognized, the authority so recognized is only that which exists by the law of England.”

And at page 117 :

40 “ It has been said that if the Court had jurisdiction, it ought not in this case, in its discretion, to have exercised it. This is not very intelligible to those who are accustomed to the proceedings in Chancery. It means, I presume, that the Court ought not to have interfered . . . In truth, however, independently of form, the doctrine of non-interference has no place in the case of an infant, for whose protection no legal right of guardianship in any person in this country exists . . . If there be a father living, or a guardian regularly appointed,” (i.e. in England) “ the Court does not interfere, except to assist the father or guardian, unless in certain cases in which the misconduct of the father or guardian renders interference necessary for the protection of the child.”

At page 84, the Lord Chancellor, Lord Lyndhurst, said :

“ It is proper that I should state, that according to the uniform course of the Court of Chancery—which I understand to be the law of that Court, which has always been the law of that Court—upon the institution of a suit of this description, the Plaintiff, the

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infant, became a ward of the Court—became such ward by the very fact of the institution of the suit; and being a ward of the Court, it was the duty of the Court to provide for the care and protection of the infant; and as the Court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the Court, for the purpose of doing that on behalf of the Court, and as the representative of the Court, which the Court cannot do itself personally. If there be a parent living within the jurisdiction of the Court, or if there be a testamentary guardian within the jurisdiction of the Court, the Court in that case does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the Court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the Court, precisely in the same way as an officer appointed by the authority of the Court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so, as far as I have been able to understand and comprehend.” 10

At page 146 Lord Langdale said :

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“ An infant whose whole property is alleged to be in Scotland, and whose tutors and curators are usually resident in Scotland, is now resident in England and entitled to the protection of the English laws . . . upon the bill being filed, the infant became a ward of the Court of Chancery; and at the same time it became the duty of the Court to protect her interests, or to see that they were duly protected.”

In *Stuart v. Bute*, 9 H.L.C. 440, an infant had been removed to Scotland by one of two guardians appointed in England, who refused to return him, although ordered so to do by the Court. Proceedings were then taken in Scotland for an order for delivery of the infant. With respect to the Scottish Court, Lord Campbell, L.C., said at page 463 : 30

“ The Court of Session had undoubted jurisdiction over the case. By their *nobile officium*, conferred upon them by their Sovereign as *parens patriæ*, it is their duty to take care of all infants who require their protection, whether domiciled in Scotland or not. But I venture to repeat, what I laid down in this House nearly 20 years ago, ‘ that the benefit of the infant which is the foundation of the jurisdiction must be the test of its right exercise.’ ”

The House came to the conclusion upon that principle that it was in the interests of the child that he should be delivered to the English guardian. 40

In *Nugent v. Vetzera*, L.R. 2 Eq. 704, cited by the learned Chief Justice in the Court below, Austrian children had been sent to England for educational purposes and their guardians appointed by the Austrian Court desired their return in accordance with a decree of that Court. This was resisted by a married sister of the children with whom they lived in England. Page-Wood, V.C., refused to interfere with the carrying out by the foreign guardian of the return of the infants to Austria. He

refused, however, to discharge the order which had been made appointing guardians in England and it is significant that in the course of his judgment he was careful to say that the right of the foreign guardian should not be interfered with

“except on some grounds which I do not think it necessary to specify, guarding myself, however, against anything like an abdication of the jurisdiction of this Court to appoint guardians.”

10 This was not the case of a parent in England desiring to keep his or her child there. Both parents were in fact deceased. The evidence on the part of the sister was directed merely to establishing that an English education was superior to an Austrian one, and that the children's mother in her lifetime had desired them to be brought up in England. There was no question raised as to the interests of the children from the standpoint of the suitability of the foreign guardian to have their custody or from the standpoint of their health or well-being. Had questions of that sort been disregarded, the decision could not stand with the decisions of the House of Lords already referred to. In the case at bar, the Appellant in effect invites the Court to shut its eyes to everything except the foreign judgment and the agreement already referred to, because the parties are  
20 aliens—in effect to abdicate its ordinary jurisdiction, a thing Page-Wood, V.C., in the case last mentioned carefully guarded himself against doing.

In *M'Lean v. M'Lean* [1947] S.C. 79, the proceedings were between a father domiciled in Scotland and a mother living in England, the children being with the latter, who had taken proceedings in the Court of Chancery in England.

Lord Justice-Clerk (Cooper) at page 84 said :

30 “Before considering what exactly we should do, it is worth recalling that, since these three children are *de facto* resident outside the jurisdiction of this Court, any order that we might pronounce could only be made effective by invoking the aid of the Court of Chancery ; and I should imagine that the Court of Chancery would treat our decision with every consideration and respect but would independently examine the matter from their own standpoint before lending their authority to the enforcement of our order. That is certainly the attitude which this Court would adopt in the converse case . . . we are not concerned with the relative superiority or inferiority of the rival claims of the two spouses to custody except from one point of view, namely, the welfare of the children, which is the primary and paramount consideration by reference to  
40 which our judgment must be guided.”

Lord Jamieson at page 90 referred to the decision of Morton, J., in *B's Settlement*, and said :

“ . . . The Court whose assistance is invoked will not just blindly give that assistance, but will first be satisfied, giving of course due weight and consideration to that order made, that such is in the best interests of the child.”

In my opinion, the result of all the authorities is correctly summed up in the 3rd Edition of Cheshire at page 539, where the author says :

50 “The cases already discussed show that whether the foreign guardian shall be allowed to exert his personal authority, as, for example,

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by removing the ward from England, is conditioned solely by what the Court considers is most calculated to promote the welfare of the infant."

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In *Re Harding*, 63 O.L.R. 518, Orde, J.A., giving the judgment of the Court, after referring to *Re Gay (supra)*, said at 520 :

"What was held there was that, whatever the jurisdiction of a foreign Court might be over infants within this province, our Courts had jurisdiction over them by reason of their being within this province."

In *Johnstone v. Beattie (supra)*, Lord Cottenham said at 114 : 10

" . . . it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the Courts of this country, with reference to a child residing in this country. The result is that such foreign tutor and curator have no right, as such, in this country ; and this so necessarily follows from reason, and from the rules which regulate, in this respect, the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found."

In *Woodworth v. Spring*, 4 Allen (Mass.) 321, Bigelow, C.J., said with respect to the status of a foreign guardian of an infant, at 323 : 20

"He" (the child) "is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled . . . The question whether a person within the jurisdiction of a State can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the State or country in which he is found . . . " 30

Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. At page 325 he said :

"It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If such were the rule, a child domiciled out of the State, who was sent hither for purposes 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. But in such cases, the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another State as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly States having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that 40

he might be again restored to his full rights and powers over him, by removing him to the place of his domicile. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the Court to award to the foreign guardian the custody of the person. This is the doctrine substantially stated by Lord Langdale in *Johnstone v. Beattie (ubi supra)*, and confirmed in a subsequent judgment in the House of Lords, as reported in 4 Law Times (N.S.) 382.”

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At 326 :

“ The result is, that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the Court. But it is for this Court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed.”

20 With respect to the term of the agreement between the Appellant and the Respondent that the child should not be removed outside the United States without consent, it is worth noting that, while under the judgment of the California Court of the 17th of December, 1942, granting the Respondent's petition for divorce against the Appellant and awarding him custody of the infant with the provision that the latter should spend three months in the summer with the Appellant, the separation agreement of 1941 (referred to in the judgment as a “ property settlement ”) was confirmed, at the same time it was provided that during the above-mentioned three months the child should not be removed from California without the consent of the Court. In my opinion, there is a great deal to be said for the view that the confirmation of the “ property settlement ” 30 by the above judgment was limited to the property provisions of that agreement which were substantial, and that it was not intended that such confirmation should extend to the provisions of paragraph 5. It would appear somewhat difficult to contend that the judgment confirmed the agreement that neither party should remove the child from the United States without the consent of the other, and therefore authorized each to have the child anywhere within the Union, and at the same time restrained the Appellant from removing the child outside the State of California during the only period of the year when the Appellant was at all entitled to have the child with her. It seems a contradiction, therefore, 40 to say that the agreement and therefore paragraph 5 was confirmed by the judgment which itself altered the provisions of that paragraph as against one of the parties.

However that may be, I do not think that under the law applicable in the Province of Ontario, such an agreement, even with the confirmation of a judgment, is to be given any greater effect than a foreign judgment itself, and I have already dealt with that matter. The agreement is a fact for the consideration of the Court in determining that which is in the best interests of the child.



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In *Re Armstrong*, 8 O.W.N. 567, Middleton, J., as he then was, held that

“ where the welfare of the infant was concerned, that consideration was paramount; and no agreement by the parents could absolve the Court from considering the infant’s welfare.”

Section 1, subsection (1), of the Infants Act, R.S.O., 1937, 215, provides that the Court, in making an order as to custody and the right of access thereto of the other party, shall have

“ 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.” 10

By Section 2, subsection (1), it is provided that, unless otherwise ordered by the Court, and subject to the provisions of this Act, the father and mother of an infant shall be joint guardians and shall be equally entitled to the custody, control and education of such infant. Subsection (2), which was not in force at the time of the decision in *Re Armstrong (supra)*, provides that

“ 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.” 20

This provision, of course, has nothing to do with an agreement as to a country where an infant is to be kept. It relates to agreements as to custody and if, inferentially, the separation agreement of 1941 is to be regarded as giving the custody to the mother because of the provision for payment by the Respondent to the Appellant of \$125.00 per month in respect of the infant, that agreement has been already set aside by the judgment of 1942 which awarded custody to the Respondent and permitted the Appellant to have the child for three months only in each year. 30

In any event, it was pointed out by Rose, J., as he then was, in *Re Allen*, 35 O.W.N. 101, after the statute had taken its present form, that the amendments of 1923 left untouched the provisions of Section 3, namely,

“ In questions relating to the custody and education of infants, the rules of equity shall prevail.”

At page 102, that learned Judge also said :

“ As a result of the amending Act ” (the amendment being embodied 40 in Sections 1 and 2 of the present Act) “ the Court in this case must concern itself, as heretofore, primarily with the welfare of the infant . . . ”

This judgment was affirmed on appeal, 36 O.W.N. 222.

In *Re Plewes* (1945) O.W.N. 479, also, Robertson, C.J.O., at 480, after referring to the amendments, said :

“ The rules of equity continue to prevail. The welfare of the child is still the paramount consideration . . . ”

I do not think that Section 2 of the statute goes any farther than to authorize an agreement between parents living apart as to the custody of their children, which prior to that statute might have been void on grounds of public policy as explained by Lord Romily, M.R., in *Hamilton v. Hector*, L.R. 13 Eq. 511, at 520 and 521.

In my opinion, the bringing of the infant to Ontario, notwithstanding the agreement, is one fact in the Respondent's conduct which the Court should take into consideration in determining his fitness to have the custody of the child, but as stated by Rose, J., in *Re E (supra)* at 536, the matter to be determined is "not the proprietary right of either of the contending parties, but the order that ought to be made regarding the custody of the infant, having regard to his welfare and to the conduct of the parents and to the wishes as well of the mother as of the father," as provided by the statute. This is the uniform ratio of all the authorities, domestic and foreign, which I have been able to find, and the situation is the same, even where a provision against removal is contained in the judgment. In *Hardin v. Hardin*, 81 N.E. 60, at 62, the Court said :

"The alleged misconduct of appellee in removing the child from the State of Kentucky beyond the jurisdiction of the McLean Circuit Court, without its consent or authority, did not in any manner enlarge the right of appellant under the judgment or decree thereof in respect to the custody of the child, but possibly subjected her to be dealt with by such Court as in contempt of its authority."

Again, in *Joab v. Sheets*, 99 Indiana 328, the Court said at 332 :

"The alleged misconduct of the appellee in having disregarded, and in planning for the further disregard of some of the provisions in the decree of divorce concerning the custody of the child, might have afforded some reason for the modification of, or some change in, those provisions in a direct proceeding to that end, but it did not of itself work a forfeiture of any of the appellee's rights or responsibilities under the decree. Conceding the truth of the alleged misconduct on her part, it made the appellee simply and only liable to an attachment for contemptuous disregard of the authority of the Court granting the decree of divorce, and to be dealt with as is usual in similar cases of contempt for refusing to comply with orders of Court."

In *Thorndyke v. Rice*, 24 L.R. 19, the Supreme Judicial Court of Massachusetts, in dealing with an agreement made after the parents had separated with respect to the custody of their child, said at 21 :

"Then there is the agreement of the mother, voluntarily entered into by her, that the father should have his custody. This is of no binding force upon the Court as an agreement, but it is evidence to show what the opinion of the mother was then as to the fitness of the father to have such custody."

Coming to the facts in the case at bar, the Appellant and Respondent were married in the year 1933, and after residing in the District of Columbia, the State of Wisconsin and the State of Michigan, they took up residence in Los Angeles in the year 1937. Both had had children of previous

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marriages. The child here in question, Terry, the only child of the marriage of the parties was born on the 14th of July, 1940. In or about the month of December, 1940, a separation in fact took place, and on the 4th of September, 1941, the separation agreement already referred to was executed.

Almost immediately afterwards, the Appellant commenced divorce proceedings in the Superior Court of Los Angeles and the Respondent filed a cross-complaint asking similar relief against the Appellant. Judgment was delivered on the 17th of December, 1942, the petition of the Appellant being dismissed and judgment for divorce being granted 10 in favour of the Respondent, the Appellant being found guilty of adultery. The Respondent was awarded custody of the infant Terry and the provision already referred to was made in this judgment that the child should spend three months in each year with the Appellant. It was also found by the judgment that the present Respondent was a fit and proper person to have the care, custody and control of Terry; that he had a well-established and proper home in Milwaukee, Wisconsin, and also one in Port Austin, Michigan; that he was able properly to care for said minor child at either of these two places, and that he was better able to provide for the proper raising and education of said minor child than 20 the present Appellant.

Following this judgment the Respondent took his son to his home in Milwaukee where he lived with all the members of his family who were not then grown up, excepting one daughter, Cynthia by name, who at all times has adhered to the Appellant. During the residence in Milwaukee, which continued for about two years, the family also used the Michigan residence at Port Austin in the summer. In July, 1944, the Respondent gave up his Milwaukee residence and removed to the Port Austin home.

In the meantime, the Appellant continued through 1943, 1944 and 30 1945 with proceedings in the California action by way of applications for a new trial and for modification of the terms of the judgment of 1942 as to custody. In January, 1944, she also instituted custody proceedings against the Respondent in the Wisconsin Courts. In May, 1945, while the Wisconsin action was pending, Respondent made application in the California action for an order eliminating the provision under which the child was to spend the three summer months with Appellant. She thereupon made a further application by way of cross-proceeding for an order awarding her complete custody to the exclusion of Respondent. This resulted on August 1, 1945, in the judgment now relied on by Appellant, 40 giving her complete custody.

The considerations which entered into the making of this order (which are of importance in considering the weight to be given to it) included such matters as the accessibility geographically of the Port Austin home, the inclemency of the weather, the fact that the care of the child there was left to aged employees of the Respondent during the latter's frequent absences from home, and the lack of school facilities. There is no finding nor suggestion of any change in the fitness of the Respondent to have the care of custody of his son, nor is there any suggestion that any consideration in the health of the child called for a change. The 50

latter was then five years of age and was, contrary to the finding in judgment, attending kindergarten in the public school at Port Austin, a fact brought out in the present proceedings by counsel for the Appellant.

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The Respondent appealed from this order and the appeal had the effect of a stay. Final judgment, as previously mentioned, was not given until some time in December, 1946, and under the law of California this did not become effective until the 13th of January, 1947. In the meantime, the Respondent, shortly after learning of the judgment in December, left his home at Port Austin with the child and came to Kitchener in the  
10 Province of Ontario. In May, 1947, after completion of alterations to a house on a farm owned by the Respondent near Kitchener, they took up residence there. The Respondent says that he preferred to have his son go to a country school owing to the attention which the boy would receive in a larger centre by reason of the publicity given the present proceedings which the Appellant had instituted. When the latter learned of the whereabouts of the Respondent, she came to Kitchener toward the end of February, 1947, and commenced these proceedings on the 17th of March following.

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The Respondent's first wife had originally come from Waterloo  
20 County and many of her relatives are still there. The Respondent had himself made a great many visits there over the years and in the fall of 1944 he purchased a farm in the county and later two adjoining farms which he operated together. It is on this property that he took up residence with his sister and son.

In my opinion, the learned trial judge determined the matter before him in accordance with the proper principles governing, and came to the conclusion on the evidence before him as to the proper custody of the child that the "boy's best interests and welfare lie in leaving him in his father's custody and training." He found the attacks made upon the  
30 Respondent by the Appellant unfounded, and his conduct throughout that of an honest and upright man.

In weighing the effect to be given to the judgment of the California Court, which I accept as having been given by a court having jurisdiction, the learned trial judge said :—

40 " . . . on looking at the evidence before me and on giving the greatest weight to the California decision which I am naturally disposed to do because it results from a prolonged trial and a consideration of the issues between these parties by a court of superior jurisdiction which is entitled to great respect, I am still reluctantly compelled to disagree with the California Court's decision and to take a contrary view as to the proper place for the custody of this child. As I apprehend the law in Ontario, even granting the validity of the California judgment of 1945, it is only one of the factors which I must consider and the overriding factor which must guide me in my final decision is my view on the evidence of the welfare of the infant."

In considering the weight to be given to the judgment of 1945, it is to be observed that while it states that it appears to the court " that it is for the best interests and welfare of said minor child " that he be placed  
50 in the custody of the Appellant, the enumerated findings, even if accurate

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—and at least one has been shown by the evidence in the case at bar to be inaccurate—would not be considered sufficient grounds under the law of Ontario for changing the custody, there being no suggestion that the Respondent has, since the decree of 1942, become unfit to have the custody of the infant, nor is there any reason given why the Appellant, who was adjudged by that judgment to be unfit to have custody for the very adequate reasons given in that judgment, had by 1945 become fit. Giving due weight to the findings in the judgment of 1945, it is impossible, in my opinion, to overrule the decision in appeal on the concurrent findings of the courts below which weighed these findings in the light of all evidence adduced, 10 particularly with respect to circumstances since the date of the 1945 judgment.

It is well to set out certain other parts of the judgment of the learned trial judge in which some of his findings are set forth, namely :—

“ Looking at the matter in a broad way, I think I must agree with Mr. Justice Smily who directed this issue, that in some respects circumstances have changed since the judgment of the courts of California in 1945. For one thing, this child is now seven instead of five years old. He is approaching an age when his father’s guidance and assistance may well be of more assistance to him 20 than that of his mother. Looking at the matter in a broad way and regarding Mr. McKee’s business life and private life as I do, it is very hard to escape the conclusion that in any event and apart from Mrs. McKee’s conduct, the boy’s best interests and welfare lie in leaving him in his father’s custody and training. During the course of Mr. McKee’s cross-examination, a vigorous attempt, commencing with some of his father’s business difficulties when he was fifteen years of age, was made to discredit him in respect of his public and business morals. There were even suggestions of private immorality, but in no case was anything established nor 30 was any evidence adduced which I believed, which might lead one to believe that Mr. McKee’s conduct had been anything but that of an upright and honest man. Mr. McKee in his testimony also indicated that his business affairs were closely integrated into the life of his own children and that of his brother and sisters. If Terry is handed over to the custody of his mother, there will be a breach of that association which in later years may rebound very markedly in his favour in a financial way and in the way of the opening of proper business opportunities to him when he is through his education. 40

\* \* \* \* \*

In my view, the evidence did not establish immorality on Mrs. McKee’s part but a looseness of public conduct and a lack of personal integrity and dignity which I think might provide a very unhappy background to the proper upbringing of the child. Evidence was also given of Mrs. McKee’s behaviour in a small restaurant in Kitchener by one Rita Eckensviller. Mrs. McKee flatly denied this evidence, but I must say in this case, having seen the witness and heard her evidence, I accept it, and I do not believe Mrs. McKee’s denial. Again the conduct complained of, which was 50

public love-making of a reasonably innocuous character, was such which might be understood if not approved in adolescents. It did not tend I think to show immorality as much as a lack of appreciation of any proper standard of public conduct for one of her years, on her part. At the conclusion of her evidence I asked Mrs. McKee whether she wanted custody of her son Terry because she felt she could do better for him than his father or did she want to take him from his father because of her animosity toward him. She said in reply: 'I hope you believe me. I have no animosity toward him. I have really gotten over that. I did feel that way in the beginning, but it is not true any more,' and she stated that she knew she could do well for the boy and really wanted him. One's belief in this statement is somewhat tempered by the fact that when Mrs. McKee returned to Kitchener to commence the proceedings which culminated in this issue, she visited the Ament home where Terry was being kept by his father, complete with a reporter and news photographer from the Detroit Daily News who took pictures of her Michigan attorney and herself vainly knocking at the door to see her infant child. One would think that this method of publicising her difficulties would indicate a sense of drama which had perhaps taken possession of her to the exclusion of any real affection for her son, but of course it may be merely that customs and practices in these matters vary. In any event, conduct of this sort and the rather hysterical publicity which she apparently supplied to newspapers in Detroit, Kitchener and Toronto would tend to shake one's faith in her as a proper person to bring up a boy of seven whose serious education must now commence and who is entitled to a training inculcating proper standards of morals and decency.

\* \* \* \* \*

In her complaint filed in the Milwaukee action, among other things, Mrs. McKee made many allegations of what might be described a scandalous nature against her former husband, including allegations that McKee in the 1942 proceedings had caused his children and an employee named Charles Watt to give perjured evidence in his favour; that he had exercised improper influence through his attorneys on the trial judge; that he had secretly entered into collusion with her own attorneys for the purpose of defeating her rights and also had entered into an improper collusive agreement with the trial judge; that he secretly made payments to her attorneys for the purpose of securing the assistance and co-operation of the attorneys, conniving at her defeat; that he committed a fraud on the Superior Court of the State of California and subjected the trial judge to his domination and control and prevailed on him to make findings of fact which were not true.

\* \* \* \* \*

Various actions of Mrs. McKee were examined on her cross-examination by counsel for Mr. McKee and one of these was the basis on which she made the serious and scandalous claims in her Wisconsin action against the court and her own attorneys in California. Whether there was a proper basis for these charges

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Fauteux,  
JJ.),  
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or not is of really very little interest to me, but on her cross-examination I gained a very strong impression that the facts on which she stated she based them would not justify their repetition as idle gossip, let alone as serious allegations of fact in litigation such as she commenced in the State of Wisconsin. Doubtless, the persons accused in this fashion are able to look after themselves, but it does in my view reflect very seriously on her judgment and capability that she should make such scandalous charges on so little evidence and such a small basis of fact. This, I think, merely reflects again on the opinion I must form of her as a proper person to have alone the care and custody of her infant child apart from the counter-balancing influence of the father, particularly at a time when his education and his proper upbringing become very important and may well shape his whole after life." 10

The learned trial judge sums up his findings as follows :—

“ Looking at the whole matter, his welfare seems inextricably bound up with the care, advice and education which his father can now give him, and I think his interests will be best served by leaving him where he is, in the custody of Mark T. McKee.”

Hogg, J.A., delivering the judgment of majority in the Court of Appeal, said :— 20

“ During the two years which, at the date of the judgment of Wells, J., had elapsed since 1945, when the Superior Court of the State of California altered their former judgment and awarded the custody of the child Terry to his mother, the circumstances had changed. Upon a review of the evidence, I have formed the opinion, which coincides with that of the trial judge, the reasons for which he has set out in his well-considered and well-expressed judgment—that it is in the best interests of Terry, who is over seven years of age, having regard to his welfare, not only from the viewpoint of his present life and education, but as well in the light of his future prospects, that he should be left in the custody of his father.” 30

These concurrent findings with respect to the Appellant, like the findings against her in the original judgment in California, are revealing and amply support the judgment in appeal. I think the courts below have correctly applied the relevant law, have given the proper weight to the California judgment, and the judgment in appeal ought not to be disturbed. I would therefore dismiss the appeal with costs.

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No. 3.

ORDER of His Majesty in Council granting Special Leave to Appeal.

AT THE COURT AT BUCKINGHAM PALACE

The 28th day of July, 1950

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

MR. NESS EDWARDS

MR. SECRETARY EDE

DR. EDITH SUMMERSKILL

*In the  
Privy  
Council.*No. 3.  
Order of  
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in Council  
granting  
Special  
Leave to  
Appeal,  
28th July  
1950.

WHEREAS there was this day read at the Board a Report from the  
10 Judicial Committee of the Privy Council dated the 24th day of July 1950  
in the words following, viz. :—

L.S.

20 “ WHEREAS by virtue of His late Majesty King Edward the  
Seventh's Order in Council of the 18th day of October 1909 there  
was referred unto this Committee a humble Petition of Mark T.  
McKee in the matter of an Appeal from the Supreme Court of  
Canada between the Petitioner (Defendant) Appellant and Evelyn  
McKee (Plaintiff) Respondent setting forth (amongst other matters) :  
that the Petitioner desires special leave to appeal from a Judgment  
of the Supreme Court dated the 6th June 1950 which by a majority  
allowed the Respondent's Appeal from a Judgment of the Court of  
Appeal for Ontario dated the 24th June 1948 which by a majority  
dismissed the Respondent's Appeal from an Order of Wells J. dated  
the 18th October 1947 that the Petitioner be awarded the sole  
custody of Terry Alexander McKee (thereinafter called ' the Infant ' )  
the infant son of the Petitioner and the Respondent born on the  
14th July 1940 and that the Respondent have reasonable access  
to the Infant once a week during reasonable hours : that the  
Order of Wells J. had been made on the trial of an issue direct d  
by Smily J. in habeas corpus proceedings by the Respondent who  
30 claimed to be entitled to the custody of the Infant under an Order  
of the Superior Court of California dated the 1st August 1945  
which by reason of Appeals only took effect on the 13th January  
1947 : that the jurisdiction of the Courts of California and the  
validity of their Orders is in dispute : that the issue was who is  
to have custody of the Infant as between the Respondent and the  
Petitioner : that the Respondent was given leave to move on the  
hearing of the issue for custody of the Infant under the Infants  
Act Revised Statutes of Ontario 1937 Chapter 215 : that from the  
40 30th September 1946 the Infant has been with the Petitioner who  
without the Respondent's knowledge on the 24th December 1946  
came with the Infant from the State of Michigan to reside in  
Kitchener Ontario : that seven judges (including Smily J.) were of  
opinion that the governing consideration in determining the dispute  
was the welfare of the Infant : that the majority in the Supreme  
Court of Canada stated that the primary purpose of their Order  
was that the Infant might be taken back to his own country from  
which in their opinion he ought never to have been removed :



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that the Petitioner submits that the Supreme Court ought not to have made what was in effect an Order for the deportation of the Infant but should have considered the welfare of the Infant which has repeatedly been held to be the paramount consideration in custody cases: that the Supreme Court has granted a stay of execution to enable the Petitioner to present this Petition on terms which include an undertaking duly given by him and his Counsel that in the event of special leave to appeal being refused or of an Appeal pursuant to special leave being dismissed he will consent to an Order fixing a new date for delivery of the Infant to the Respondent: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the Supreme Court dated the 6th June 1950 and for such further or other Order as to Your Majesty in Council appears just : 10

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 6th day of June 1950 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs : 20

“ AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution. 30

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

# In the Privy Council.

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## ON APPEAL FROM THE SUPREME COURT OF CANADA.

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IN THE MATTER of The Habeas Corpus Act, R.S.O. 1937 Chap. 129  
and amendments thereto

AND

IN THE MATTER of Terry Alexander McKee, an infant

BETWEEN

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

AND

EVELYN McKEE (Plaintiff) - - - - - Respondent.

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# RECORD OF PROCEEDINGS VOLUME V

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*Solicitors for the Appellant.*

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