

*Privy Council Appeal No. 44 of 1950*

Mark T. McKee - - - - - *Appellant*

v.

Evelyn McKee - - - - - *Respondent*

FROM

**THE SUPREME COURT OF CANADA**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1951**

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*Present at the Hearing:*

LORD MERRIMAN  
LORD SIMONDS  
LORD MORTON OF HENRYTON  
LORD RADCLIFFE  
LORD TUCKER

[*Delivered by* LORD SIMONDS]

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This appeal is brought from a judgment of the Supreme Court of Canada dated the 6th June, 1950, whereby by a majority of four judges to three (Kerwin, Estey, Locke and Cartwright, J.J., Taschereau, Kellock and Fauteux, J.J., dissenting) an appeal by the present respondent, Evelyn McKee, from a judgment of the Court of Appeal for Ontario dated the 24th June, 1948, was allowed and an Order was made that the respondent, having undertaken forthwith to return with Terry Alexander McKee, the infant son of the appellant and respondent, to the United States of America and to keep the appellant fully advised as to the infant's whereabouts, should have the custody of the infant and that the appellant should deliver the infant into her custody at the time and place mentioned in the Order. The Order of the Court of Appeal of Ontario had by a majority (Hogg and Aylesworth, J.J.A., Robertson, C.J.O., dissenting) affirmed an Order of Wells, J., of the 18th October, 1947, whereby sole custody of the infant son was given to the appellant.

The appellant will be hereafter generally referred to as the father and the respondent as the mother.

The following statement of the relevant facts is taken with some slight modification from the judgment of Cartwright, J., in the Supreme Court in which, as already stated, Kerwin, Estey and Locke, J.J., concurred.

The father is an Airlines Executive and has been for more than 33 years an attorney of the State of Michigan. The mother and the father are American citizens. They were both born in the United States of America and, until the father 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, 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.”

On 18th September, 1941, the mother commenced an action for divorce in the Superior Court of the State of California in and for the County of Los Angeles. The father entered a cross-complaint for divorce. After a trial which occupied 16 days and concluded on 20th November, 1942, the Honourable Thurmond Clarke delivered judgment on 17th December, 1942, dismissing the mother's complaint and granting the father a divorce on his cross-complaint. This judgment awarded the custody of the infant to the father, but directed that the infant should spend three months each summer with the mother. The judgment also affirmed and approved the agreement above referred to. It was conceded that this judgment was 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 father made an application to the same Court in California in the proceedings in which the Order of 17th December, 1942, as to custody had been pronounced, asking for a modification of the terms of that Order as to custody. The mother delivered a cross-application and the two applications were heard together before the Honourable Ruben S. Schmidt in June, 1945. The hearing occupied five days. By Order, dated 1st August, 1945, the previous orders of the Court were modified to provide that full custody of the infant be awarded to the mother with the right of reasonable visitation allowed to the father. The infant was not in the State of California when the application for modification was heard or when oral judgment was pronounced but was there when the formal Order of the 1st August, 1945, was made. That Order permitted the father to have the infant in Port Austin, Michigan, until 1st September, 1945, on which date it was ordered that the infant be delivered to the mother in Los Angeles, California. From this Order, the father appealed to the District Court of Appeals in California and the appeal was dismissed in November, 1946. The father 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 1st August, 1945, until the filing of a remittitur, following their final disposition. In the result the Order of 1st August, 1945, did not become effective until the 13th day of January, 1947, so that the infant continued to be in the custody of the father except that he spent three months with the mother during the summer of 1946.

On or about the 24th of December, 1946, the father 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 mother, who was not able to discover the whereabouts of the father 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

father's appeal. The affidavit further stated that on or about the 24th day of December, 1946, the father without any knowledge or consent on the part of the mother 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.

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.

By way of return to the writ, the father filed a lengthy affidavit. In this he stated that at the date of his marriage to the mother 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 mother. 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 mother. 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. The affidavit contained no denial of the statement in the mother's affidavit that he, 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.

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. But 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. It is not necessary to decide whether the practice which was followed was technically correct, for it is now common ground that, the matters in dispute having been fully investigated on their merits, no technical defect in procedure should be allowed to render the proceedings abortive.

From this brief recital of the facts as stated by Mr. Justice Cartwright it is clear that it was the duty of Wells, J., to determine the issue before him by reference to the familiar principles which are applicable in regard to the custody of infants and in Ontario are embodied in the Infants Act, R.S.O., 1937, ch. 215. It was not, and could not, be argued before their Lordships' Board that the Courts of Ontario had not jurisdiction to decide this issue. The infant was resident, if not domiciled, in the Province: he was within the King's allegiance and entitled to the protection of His Courts: he was an infant and therefore entitled to the special protection owed by the King as *parens patriae* to infants. Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the learned Judge, who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

It is important then to see what course was taken by Wells, J., in a case which undoubtedly presented some features of difficulty. The trial before the learned Judge occupied eleven days. In the course of it the father and mother were examined and cross examined at some length. No circumstance which could be regarded as in any way relevant to the welfare of the infant was ignored. The learned Judge accompanied by counsel went to the farm where the infant was living and saw for himself what were the conditions of his life. Having done so he delivered a considered judg-

ment of which their Lordships would say with respect that, in its lucid exposition of the facts and relevant law and in its careful appraisal of the factors which in such a case must be considered, it is open to no criticism. Some of his conclusions may be quoted. Of the father he said: "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 honest and upright 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 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." Of the mother he said: "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". Of the infant's education he said: "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 full advantage of a full education. I was very impressed with the school teacher's attitude towards the child and I think he is presently in safe hands in so far 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". Finally after referring to his visit to the child he said: "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 well served in both. 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 best be served by leaving him where he is in the custody of Mark T. McKee".

In this judgment the majority of the Court of Appeal for Ontario concurred, nor, though Robertson, C.J.O., in that Court and Cartwright, J., in the Supreme Court of Canada made some criticisms upon this aspect of the judgment, does it appear that they would have thought fit to reverse the order of the trial Judge but for two considerations to which reference must now be made.

The first consideration which has already been mentioned is that the father's action in taking the infant out of the United States was a breach of the agreement of the 4th September, 1941. Learned counsel for the father sought to justify the act by saying that the agreement had become no longer operative in this respect. But, whether or not this argument could be sustained, there appears to be no doubt that the father did not so regard it. The fact that the father had broken an agreement solemnly entered into was therefore a circumstance which the learned Judge had to take into account and weigh in determining what was for the welfare of the child. This he expressly did and their Lordships see no ground for saying that he gave too little weight to what was only one of many elements in the case.

The second and more serious consideration turns upon the effect of the Order of the Californian Court of the 1st August, 1945, which became effective on the 13th January, 1947. The validity of this Order has been challenged on the ground that the Californian Court had no jurisdiction to make it. Their Lordships will, however, assume, as it has throughout been assumed, that the Order was validly made. They will further assume that it was for no other reason than to remove the infant from any jurisdiction in the United States that the father took him to Ontario on the 26th December, 1946. It may well be that it had long been his intention one day to make his home in Ontario, but it is not open to doubt what was the immediate purpose of his action. These then are the facts to be considered, an order of a competent Court giving custody to the mother, the

deliberate evasion of that order by the father in removing the child to another jurisdiction. The matter is somewhat complicated by the fact that the father might as well in the state of Michigan, where the child was before his removal, as in Ontario, to which he was removed, have challenged the validity and effect of the order of the Californian Court. But this may be disregarded by a Court in Ontario which has only to consider how it should regard the order made by a competent foreign Court upon a question of custody.

Upon this question, Wells, J., after a survey of the relevant authorities, finally expressed himself thus: "As I apprehend the Law in Ontario, even granting the validity of the Californian 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." He had already carefully considered that judgment and in his own words "given the greatest weight" to it. This view, which was affirmed by the Court of Appeal by a majority, then fell to be considered by the Supreme Court of Canada and their Lordships observe that Cartwright, J., does not appear to dissent from the general proposition stated by Wells, J. Thus he says that the authorities make it clear that the Californian 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 will be enforced in an action brought on such judgment in the Courts of Ontario. In his view it had been rightly held 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 the Courts of Ontario though great weight must be given to it. Such a judgment he says "would not be conclusive in our Courts, but only of great persuasive effect".

So far then there seems to be no difference of judicial opinion. But it is at this point that Cartwright, J., appears to their Lordships to adopt a line of reasoning which cannot be supported. For, after reaffirming "the well established general rule that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant", he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent 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, becomes "entitled as of right to have the whole question retried in our Courts and to have them reach a new and independent judgment as to what is best for the infant". And it is in effect because he held that the father had no such right that the learned Judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to.

But with great respect to the learned Judge this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a Court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further enquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded, viz.: that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the Court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign Court, the consequence cannot be escaped that it must form an independent judgment upon the question, though

in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend upon the circumstances of each case. It may be that, if the matter comes before the Court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an Order as the Supreme Court made in this case could be justified. But if so, it would be not because the Court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.

It cannot be ignored that such consequences might follow as are suggested by Cartwright, J. The disappointed parent might meet stratagem by stratagem and, taking the child into the Province of Manitoba, invoke the protection of its Courts, whose duty it would then be to determine the question of custody. That is a consideration which with others must be weighed by the trial Judge. It is not perhaps a consideration which in the present case should have weighed heavily.

It has been said that the weight or persuasive effect of a foreign judgment must depend on the circumstances of each case. In the present case there was ample reason for the trial Judge, in the first place, forming the opinion that he should not take the drastic course of following it without independent enquiry and, in the second place, coming to a different conclusion as to what was for the infant's benefit. For not only was the child two years older at an age when two years make a material difference, but the facts, which, as appeared upon the face of the Californian order, had influenced that Court had substantially changed. No longer was the choice between California and "a place not accessible, snowbound in winter": no longer was the child under the care and supervision for most of the time of aged employees hired by the father, nor was he many miles from adequate transportation and adequate school facilities. This conspicuous change of circumstances demanded an independent enquiry, and their Lordships see no reason for thinking that the learned Judge, whose full and exhaustive enquiry they have already recognised, came to a wrong conclusion.

In the course of the proceedings a large number of authorities have been discussed. It is necessary only to refer to them shortly. For their Lordships concur in the review of them which is to be found in the judgment of Kellock, J., in the Supreme Court of Canada.

It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody: see re *Laurin* (1927) 60 O.L.R. 409 following *Ward v. Laverty* 1925 A.C. 101. So also it is the law of Scotland, see *M'Lean v. M'Lean* 1947 S.C. 79 and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield. The order of a foreign Court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment: comity demands not its enforcement but its grave consideration. This distinction, which has long been recognised in the Courts of England and Scotland (see *Johnstone v. Beattie* 10 Cl. & F. 42 and *Stuart v. Bute* 9 H.L.C. 440) and in the Courts of Ontario (see, e.g., re *Ethel Davis* 25 O.R. 579, re *Gay* 59 O.L.R. 40), rests upon the peculiar character of the jurisdiction and upon the fact that an order providing for the custody of an infant cannot in its nature be final.

Learned counsel relied (as had the Supreme Court of Canada) on the observations of Page Wood, V.C. (as he then was) in *Nugent v. Vetzera* L.R. 2 Eq. 704 and of James, V.C., in *Di Savini v. Lousada* 18 W.R. 425. It is true that in both these cases particular emphasis was laid on the respect to be paid by an English Court to a foreign judgment relating to custody. But in the former case Page Wood, V.C., was careful to observe that he guarded himself against anything like an abdication of the jurisdiction of his Court to appoint guardians. This can only mean

that, if he thought that the welfare of the infants required the appointment of guardians by an English Court, he would appoint them notwithstanding the foreign order. There is in fact no *via media* between the abdication of jurisdiction, which he rejected, and the consideration of the case upon its merits, in which the respect payable to a foreign order must always be in the foreground. In the latter case James, V.C., used language which appears to amount to blind surrender to a foreign order. "I think", he said, "that I am bound without exercising any judgment of my own to recognise their authority." "Their" authority appears to mean the authority of the Italian guardians who had been appointed by an Italian Court, though this is not quite clear. If the learned Vice Chancellor intended by this observation to apply a general proposition, their Lordships cannot accept it as an accurate statement of the law. It is, however, probable that he no more than Page Wood, V.C., intended an abdication of jurisdiction. In their Lordships' opinion the nature and limits of the jurisdiction of a Court alike in England and Ontario in relation to the custody of an infant are correctly stated by Morton, J. (as he then was) in *re B.'s Settlement* 1940 Ch. 54. But they would add that too much stress should not be laid on the provisions of the Guardianship of Infants Act, 1925. Section 1 of that Act introduced no new principle of law, but merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice: see *re Thain* 1926 Ch. 676. It is true, as pointed out in the judgment of Cartwright, J., that the judgment in *re B.'s Settlement* has been criticised by some writers whose opinions are entitled to consideration, but it has not so far as their Lordships are aware been the subject of adverse judicial comment. In their opinion it is not only consistent with authority but, as they have already observed, proceeds inevitably from the nature of the jurisdiction and of the subject matter in regard to which it is exercised.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal for Ontario dismissing an appeal from an Order of Wells, J., of the 18th October, 1947, should be restored. The orders as to costs made by the Court of Appeal for Ontario and Wells, J., will stand and the order as to costs made by the Supreme Court of Canada will be varied by providing that each party will bear his or her own costs. There will be no costs of the appeal to His Majesty in Council.

In the Privy Council

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DELIVERED BY LORD SIMONDS

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