1950

*Mar 15, 16, 17, 20, 21
*June 6

EVELYN McKEE (PLAINTIFF).....APPELLANT;

AND

MARK T. McKEE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Infant—Custody—Habeas Corpus—Parents and child citizens of foreign State—Infant brought to Ontario by father to evade foreign Court's Order awarding custody to mother—Manner in which general rule as to infant's custody should be exercised—The Infants Act, R.S.O., 1937, c. 215.

Held: (Taschereau, Kellock and Fauteux JJ., dissenting), that in determining the custody of an infant the well established rule in Ontario is that the paramount consideration is the welfare of the infant and the judgment of a foreign Court as to such custody need not as a matter of binding obligation be followed. Where however. as in the case at bar, the infant and both of his parents are citizens of a friendly State in which they are all domiciled and have always resided, and when the Courts of the country to which he belongs and from which he has been improperly removed, have reached a decision that one of the parents is to have custody, and the other parent 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 he had himself submitted the question of custody, brings such infant into Ontario, any jurisdiction an Ontario Court may have acquired as the result of such conduct should be exercised only for the purpose of returning the child in proper custody to the country whose subject he is.

In re B—'s Settlement [1940] 1 Ch. 54, distinguished, and questioned.

Per: Taschereau, Kellock and Fauteux JJ., dissenting: 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 such authority resides in the executive, it has not been committed to the courts. *Atty.-Gen. for Canada* v. *Cain* [1906] A.C. 542 at 546.

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 apply to the circumstances of this case the ordinary law of Ontario as to custody, giving due weight to the California decree. Whatever the position of the respondent, the infant is entitled to rely upon the protection of the court and the law of Ontario relating to infants. To grant what the appellant seeks would be to ignore these rights. *Re Gay,* 59 O.L.R. 40; *Re Ethel Davis,* 25 O.R. 579.

The courts below correctly applied the relevant law, gave proper weight to the California judgment, and the judgment in appeal should not be disturbed.

*PRESENT: Kerwin, Taschereau, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

**Reporter's Note*—Petition for special leave to appeal granted by Privy Council July 24, 1950.

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APPEAL from the judgment of the Court of Appeal, Robertson, C.J.O., dissenting (1), dismissing an appeal from an Order of Wells J. (2), made in habeas corpus proceedings, awarding custody of the infant child of the parties to the respondent.

A. G. Slaght, K.C. and *Peter Slaght,* for the appellant.

G. H. Lochead and *G. A. MacKay,* for the respondent.

The judgment of Kerwin, Estey, Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—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 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 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 September 18, 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

(1) [1948] O.R. 658. (2) [1947] O.R. 819.

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respondent entered a cross-complaint for divorce. After a trial which occupied sixteen days and concluded on November 20, 1942, the Honourable Thurmond Clarke delivered judgment on December 17, 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 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 17, 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 five days. By order, dated August 1, 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 1, 1945 permitted the respondent to have the infant in Port Austin, Michigan until September 1, 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 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 1, 1945 until the filing of a remittitur, following their final disposition. In the result the order of August 1, 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 appellant during the summer of 1946.

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 sometime 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.

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 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

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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.

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 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 JJ.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 1, 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

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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 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 1, 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 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 ratified by such Court, 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.

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, 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 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* (1), 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.

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

(1) [1940] 1 Ch. 54.

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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. Well 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 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 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 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.

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I respectfully agree with the views expressed by the learned Chief Justice of Ontario when after discussing the cases of *Hope* v. *Hope* (1), *re Harding* (2) and *Nugent* v. *Vetzera* (3), he says:

> 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 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 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 circumstances 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.

I think it desirable to say a few words in regard to the judgment of Morton J., in *re B—'s Settlement, supra.* 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:

> 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* (4),

(1) (1854) 4 DeG. M. & G. 327.
(2) (1929) 63 O.L.R. 518.
(3) (1866) L.R. 2 Eq. 704.
(4) L.R. 2 Eq. 704.

and *Di Savini* v. *Lousada* (1)) which state or imply 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 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 5, 1937 at which time the child was apparently already in England, but was not served upon the mother until December 6, 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 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 Law pages 204-205; 4 Modern Law Review page 64 and Cheshire on Private International Law 3rd Edition (1947)

(1) 18 W.R. 425.

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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 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 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 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.

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 delay in completing the appeal.

The judgment of Taschereau, Kellock and Fauteux JJ., dissenting, was delivered by

KELLOCK J.:—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 paragraph 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, in my opinion, be seriously challenged.

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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 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 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 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 competent jurisdiction, such decree will be given full force and effect in 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* (1), the parents were divorced in Wisconsin where they both resided, the father being awarded custody of the children. 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 United States 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 of 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

> We undersand 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 *People ex. rel. Allen* v. *Allen* (2), the wife commenced an action for divorce in the Supreme Court of Illinois 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

(1) (1881) 25 Kas. 308.

(2) (1886) 40 Hun. (N.Y.) 611; 105 N.Y. 628.

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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. 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. Its 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.

Upon the merits, the mother was awarded custody.

The Court of Appeals 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.

In *Slack* v. *Perrine* (1), the Court of Appeals 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 juris-

(1) (1896) 9 App. D.C., 128.

diction 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.

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* (1), 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 * * *

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, 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.*

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 naturalized subject.*

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.

(1) [1921] 2 A.C. 262.

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In *Porter* v. *Freudenberg* (1), 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 presentation 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.

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.*

In *Hope* v. *Hope* (2), 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.

At page 347 he said:

> 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 be made upon her. Therefore, I shall not abstain from making an order upon her merely because she happens to be residing at

(1) [1915] 1 K.B. 857. (2) (1854) 4 DeG. M. & G. 327.

Paris. That no order could be made on a person abroad would be a dangerous principle to recognize 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, c. 51, the relevant parts of which read as follows:

26. 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.

27. 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.

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. 168; now R.S.O. 1937 cap. 215).

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* (1), Cockburn C.J. referred at page 259 to what had been said by Jervis L.C.J. in *MacDougall* v. *Paterson* (2), 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.

In *Re Gay* (3), 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* (4), 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

(1) (1879) 4 Q.B.D. 245.
(2) 11 C.B. 755.
(3) (1926) 59 O.L.R. 40.
(4) (1873) 6 P.R. 245.

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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:

> 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.

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 for Canada* v. *Cain* (1). 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.

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* (2), 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

(1) [1906] A.C. 542 at 546. (2) 1894) 25 O.R. 579.

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.* (1), and *Re Ethel Davis* (*supra*), he said at page 42:

> The kidnapping cases cited by Mr. Greene, e.g. *Rex* v. *Hamilton* (2), 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, 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

(1) (1921) 19 O.W.N. 534. (2) (1910) 22 O.L.R. 484.

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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 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, 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* (1), 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, 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.

(1) [1940] 1 Ch. 54.

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 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,

> 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.

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.

In *Johnstone* v. *Beattie* (1), 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:

> 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;

(1) (1843) 10 Cl. & F. 42.

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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:

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 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.

At page 146 Lord Langdale said:

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* (1), 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

(1) (1861) 9 H.L.C. 440.

an order for delivery of the infant. With respect to the Scottish Court, Lord Campbell L.C. said at page 463:

> The Court of Session had undoubted jurisdiction over the case. By their *nobile officium,* conferred upon them by their Sovereign as *parens patriae, 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.

In *Nugent* v. *Vetzera* (1), 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.

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

(1) (1866) L.R. 2 Eq. 704.

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and the agreement already referred to, because the parties are 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* (1), 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:

> 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 which our judgment must be guided.

Lord Jamieson at page 90 referred to the decision of Morton J. in *B's Settlement* (2), 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:

> The cases already discussed show that whether the foreign guardian shall be allowed to exert his personal authority, as, for example, by removing the ward from England, is conditioned solely by what the Court considers is most calculated to promote the welfare of the infant.

In *Re Harding* (3), 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:

> * * * 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

(1) (1947) S.C. 79.
(2) [1940] Ch. 54.
(3) (1929) 63 O.L.R. 518.

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* (1), Bigelow C.J. said with respect to the status of a foreign guardian of an infant, at 323:

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 domicil, 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* * * *

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 domicil, 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 he might be again restored to his full rights and powers over him, by removing him to the place of his domicil. *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 case of *Stuart* v. *Moore,* in the House of Lords, as reported in 4 Law Times (N.S.) 382.

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

(1) (1862) 4 Allen (Mass.) 321.

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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.

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" 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, 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.

In *Re Armstrong* (1), 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.

By section 2 subsection (2), 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.

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 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.

In any event, it was pointed out by Rose J., as he then was, in *Re Allen* (2), 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.

(1) (1915) 8 O.W.N. 567.

(2) (1928) 35 O.W.N. 101

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At page 102, that learned judge also said:

> As a result of the amending Act (the amendment being embodied 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* (1), 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* (2).

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* (3), 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* (4), 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

(1) (1945) O.W.N. 479.
(2) (1872) L.R. 13 Eq. 511 at 520, 521.
(3) (1907) 81 N.E. 60 at 62.
(4) (1884) 99 Ind. 328.

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* (1), 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 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 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,

(1) (1860) The Monthly Law Reporter, 19.

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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 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 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, 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 or custody of his son, nor is there any suggestion that any consideration in the health of the child called for a change. The latter was then five years of age and was, contrary to the finding in the judgment, attending kinder-

garten in the public school at Port Austin, a fact brought out in the present proceedings by counsel for the appellant.

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 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.

The respondent's first wife had originally come from Waterloo 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 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:

* * * 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

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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 over-riding 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 in the custody of the appellant, the enumerated findings, even if accurate —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, 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 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 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 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.

* * *

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 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 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 visted 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 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 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

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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 againt the court and her own attorneys in California. Whether 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 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 counterbalancing 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.

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:

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 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.

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.

Appeal allowed.

Solicitors for the appellant: *Slaght, Ferguson, Boland and Slaght.*

Solicitors for the respondent: *Sims, Broy, Schofield and Lochead.*