VERA LEONA KRUGER (*Defendant*) .....APPELLANT; 1960

*Nov. 14, 15

AND

ERNEST WILLIAM BOOKER (*Plaintiff*) RESPONDENT. 1961

Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Custody—Separation of parents—Action for divorce—Judgment nisi and order for custody—Undertaking to Court violated by mother—Subsequent agreement by parents as to custody—The Infants Act, R.S.O. 1950, c. 180, ss. 1, 2 and 3—The Matrimonial Causes Act, R.S.O. 1950, c. 226, s. 5.

The plaintiff and the defendant were married in 1943, and three children were born to them: a boy in 1945, and two girls in 1951 and 1953 respectively. In June 1956, the parties entered into a separation agreement, which provided that during their minorities the son would remain with his father and the two girls with their mother. In June 1957, the plaintiff commenced an action against his wife for the dissolution of the marriage on the ground of her adultery with Richard Kruger. A decree nisi was granted on March 5, 1958, and custody of the daughters was awarded to the defendant upon her undertaking to discontinue any associations by her with Kruger.

In September 1958, the plaintiff instructed his solicitor to apply for an order rescinding the custody order in the decree nisi and giving him the custody of all three children, on the ground that the defendant had failed to carry out her undertaking to the Court. This application was later withdrawn. On November 6, 1958, an agreement was arrived at whereby the two girls would remain with the defendant and the son with the plaintiff. The plaintiff agreed to apply for judgment absolute

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forthwith, consented to the marriage of the defendant and Kruger following judgment absolute and agreed that the defendant's association with Kruger, following the judgment absolute, would not be raised by him as a ground for further application for custody of the children. The decree was made absolute on November 12, 1958. In the following month the defendant married Kruger and the plaintiff re-married.

On a further application by the plaintiff in May 1959 to vary the judgment of March 5, 1958, on the ground, *inter alia*, that the defendant had not adhered to her undertaking given at the trial, an order was made directing the trial of an issue as to who should have custody of the daughters. The trial judge directed that the custody of the two girls should be awarded to the plaintiff with rights of access to the defendant. The Court of Appeal, by a majority, dismissed an appeal from this order, and the defendant then appealed to this Court.

Held (Kerwin C.J. and Locke J. dissenting): The appeal should be allowed.

Per Cartwright, Abbott and Judson JJ.: The trial judge in dealing with the effect of the breach of the defendant's undertaking to discontinue associating with Kruger failed to give due weight to the complete change in circumstances resulting from the marriage of the defendant and Kruger, and to the fact that with full knowledge of that breach the plaintiff had signed the agreement of November 6, 1958. That agreement was a proper one and in the best interest of the daughters. The express power given to parents of an infant who are not living together to enter into a written agreement as to which parent shall have the custody of the infant is not abrogated by the circumstance that an order of the Court dealing with the custody is in effect.

Proof of a very real change of circumstance would be required to warrant the Court disregarding the agreement of November 6, 1958. The evidence fell far short of shewing any such change in circumstances as would enable the Court to say that in the best interests of the daughters their custody should be taken from their mother.

It was not a question whether Kruger or the plaintiff should have custody of the girls, but rather whether they were to be brought up by their mother or their step-mother. The record was replete with evidence that the defendant was a good and affectionate mother well fitted to care for and bring up her daughters.

Per Kerwin C.J., *dissenting*: There was evidence that the mother breached her undertaking given to the Court and that the breach affected the welfare of the children to their detriment. The agreement of November 6, 1958, could not tie the hands of the Court in considering the position of the mother who, wilfully and flagrantly, violated her promise to the Court, and in considering what was best for the children. It was impossible to say that the mother, now married to the man responsible for the wrecking of a home and family, was a proper person to have custody of the two girls.

Per Kerwin C.J. and Locke J., *dissenting*: The agreement entered into by the parties on November 6, 1958, which ignored the interest of the children, was of no legal effect. While s. 2(2) of *The Infants Act* permits parents who are divorced to agree as to the custody of their children, this could not mean that they may do so when an order made in the divorce proceedings, whether before or after the decree absolute, is in effect. To construe it otherwise would be to say that, at the will of the parents, the jurisdiction of the Court could be ousted.

The same principles applied to the exercise of the powers given by s. 5 of *The Matrimonial Causes Act*, under which the order for custody embodied in the decree *nisi* was made, as applied to the exercise of the powers given by s. 1 of *The Infants Act*.

It was unrealistic to suggest that in awarding custody to the mother the girls would not also be for all practical purposes in the custody of Kruger who, having married their mother, would stand in *loco parentis* to them. The Courts below were correct in finding that it was contrary to the interests of these children that they should be permitted to associate with Kruger.

The judges who decided this matter had rightly directed their attention to the paramount consideration in questions of custody (the welfare and happiness of the infant) to which all others yield. *McKee v. McKee*, [1951] A.C. 352, referred to. But if the matter were to be considered as merely a determination of the rights of the parents *inter se* without regard to this paramount consideration, the result would inevitably be the same. Section 1 of *The Infants Act* requires the courts in matters of custody to have regard, *inter alia*, to the conduct of the parents. Unless otherwise ordered by the court the parents are joint guardians and equally entitled to custody by virtue of s. 2. Section 3 requires that in questions relating to custody the rules of equity prevail.

There was no equitable principle which would justify an order to have these children taken from the home and custody of the father whose conduct was blameless throughout, so that they might be brought up by the defendant in the home maintained by the man whose adulterous conduct with her was the cause of the breaking up of the plaintiff's home.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Spence J. Appeal allowed, Kerwin C.J. and Locke J. dissenting.

W. B. Williston, Q.C., and *R. D. Wilson*, for the defendant, appellant.

Malcolm Robb, Q.C., for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting*):—We had a very complete argument in this appeal at the conclusion of which I was satisfied that the trial judge and the majority of the Court of Appeal had come to the right conclusion. Further consideration has confirmed that view.

We are asked to make an order directly opposed to concurrent findings of fact. That places a heavy burden upon the appellant,—particularly in a case relating to the custody of children. However, I do not rest my judgment upon the failure of counsel for the appellant to satisfy me that both Courts below were wrong, but proceed affirmatively upon a review of all the evidence and of the reasons for judgment in the Courts below.

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Laidlaw J.A., who dissented in the Court of Appeal, considered that the trial judge did not give proper consideration, weight or effect to a certain agreement between the parents; that the trial judge ought to have found that there was no evidence whatsoever that the breach of an undertaking given by the mother to the Court at the trial before the Chief Justice of the High Court in any way affected the welfare of the children to their detriment; that the trial judge ought to have held that the father entered into an agreement in writing with the mother that the latter's association with Kruger would not be raised by him as a ground for further application by him for custody of the children and that in the particular circumstances he was precluded from so doing; that the trial judge ought to have held that there is no evidence whatsoever of any circumstances subsequent to the order made by the Chief Justice whereby the custody of the two girls was awarded to the mother which in any way was detrimental to the welfare of the children or that would justify a reversal of the order made by the Chief Justice or that would support an order removing the children from the custody of their mother.

With respect I disagree with the learned Justice of Appeal. There was evidence that the mother breached her undertaking given to the Chief Justice of the High Court and that breach did and does affect the welfare of the children to their detriment. Any agreement entered into by the father was to avoid publicity, if possible. In any event such an agreement cannot tie the hands of the Court in considering the position of the mother who, so wilfully and flagrantly, violated her promise to the Court, and in considering what is best for the children. My brother Locke deals with all the circumstances in the case and I entirely agree with his reasons which I have had the opportunity of reading. I find it impossible to say that the mother, who is now married to the man responsible for the wrecking of a home and family, is a proper person to have custody of the two girls.

The appeal should be dismissed with costs.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing the appeal of the present appellant from an order made by

Spence J. on October 22, 1959, which awarded the custody of the two younger infant children of the parties to the respondent. Laidlaw J.A. dissented and would have allowed the appeal.

The parties were married at the city of Toronto on July 16, 1943, and three children were born to them: a boy on October 21, 1945, a girl on October 27, 1951 and a girl on November 3, 1953.

On July 5, 1957, the respondent commenced an action against his wife for the dissolution of the marriage on the ground of her adultery with one Richard Kruger. The acts of adultery alleged were said to have been committed during the years 1951, 1952, 1954, 1955 and 1956, variously at the city of Toronto, at Cove Island in the District of Muskoka, and at the city of Miami, Florida. The said Kruger to whom the appellant has been married since December 1958 was named as the co-respondent. Both parties entered defences to the action.

A decree *nisi* was granted by McRuer C.J. on March 5, 1958, directing that the marriage be dissolved by reason of the adultery of the defendant with Kruger, unless sufficient cause be shown to the court within three months as to why the judgment should not be made absolute. A term of the formal judgment which is of importance in considering the question of custody of the two female children read:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, Vera Leona Booker, upon her undertaking to this Court to discontinue any associations by her with the defendant, Richard Kruger, be and she is awarded the sole custody and control of the infants Susan Clair Booker, born on the 27th day of October, 1951 and Jennifer Lynn Booker, born on the 3rd day of November, 1953, subject however to the right of the Plaintiff, Ernest William Booker, to have access to the said infants on Saturday of each week from 9.00 A.M. to 6.00 P.M. and for three days during Easter vacation and for three weeks during summer school-vacation in each and every year.

On November 12th this decree was made absolute by a judgment delivered by Aylen J. In the following month the appellant married Kruger and the respondent married Ulrike Ehlers.

By a notice of motion dated May 8, 1959, the respondent gave notice of an application to be made before the Chief Justice of the High Court for an order varying the judgment of March 5, 1958, so as to provide that Booker should

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have custody of all three of the children, or alternatively for an order directing the trial of an issue as to the custody of the two younger children on the grounds that the present appellant had not adhered to the undertakings given by her at the trial, upon which she was awarded custody of the two young girls, that she had shown herself unfit to have the custody of these children and that it was not in their interest that she should have their custody and that, for all practical purposes, access to the children could not be obtained by Booker.

By order made on May 14, 1959, the Chief Justice directed that there should be a trial of an issue as to who should have the custody of the two girls, that pleadings be delivered upon this issue and that it be set down for trial before the Chief Justice during the week commencing June 15, 1959.

By a further order dated June 15, 1959, it was directed that the issue should be tried on September 8, 1959, and that the present respondent should have interim custody of the two young girls until that date, subject to any order that the judgment at the trial might make. The order contained provision for access by the mother. These children have remained since then in the custody of their father.

There was a lengthy hearing before Spence J. at which the appellant and the respondent gave evidence at length. Kruger was called by counsel for the present appellant, it was said for the purpose of submitting him to cross-examination and gave no evidence in chief. In a most carefully considered and exhaustive judgment Spence J. directed that the custody of the two girls should be awarded to the present respondent.

Section 1(1) of *The Infants Act*, R.S.O. 1950, c. 180, provides that the Supreme Court may on the application of the father or mother of an infant make such order as the court sees fit regarding its custody and the right of access thereto of either parent:

having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother and of the father.

This section has been considered several times in this Court and was relevant to the issue to be determined in *McKee v. McKee*[1], where Lord Simonds, delivering the judgment of the Judicial Committee, said in part (p. 365):

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . To this paramount consideration all others yield.

The evidence taken at the proceedings for divorce before the Chief Justice of the High Court, and also the exhibits, were made part of the record in the trial of the issue by Spence J. by consent. In view of the fact that it is the moral as well as the physical welfare of the infants which must be considered, a thorough examination was made of the relations between the then Mrs. Booker and Kruger during the years preceding the divorce. This is not the ordinary case where a wife has been found guilty of adultery with another on a single occasion and where, after divorce, she has married some other person than the adulterer. Rather is this a case of a wife, confessedly an adulteress, marrying the adulterer who has been responsible for the breaking-up of the home.

I have read with care the lengthy record of both of these hearings and, having done so, I am in complete agreement with the conclusion of Spence J. as well as with the opinion expressed at the trial of the divorce proceedings by the Chief Justice of the High Court as to the undesirability of permitting these young girls to associate with the man who was the co-respondent.

While the fact that there had been adultery committed by the appellant and Kruger had been established to the satisfaction of the Chief Justice, the investigation at the hearing of the issue before Spence J. properly extended to matters that had occurred in the years preceding the adultery which was admittedly committed in Florida in March of 1956.

Kruger is the son of a German father and a Russian mother and was born in Russia and brought to Canada when he was four months old. When he was about 16 years of age, he and Booker became friends and the latter, who is some 8 years older, interested himself in the boy's

[1] [1951] A.C. 352, 1 All E.R 942.

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welfare, lending him substantial sums of money on various occasions for the purpose of assisting him to become established in life. Over the period of years between 1951 and the spring of 1956, the evidence shows that Kruger was constantly associating himself with the respondent and his wife in their home and, until the events to be hereafter referred to, Booker regarded Kruger as a trustworthy friend of both of them and treated him as such.

During the year 1947 Booker left for Venezuela as the representative of a Canadian life insurance company and his wife lived there with him but came to Canada when each child was born. Booker returned to Toronto to live in the year 1953. As pointed out by the Chief Justice in his oral reasons for judgment, Booker devoted himself to his business and his wife appears to have felt neglected, a situation which appears to have been favourable for Kruger's plans. On Booker's return from Venezuela he and his wife and children lived for a while with Kruger in the latter's home at 28 Ashley Park. In December 1954 Booker bought a house, 5 Darlingwood Crescent, and moved his family there. Relations between husband and wife became strained in the year 1955, Booker complaining of his wife being frequently out late at night and it would appear that, at least towards the end of that year, he became suspicious of his wife's association with Kruger. Booker says that he and his wife ceased to live as man and wife in October 1955.

In January 1956 the appellant, taking the two young girls with her, moved from their home to that of her mother claiming that her nerves were very bad. They remained away until the month of March and the husband, in June 1956, received an account from the Doctors' Hospital in Toronto for services rendered to his wife on March 14th and 15th. According to the hospital account, the diagnosis taken from the records was a threatened abortion. The wife had not told her husband that she was pregnant and he knew nothing of the matter until he received the account and, when he demanded an explanation, she refused to give it. It was while Mrs. Booker was staying with her mother that the first dispute arose between Booker and Kruger as to the latter's association with Mrs. Booker. During the month of March 1956 Booker had

telephoned one evening to the house where his wife was staying with her mother, wishing to speak to her, and was told by the mother that Mrs. Booker was going to bed early. Being suspicious, he went to the house and found that this was untrue and that his wife was out. He waited there and she returned at 2 o'clock in the morning with Kruger. A violent scene ensued, Booker assaulting Kruger. He then accused his wife of adultery with Kruger, which she denied.

Booker then decided, in an endeavour to prevent the break-up of his marriage, that it would be advisable if he and his wife and the children had a holiday together in Florida and took them there. In April 1956 Kruger also went to Florida and after a few days Booker returned to his business in Toronto. It was during the time that the wife was in Florida with the children that she admittedly committed adultery on various occasions with Kruger. The latter had been in Florida on one occasion but, unknown to Booker, made a second trip there.

In June of 1956 Booker received information to the effect that in the year 1952, when he was living in Venezuela and had come with his wife to Toronto on business, leaving her there, after he had returned she had gone on a motor trip for three weeks with Kruger, leaving the children with her mother. Believing this information which, apparently, confirmed his suspicions of his wife and Kruger, he rented a flat and moved his wife's belongings there, informing her by telephone to Florida that they were to live separate from each other thereafter. On the return of the wife to Toronto, a separation agreement was drawn which bears date simply June 1956 which provided, *inter alia,* that the boy John should remain with his father and the two girls with their mother during their respective minorities, the husband agreeing to pay a monthly amount for their maintenance. The agreement further provided that both parties should have reasonable access to the children.

In July 1956, at a time when Booker was at Cove Island with his son, he found several letters written to his wife by Kruger when she was in Florida which made it perfectly clear that while in Florida and prior to that time the two had been carrying on an adulterous relationship. Mrs. Booker was on the island when these letters, which are

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referred to in some detail in the judgment delivered by the Chief Justice in the divorce action, were found, and when Booker left the island taking them with him he was pursued by her in the company of Kruger, his wife using vile and abusive language to her husband in the presence of the little boy and demanding the return of the letters. Booker, however, retained possession of them and delivered them to his solicitor for safe-keeping. The wife thereafter went to the solicitor's office while her husband was there and again used abusive language of the same nature without result. Thereafter admittedly she, accompanied by Kruger, broke into her husband's house causing material damage in doing so, in an endeavour to recover the letters. The nature of the letters justified her perturbation.

For about a month after her return from Florida the appellant, together with the two younger children, lived in the flat which had been rented for her by her husband. After the separation agreement was made, the appellant and these children went to Kruger's place on Cove Island and spent the summer there, and it was during this time that the letters had been found.

The respondent issued a writ for the dissolution of the marriage on August 23, 1956, but this action was later discontinued and the action of July 5, 1957, commenced.

The respondent had been advised after the making of the separation agreement of June 1956 that he could not object to the action of his wife in living in Kruger's properties and was a consenting party to her going with the younger children to Cove Island. I disagree with the opinion upon which the respondent relied. The respondent took the precaution, however, of employing a man and wife to go to Cove Island and to live in the cottage to be occupied by the appellant but, shortly after their arrival there, they were moved out and during the summer Kruger occupied a room in the cottage with the appellant and the children on the frequent occasions that he was there.

The finding of the letters altered the situation. When the appellant and the children left Cove Island they, contrary to the wishes of the respondent, moved into Kruger's house at 28 Ashley Park and lived there until the trial of the divorce action in March of 1958. The respondent was paying to his wife under the terms of the separation agreement

an ample monthly allowance for the maintenance of herself and the two younger children, and the appellant claimed that he was paying Kruger a rent of $100 a month for the house. This was shown to be mere pretence, Kruger having given her the money with which to pay it. Kruger took roofs elsewhere when the appellant and the children moved into his house and, from the Fall of 1956 until the trial of the divorce action, the respondent, either alone or in the company of a witness, observed that Kruger constantly came to 28 Ashley Park in the evening, frequently leaving there in the early hours of the morning and that on many occasions the lights of the house were turned out. On January 9, 1958, for example, he arrived at 6 o'clock in the evening and stayed until after 3 o'clock the following morning. This was just two months before the trial of the divorce action.

At the time of the trial before the Chief Justice, Booker expressed his willingness to have the interim custody of the two younger children awarded to his wife, he having no facilities then to properly care for them, and it was on that footing that the Chief Justice made the order referred to. He, however, expressed his opinion as to the necessity of ensuring that the children were not permitted to associate with Kruger. In the reasons for judgment delivered orally at the conclusion of the trial, dealing with this aspect of the matter the learned Chief Justice said in part:

> Unfortunately early in their married life Mr. Booker made the acquaintance of Mr. Kruger, the Co-defendant, and he made a friend of him, taking him to his house and treating him as a friend for many years. Mr. Kruger appeared to respond to this friendship but all the while was developing an affection for Mrs. Booker, and that situation developed to the extent that it is quite clear to me that he, Kruger, was seeking to get rid of Mr. Booker so that he could marry Mrs. Booker. That becomes evident in some letters that I shall refer to in due course.

And after quoting some passages from the letters indicating an adulterous relationship it was said:

> In addition, Kruger had been acting as a companion, a very close companion, of Mrs. Booker for years. She was a guest at his cottage at Cove Island, where she would stay for periods of time. Mr. Booker foolishly concurred in this. He went there himself. The whole thing is a tangled mess and in some circumstances perhaps wouldn't raise too much suspicion but in the circumstances we have here it seems to me to be perfectly clear that there was a very definite affinity between Mrs. Booker and Kruger and that Kruger was ingeniously conniving to appear to be a friend of Mr. Booker while at the same time having the sort of relationship with Mrs. Booker that these letters indicate.

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These letters are not the scribblings of an adolescent child; they are the writings of a mature man. The words were written contemporaneously with the events as they were developing and as they ultimately did develop, to the extent of the frequent visits to the house during the late hours. I cannot conceive that a man who desired the body of a woman as Kruger clearly showed he desired the body of Mrs. Booker could remain in the house with her night after night during these later hours for any other purpose than having sexual intercourse with her.

I think on the whole course of conduct the inference to be drawn is irresistible and I draw the inference that adultery has been proved. I hope that Kruger will realize that he has been a party to destroying a home with all the incidents that will flow from it and the handicaps these little children will have as a result of his selfish sexual desires.

Dealing with the custody of the two young girls, the learned Chief Justice said:

Now as to the custody of the children, Mrs. Booker has given an undertaking to the Court which is recorded in the evidence, and I will not make any attempt to repeat it because it was specific, and I incorporate it in my judgment as it was given; I will ask the Reporter to do so:

HIS LORDSHIP: If the custody of these two little girls is awarded to you, are you willing to undertake that any associations that have been carried on between you and your co-defendant Kruger will be discontinued:

MRS. BOOKER: Yes, sir, I do.

HIS LORDSHIP: The little girls won't come under his influence at all?

MRS. BOOKER: No, sir.

HIS LORDSHIP: You will undertake that?

MRS. BOOKER: Yes, sir, I do.

I trust and hope that Mrs. Booker has learned by now that there are more valuable things in life than the affections of a deceitful man, a man that would steal the wife of another man. His affections are of no value to any woman, and I am anxious that these children will not come under his influence.

The reasons for judgment pointed out to both of the parties that the order for custody was not final and that if there was a change of circumstances the order might be changed. The order made permitted the parents access to the children not in their custody at defined times.

On March 10, 1958, following the granting of the decree nisi, the respondent arranged for a lease of a suitable house property for the appellant and the two girls but she refused to sign the lease or to live there.

Despite the undertaking given to the Chief Justice by her and the terms of the custody order, the appellant promptly resumed her association with Kruger and, shortly

afterwards with $5,000 lent to her by him, made the first payment on the purchase of a house property in Oakville. At the trial before Spence J. the appellant admitted that she was aware that this conduct jeopardized her right to custody under the terms of the order.

On June 13, 1958, Kruger filed a notice of intervention in the divorce action. This document which did not bear the name of any solicitor said that Kruger could show cause why the judgment in the action should not be made absolute, the causes of the intervention being, *inter alia,* that Booker had committed perjury at the trial and that collusion existed between the plaintiff and the defendants. An affidavit made by Kruger was filed in support of the intervention, the document bearing no solicitor's name, stating certain facts intended to indicate that the obtaining of the decree nisi had been collusive and containing also the grave charge that, to Kruger's knowledge, Booker had been having illicit relations with Ulrika Ehlers, a woman whom he intended to marry. No attempt was ever made to support this statement. The appellant knew that this notice of intervention was to be filed and said that she informed Booker of the fact.

According to the appellant, however, Kruger had told her that he had been advised by counsel that after filing the notice of intervention it was unobjectionable for them to associate with each other. Kruger who gave evidence before Spence J. did not support this statement and Spence J. did not believe it. It appears to me to be inconceivable that any such advice had been given.

According to the respondent, he became aware of the filing of the notice of intervention in July 1958 some weeks after it had been filed. The judgment of the Chief Justice had granted temporary custody of the two girls to the wife on the conditions above mentioned and, save in this respect, the separation agreement of June 1956 remained unchanged. The respondent was aware that his wife had resumed her association with Kruger, in disregard of the order of the Court, and instructed his solicitor to apply to the Chief Justice for an order rescinding the custody order in the decree nisi and giving him the custody of all three of the children. The motion was made returnable on September 5, 1958, and was supported by two affidavits of the respondent

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showing that the appellant had promptly resumed her association with Kruger and in premises where the two young girls were in her custody under the judgment. This was followed by negotiations between the solicitors for the parties and a solicitor on Kruger's behalf. It is clear from the evidence that the respondent was most unwilling to agree to his wife having custody of the two girls, knowing that she intended to marry Kruger. According to his evidence, however, being advised that his chances of obtaining an order for custody of these two children were very slight and acting on that advice, he authorized his solicitor to agree that the appellant should have the custody of the two girls. I do not agree with the opinion upon which the respondent relied. A memorandum to this effect was signed by the respondent and his solicitor and a formal agreement was drawn, though it was not signed. This was done without reference to the Chief Justice, the solicitors, apparently overlooking the fact that once the court had assumed jurisdiction over the children and had made an order for temporary custody, the provision could not be changed without its approval. The solicitor acting for the appellant, however, in advance of the application for the decree nisi informed the Chief Justice of what had been done.

By the terms of the separation agreement made in June 1956 it was agreed that the respondent should have the custody of the boy, the eldest of the children, and the appellant that of the two girls during their respective minorities. The agreement provided in general terms that both parties should have reasonable access at all times to each of the children and, with the approval of one another, to take any of the children for week-ends or holidays on giving reasonable notice to the other. This was before the discovery of the Kruger letters and the commencement of the first divorce action. Difficulties arose thereafter in the arrangements for access. On one occasion, the date of which is not made clear in the evidence, the respondent had arranged with his wife to take the two girls for the week-end but, when he arrived at Kruger's place where the appellant was then living, he found that his wife and Kruger had taken them away for the week-end. On their return, apparently a violent scene ensued between the respondent and Kruger, the respondent

threatening him with violence, as a result of which Kruger laid a charge in the police court and the respondent was bound over to keep the peace.

In the summer of 1957 when the appellant and the two girls were at Cove Island, the respondent was having great difficulty in obtaining access and accordingly applied in chambers to Treleaven J. on July 24, 1957, the latter directing that the respondent should have access for defined periods during the months of July and August 1957, and thereafter on Saturday and Sunday of each week between the hours of 9.00 a.m. and 6.00 p.m. The appellant had taken the position that the respondent had no right to see the young girls at all and, when the order was made, the respondent sent a telegram informing the appellant of the making of the order and that he proposed to call for the children, and it was shown that this telegram was received by the appellant. However, when the respondent arrived at Cove Island to take the children away, the appellant informed the respondent that no judge could tell her whether she could have her children or not.

In September 1958, after the decree *nisi* when the two girls were living with their mother at the house at Oakville and, at or about the time when the above mentioned application was launched, the respondent went there to take the two younger children with him when the appellant, in the presence of the little boy, attacked her husband using foul language and damaging the respondent's car to the extent of about $300. The two younger children were in the house at the time of this occurrence.

The decree absolute for divorce contained no provision for custody.

After the remarriage of both parties there was further trouble in carrying out the arrangements for custody. The respondent, who had evidently changed his mind as to the wisdom of having authorized his solicitor to make the agreement above mentioned, advised the appelant's solicitors that he did not propose to be bound by it. At the end of the year 1958 the appellant, having married Kruger, went with him for a holiday to the West Indies, leaving the two young children in the custody of some friend at Oakville, without informing the respondent of her intention to do so or of the whereabouts of the children. For

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several days he was unable to exercise his right to custody since he did not know where the children were. He was, however, able to locate them and take them to his home. In April 1959 the respondent called at Kruger's place at Oakville for the purpose of taking the two young girls into his temporary custody, having wired to the appellant saying he wished to do so and asking her to wire if she disagreed with the proposal. The respondent drove his car, in which his son was a passenger, and stopped at the front door of the place and, shortly afterwards, Kruger drove his car into the driveway blocking the exit and informing the respondent that he was going to leave his car there as long as was necessary and that he would call the police. The young girls were in the house at the time watching this. As they were not given into the respondent's custody and as there was no other means of exit from Kruger's property, the respondent drove his car across the lawn to enable him to leave the property. Kruger then prosecuted him in the police court for doing wilful damage to his property. The charge was dismissed.

The evidence of the respondent is that as the Easter holidays were approaching the situation in regard to the custody of the children was wholly intolerable and he thought that it was in their best interests that he should stay away altogether rather than to expose them to these recurring scenes. Having done this, he consulted another solicitor and the motion above mentioned was launched on May 8, 1959.

The trial of the issue before Spence J. lasted seven days during which there was a most extensive examination of the behaviour of the appellant and respondent during the years of their married life.

The evidence was most carefully and exhaustively examined by Mr. Justice Spence in his considered reasons for judgment. After having referred to what had been said by Roach J.A. in *Bell v. Bell*[1], as to the desirability of small girls being entrusted to the custody of their mother, the learned trial judge said:

> It is, therefore, the unpleasant duty of the Court to find whether in its opinion the present Mrs. Kruger is or is not an improper party to have the custody of these two little girls. That investigation must be carried on

[1] [1955] O.W.N. 341 at 344.

in light of the fact that I have already found that Mr. Booker is an excellent character and that his present wife, although only 24 years of age, is a calm, serene, capable young woman.

Spence J. did not believe the evidence of the appellant who had said that the only occasions on which she had committed adultery with Kruger was during her stay in Florida in the early summer of 1956. It was made quite clear by the letters written by Kruger to the appellant in 1956 that the affair between them was one of long standing. Referring to the occasion in 1952 when, in the absence of her husband, the appellant had driven with Kruger to Boston and New York, the learned judge said that he did not believe her explanation and did not believe her when she said that the trip was taken with her husband's knowledge. Cross-examined as to this, she said that she and Kruger had driven to Boston and thence on to New York and returned by air. Later she said, in answer to a question asked by the learned trial judge, that she had been away four or five days. She said she could not remember what hotel she had stayed at in New York. The information obtained by her husband was that it had been of some three weeks' duration, during which time she had left the children with her mother. The learned trial judge said as to this:

> The defendant in the issue and her co-defendant Kruger knew of her husband's information on this trip to the east coast as early as June of 1956 and in the intervening 3½ years they have done nothing to refute the evidence which tends to show that it was far from an innocent trip made at the request of the husband. I agree with the view expressed by counsel for the plaintiff upon the argument that even if Mrs. Booker's version of the Boston or New York trip was one which should be accepted, then not one woman in a thousand would put herself in the position of making such a trip. I am convinced, however, that her version is not to be accepted and that rather the trip to the east coast was substantially that described to the plaintiff by the witness Barrett, that it was not innocent and that it constituted a most disturbing disregard for her marital vows or for the continued happiness of the home in which she and her husband and her then two children resided. It seems more than probable that the defendant in the issue and her co-defendant Kruger continued their surreptitious association, at any rate not infrequently, after 1952.

Dealing with a matter occurring in 1955, he said:

> In 1955 the plaintiff left Cove Island expecting his wife, the defendant in the issue, and her co-defendant Kruger, to follow him down in an automobile within a very short time. Instead, they only arrived the next day with protestations of innocence.

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The learned judge further said:

> Upon the plaintiff and the defendant in the issue returning from Florida with their children she was installed in an apartment which her husband had rented for her and it was abundantly plain to her at that time that the marriage was a broken one and it must have been plain to her that the custody of her two daughters was in considerable jeopardy . . . From that time until the trial of the action in March of 1958 the defendant in the issue and her co-defendant Kruger associated openly in a district in which she and her husband, the plaintiff, had always lived and in front of their many mutual friends so that there could be no mistake in the view of all persons as to the relationship between the two defendants. The view taken by the Chief Justice of the High Court of such an association was made abundantly clear to the defendant in the issue and the defendant in the issue has acknowledged that when she left the courtroom she was in no doubt as to the danger which her continued association with her co-defendant Kruger would be to her retention of custody of the two infant daughters. Despite this as I have found that association continued unabated and in fact she accepted the bounty of the defendant in the issue firstly by living in his home at 28 Ashley Park for some months at a rent which if paid was ridiculously small, and it would appear that the alleged payment of rent was another mere sham, and thereafter moving to a house which she purchased with his money, some $5,000 in fact. All of this conduct I cannot help but feel, goes far to show that the defendant in the issue is such a person as would put the gratification of her own pleasures ahead of her interest in her two infant daughters and show that she would be ready to sacrifice that interest at any time it collided with her own personal pleasure.

After referring to the various violent displays of temper on the part of both parties and their effect on the children, the learned judge said:

> Some instances which follow the trial for dissolution are particularly disturbing. As I have said, the defendant in the issue then realized her conduct was under constant scrutiny by her husband or by his agents. I am of the opinion that this realization caused her and her co-defendant Kruger to take the most picayune methods of annoying the plaintiff. Among such instances were the departure of the defendant in the issue and her co-defendant to the Barbados after their marriage without any notification to the plaintiff of where they had left the two infant girls so that he might have them for the access to which he was entitled and the writing of such information to him from the Barbados only in such a fashion as would cause it to arrive some days after he was supposed to have access; and again, the ridiculous incident upon the plaintiff driving into the driveway at 1037 Lakeshore to pick up the children and having with him his son John at the time the defendant Kruger drove his automobile in back of the plaintiff blocking his exit and causing the plaintiff to drive across the lawn in order to leave and then charging the plaintiff with wilful damage to the lawn and shrubs. The latter incident occurred only in April of this year. Such instances may in themselves appear to be and be unimportant. They do exhibit a smallness of mind and a bitterness. The putting of their own selfish interests ahead of the interests of the children would tend to indicate that the defendant in the issue is not a proper person to have the custody of these young children.

There is, moreover, the most important circumstance that to award the defendant in the issue the custody of the two infant daughters, Susan and Jennifer, would be in effect awarding such custody to the defendant Kruger. Counsel for the plaintiff on the argument put it that Kruger was the moving spirit in this alliance and that he was the person who was in control and directed the conduct of the defendant in the issue throughout. Everything in the trial would seem to indicate such a conclusion to be the sound one. The defendant Kruger was a close friend of the plaintiff for ten years prior to the action for dissolution of marriage and what is more was an object of the plaintiff's bounty on more than one occasion. The plaintiff advanced the defendant Kruger large sums of money, which were subsequently repaid, and yet the Chief Justice of the High Court in the dissolution action and I in this action have found that the conduct of the defendant Kruger throughout was, in reference to the plaintiff, about as disgraceful as can be imagined. It would be with some very considerable misgiving that I would make an order which would have the practical effect of giving him the custody of the plaintiff's two infant daughters. Therefore, and for these reasons and despite the fact that it is with the utmost reluctance that I award the custody of the infant daughters to anyone but their mother. I must find that as between the plaintiff and the defendant, the plaintiff is the more proper person to have the custody of Susan and Jennifer Booker.

Aylesworth and LeBel JJ.A. agreed with the learned trial judge and the appeal was dismissed. Both of these learned judges held that the trial judge had proceeded upon the proper principles and, upon evidence, agreed with his conclusion that it was in the interests of the two little children that they should be given into the custody of their father.

There are thus concurrent findings upon this question of fact.

Laidlaw J.A. dissented. That learned judge said in part that McRuer C.J. had the same full opportunity as had Spence J. of seeing the parents and the children and that it was certain that he had given full effect to this before reaching his decision to award the custody of the children. This observation appears to me to overlook the evidence that it was with Booker's approval and consent that the Chief Justice awarded temporary custody to the appellant and that the reason for the consent was that, since the parties were separated, the father had no means at that time of properly caring for these little girls. It is also to be remembered that the learned Chief Justice expressed himself forcibly as to the undesirability of the children being permitted to have any association with Kruger and that this was a term of the order.

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Laidlaw J.A. was further of the opinion that Spence J. had erred in treating the hearing before him as a trial *de novo*. This he considered to have been error and held that it was not open to Spence J., in view of the order of the Chief Justice, to consider all of the facts and circumstances. With this conclusion I disagree.

The whole issue as to what was in the interest of the two little children was referred to Spence J. and every fact and circumstance necessary for the determination of that issue was relevant and admissible before him. That this was the view of the learned and experienced counsel who appeared for the present appellant in those proceedings is shown by the fact that he raised no objection to this being done. Laidlaw J.A. was further of the opinion that, by reason of the agreement made in advance of the making of the decree absolute, the respondent was precluded from making an application based on the ground of the wrongful association between the appellant and Kruger after the decree *nisi*. But this, with respect, is to misconceive the issue which Spence J. was required to try. This is not an ordinary law suit for the determination of legal rights, but an issue to decide what order for custody is in the best interests of these two little children. That is the primary consideration to which, as was said by the Judicial Committee in *McKee's* case[1], all other considerations are subservient. The rights of the mother and the father given to them by s. 2 of *The Infants Act* were merely matters to be considered in determining the real issue.

The learned judge further attached weight to the fact that the intervention filed by Kruger was withdrawn or abandoned on the faith of the agreement. The evidence as to the filing of this notice of intervention in June of 1958 shows that it was done by Kruger with the approval and consent of the then Mrs. Booker. The notice was supported by an affidavit made by Kruger to the effect that during the summer of 1956 an agreement had been made by him with Booker that he—Kruger—"would allow evidence of adultery to be established" but that Booker had brought the action for divorce in July, and accordingly he (Kruger) had "refused to commit the act of adultery

[1] [1951] A.C. 352.

necessary to support the action." The fact was that the action referred to was commenced on August 23, 1956, a month after the letters had been discovered by Booker. In view of the evidence afforded by the letters, the statement was patently untrue. Booker denied that there was any such agreement and Spence J. believed him. The filing of the notice of intervention containing the false statement that Kruger had evidence of misconduct between Booker and Miss Ehlers was apparently done by Kruger for the purpose of bringing pressure to bear upon Booker to agree to his wife having custody of the two younger children. It was apparently thought that he would do this rather than face the publicity attendant on a contest at the time of the granting of the decree absolute. No solicitor cared to put his name on the notice or the affidavit. Why any weight should be assigned to the withdrawal of this baseless intervention I cannot understand.

The learned judge of appeal further dealing with the facts said that the trial judge had given undue weight to the breach of the undertaking given by the appellant to the Chief Justice, having regard to the fact that, in his opinion, the breach became of little or no importance, in the absence of evidence that it affected the interest or welfare of the children while in her possession and under her care. This appears to overlook the fact that the renewed association with Kruger immediately after the decree nisi was a breach of an order of the court, and thus a contempt for which the appellant might have been committed, and that throughout the summer of 1958 the appellant constantly associated with Kruger, that he stayed late at the house in Toronto in which she and the two little girls were living, this being in the neighbourhood where she and her husband were well known and where the fact was known that she and Kruger had been found guilty of adultery, and in his summer place on Cove Island in his company together with the children. That such conduct by a parent having custody of children in such circumstances is not detrimental to their welfare is not, in my opinion, a tenable proposition.

It must be rarely, if it is ever the case, that decisions by other courts in questions of this nature, decided upon different facts, are of any assistance as precedents. Laidlaw

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J.A., after stating that the learned trial judge had clearly acted upon some wrong principle and had disregarded material evidence, referred to the cases of *Philpott v. Philpott*[1], and *Bell v. Bell*[2], as authority for the proposition that upon these grounds the Court of Appeal may reverse the judgment of a trial judge. I would not have thought that any authority was necessary for this. As the trial judge acted upon the principle enunciated by the Privy Council in *McKee's* case[3] and by this Court on many occasions, I think it cannot be said that he acted on some wrong principle. As to the statement that he disregarded material evidence, the majority of the members of the Court of Appeal were of the contrary opinion and, having read all of the evidence at both hearings with great care, I respectfully agree with them.

In *Philpott v. Philpott*[4] as the head note shows, the evidence did not establish moral misconduct on the part of the wife and it was held that the custody of the twin infant children, one a boy and the other a girl some three years of age, should be given to the mother. Pickup C.J.O. was of the opinion that the trial judge had erred in not giving due consideration to the welfare of the infants. Hogg J.A., with whom the Chief Justice agreed, after reviewing the facts and saying that there was no satisfactory evidence of misconduct on the part of the mother, was of the opinion that they would be properly cared for and that it was in their best interest that they should be with the mother. The decision enunciates no new principle and is simply a judgment on the facts.

In *Bell v. Bell*[5] there was no evidence or moral misconduct on the part of either the husband or the wife, both of whom were deeply religious. The child, a girl, was four years old and the Court of Appeal considered upon the facts that it was in her interest that she should be in the custody of the mother.

Laidlaw J.A. also referred to a judgment of the Court of Appeal in England in *Allen v. Allen*[6]. In that case, decided under the provisions of the *Guardianship of Infants Act*, 1925, which, by s. 1, provides that in deciding the question

[1] [1954] O.R. 120.
[2] [1955] O.W.N. 341.
[3] [1951] A.C. 352.
[4] [1954] O.R. 120.
[5] [1955] O.W.N. 341.
[6] [1948] 2 All E.R. 413, 64 T.L.R. 418.

of the custody of an infant the court shall regard its welfare as the first and paramount consideration, after a decree of divorce had been granted to a husband on the ground of the wife's adultery, the custody of the daughter of the marriage, 8 years old, who had lived with her mother from birth, had been given by Wallington J. to the husband. The assigned ground for this was that the wife, who had married the co-respondent, having once committed adultery was likely to do so again and that, as the husband was remarried to a wife against whose moral conduct no charge could be made, he was more fit to have the child. Wrottesley and Evershed L.JJ., after reciting the facts, were of the opinion that the fact that a woman had once committed adultery did not prove that she was unfit to look after a child. In that case, the father was a soldier and the adultery had been committed during his absence from England.

The only other case relied upon is *Willoughby v. Willoughby*[1]. In that case the husband had been unable to support his wife and she had to go out to work and it was shown that during this period she had commited adultery with the co-respondent and that she had lived with him until the husband divorced her in the following year. The child was not with the mother during this period, having been sent to the country to live with the mother of the husband. While the trial judge, Wallington J., who gave the custody of the child to the father gave no written reasons, it was agreed by counsel that the main reason which he gave for not giving custody to the mother was that a woman who had committed adultery once might commit it again. This was the opinion which the same judge had expressed in *Allen's* case. The Court of Appeal reversed this judgment. Cohen L.J. referred to the decision in *Allen's* case and said that apparently it had not been drawn to the attention of Wallington J. Upon the evidence he said there was no suggestion that the mother was promiscuous or a bad mother and accordingly considered that the child, a little girl, should be entrusted to her care until further order. The child was two years of age and Singleton L.J. agreed that it was better that she should be with the mother, at least for the present.

[1] [1951] P. 184.

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With great respect, I think none of these cases touch the matter for decision in the present case.

The order for custody embodied in the decree *nisi* was made under the provisions of s. 5 of *The Matrimonial Causes Act*, R.S.O. 1950, c. 226, which reads:

> 5. (1) In any action for divorce the court may from time to time and either before or after the judgment absolute, make such provision as appears to be just with regard to the custody, maintenance and education of the children of the marriage and may direct payment by either the father or the mother of such sum as may be necessary for the due care, maintenance and education of the children of the marriage.
>
> (2) An application under this section may be made by either husband or wife or by the children by their next friend either at the hearing of the case or upon summary application therein.

It is to be noted that under subs. (2) the right is given to the children to apply by their next friend recognizing, if any recognition is necessary, their interest in the matter.

The action was still pending at the time the respondent, acting upon legal advice, signed the memorandum of November 6, 1958, which purported to change the terms of the order. In my opinion, this agreement which ignored the interest of the children was of no legal effect. While s. 2(2) of *The Infants Act* permits parents who are divorced to agree as to the custody of their children, this cannot mean that they may do so when an order made in the divorce proceedings, whether before or after the decree absolute, is in effect. To construe it otherwise would be to say that, at the will of the parents, the jurisdiction of the court may be ousted.

This was the view forcibly expressed by McRuer C.J. when the application to change the order for custody was made before him in September 1958, at which time he directed the delivery of pleadings and the trial of an issue. The learned Chief Justice then pointed out to the parties that the children were not to be treated by the parents as though they were chattels and that the custody order of March 1958 was still in effect. This was also the view of Spence J. with whom the majority of the members of the Court of Appeal agreed.

The application which resulted in the trial of this issue was made in the divorce action. In my opinion, the same principles apply to the exercise of the powers given by s. 5 of *The Matrimonial Causes Act,* as applied to the exercise of those given by s. 1 of *The Infants Act.*

The two little girls are now nine and seven years old, respectively, and for the past year and a half have been in their father's custody at his home in Toronto. His second marriage has been a happy one. Spence J. found his wife to be a calm, serene, capable and very responsible young woman. As to Booker, he found him to have a scrupulous regard for the truth and "a fine citizen . . . who is normally of a calm and equitable temperament" and very fond of the children. The evidence is that they are very happy with their stepmother. They are going to a school nearby and to the Sunday school of the United Church in their neighbourhood. Booker is a successful business man with a substantial income and supports his family in comfort.

These findings as to the respondent and his wife are to be contrasted with those made by McRuer C.J. and Spence J. as to the appellant and Kruger. In one of the letters written by Kruger to the then Mrs. Booker when she was in Florida in the spring of 1956 he said that "the last ten years have been longing ones for both of us." Whether the adulterous relationship between the two had lasted as long as this is uncertain but the contents of these letters make clear that it had existed for some time prior to the time when they were written, probably as far back as 1952 when, after Booker had left Toronto to return to Venezuela, the appellant and Kruger went on the trip together, professedly to Boston and New York.

Booker apparently had complete trust in his wife and in his friend Kruger up to the fall of 1955, when he became suspicious of her relations with Kruger. When she left home in January 1956 and went to live with her mother, professedly on the ground that she was not well, he found his suspicions confirmed by the incident at her mother's house when she returned in the early hours of the morning with Kruger. It was not until July that he received the bill from the hospital with the details of the treatment

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given to his wife. She had not told him that she was pregnant and her account of this was obviously untrue, she having said that she went there for a blood transfusion.

The parties had not lived as man and wife since October, 1955. The conduct of the appellant in Florida at a time when the children were in her custody, living with her in a motel, afford some indication of her unfitness as custodian. After her husband had stayed with them there and returned to Toronto she engaged in a series of adulteries with Kruger in another motel nearby.

On her return to Toronto she lived with the two girls for a short time in the apartment provided by her husband, then at Kruger's place at Cove Island, and later in Kruger's home in Toronto. Their constant association continued up to the time of the trial. McRuer C.J., after referring to the fact that she had lived in Kruger's house between the fall of 1956 until the trial of the divorce action in March 1958 and after referring to the terms of Kruger's letters, said that he could not conceive that a man who desired the body of a woman as Kruger clearly showed he desired the body of Mrs. Booker could remain in the house with her night after night during these late hours for any other purpose than having sexual intercourse with her.

Her conduct following the granting of the decree nisi in continuing to associate with Kruger was a flagrant contempt of court committed at a time when, under the order of the Chief Justice, she had custody of the two little girls in Kruger's house. Spence J. indicated his view of her conduct in the summer and fall of 1958 when he said in the passage above quoted that she was such a person as would put the gratification of her own pleasures ahead of her interest in her two daughters.

These two young girls are now of an age when, if they are entrusted to the custody of their mother, they will undoubtedly ask why they are separated from their father and from his home where they are living so happily, and why their father and mother are not living together. It is scarcely to be expected that the appellant will tell them the truth, that being that her marriage to their father was broken up by her continued adultery with Kruger in whose home they would then be living. There would thereafter

be over the years these further deceptions practised by the appellant until a few years hence when it would be impossible to conceal the truth from the two children.

It is, in my opinion, unrealistic to suggest that in awarding custody to the mother these two young girls would not also be for all practical purposes in the custody of Kruger who, having married their mother, would stand in *loco parentis* to them (21 Hals., 3rd ed., 189; *Stone v. Carr*[1]). It is quite clear from the letters written and from the evidence given by the appellant at the trial that she had come completely under the domination of Kruger for some time prior to the bringing of the divorce action and, while in Florida, she knew and was a party to Kruger having her husband watched by private detectives in the vain hope of finding some impropriety by him which would enable her to secure a divorce. This was in advance of the discovery of Kruger's letters by Booker. On her own evidence, Kruger actively directed the negotiations on her behalf between the granting of the decree nisi and the decree absolute.

Kruger was befriended by Booker in his youth and assisted in getting a start in life by very considerable loans of money. While posing as Booker's friend, he was obviously engaged for years before March 1956 in an adulterous relationship with his wife and in an endeavour to break up the marriage of the man who considered him to be his friend and trusted him. His behaviour can only be described as contemptible throughout. McRuer C.J. said:

> I hope that Kruger will realize that he has been a party to destroying a home with all the incidents that will flow from it and the handicaps these little children will have as a result of his selfish sexual desires.

McRuer C.J. and Spence J. who have had the advantage of seeing these people were firmly of the opinion that it was contrary to the interests of these little children that they should be permitted to associate with Kruger. The majority of the members of the Court of Appeal have concurred in the opinion of Spence J. that it is in their best interests that they should remain in the custody of their father, and we are asked to reverse these concurrent findings. It would, in my opinion, be a grave injustice to these children to award their custody to their mother. They are now being brought

[1] (1799), 3 Esp. 1.

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up in the home of an honest clean-living man and his wife, are being properly educated and instructed in religious matters which will include instruction in the virtues of truthfulness and chastity. Much of the influence that all parents have upon their children is attributable to the example furnished by their own characters and conduct and these, in the case of Booker and his second wife, are unimpeachable. The character of the appellant and of the man to whom she is now married have been demonstrated to be such as to make neither of them a desirable custodian of these two small girls.

The learned judges who have decided this matter have rightly directed their attention to the paramount consideration in questions of custody to which, as stated by Lord Simonds, all others yield. But if the matter were to be considered as merely a determination of the rights of the parents *inter se* without regard to this paramount consideration, the result must inevitably, in my opinion, be the same. Section 1 of *The Infants Act* requires the court in matters of custody to have regard, *inter alia,* to the conduct of the parents. Unless otherwise ordered by the court the parents are joint guardians and equally entitled to custody by virtue of s. 2. Section 3 requires that in questions relating to custody the rules of equity prevail.

The contention of the appellant is that it is her right to have the children taken from the home and custody of the father whose conduct has been blameless throughout, so that they may be brought up by her in the home maintained by the man whose adulterous conduct with her was the cause of the breaking-up of the respondent's home. If there is any equitable principle which would justify such an order in these circumstances, we have not been referred to it and I am not aware that there is any.

I would dismiss this appeal with costs.

The judgment of Cartwright, Abbott and Judson JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to an order of this Court granting leave to appeal made on June 20, 1960, from a judgment of the Court of Appeal for Ontario, pronounced on May 6, 1960, whereby an appeal

from a judgment of Spence J. pronounced on October 22, 1959, was dismissed; Laidlaw J.A. dissenting would have allowed the appeal.

The effect of the judgment of Spence J. was to award the custody of the two infant daughters of the appellant and the respondent, hereinafter referred to collectively as "the daughters", to the respondent and to give rights of access to the appellant. These infants are Susan Claire Booker born on October 27, 1951, and Jennifer Lynn Booker born on November 3, 1953. There is one other child of the parties John Scott Booker born on October 21, 1945, but his custody is not in question in this appeal; he is in the custody of the respondent and the appellant has rights of access to him.

It will be convenient to set out certain undisputed facts in chronological order.

The appellant and respondent were married on July 16, 1943.

Three children were born of the marriage as set out above.

In June 1956, the appellant and respondent entered into a separation agreement whereby during their minorities the custody and guardianship of John was given to the respondent and the custody of the daughters was given to the appellant. Paragraph 7 of this agreement read as follows:

> 7. The wife, in performing and observing the stipulations on her part stated herein, and provided she remains chaste shall have the custody and guardianship of the two girls, Susan and Jennifer during their respective minorities.

By writ issued on August 23, 1956, the respondent commenced an action for divorce against the appellant and Richard Kruger, hereinafter referred to as Kruger, but this action was discontinued in June 1957.

In September 1956, the appellant and respondent entered into a further agreement which provided as follows:

> 1. The Husband, Plaintiff in an action for divorce against the Wife, hereby WAIVES all claims for costs in connection with such action and to a complete release of any and all claims either against the Wife or the co-Defendant in the said action, Richard Kruger.
>
> 2. The Husband further AGREES to pay monies due under a Separation Agreement between the parties to the credit of a bank account in the name of the Wife as and where she shall designate.

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3. The Husband further AGREES to turn over to the Wife for her sole ownership, the following articles—Vibrator; Washer and Dryer;—out-board motor boat.

4. The Wife in turn RELINQUISHES all claim to any furniture presently in the possession of the Husband.

5. The Wife further AGREES that in the event of her remarriage in the event of a divorce being granted that she will agree to reduce the amounts payable under the Separation Agremeent entered into between the parties to $100.00 per month, subject to increase as the children get older to an amount to be agreed upon.

6. The boy John is to be left in care of the mother in the absence of the father at any time.

At the time of signing this agreement the agreement of June 1956 was amended by striking out the words "and provided she remains chaste" which appeared in paragraph 7 quoted above. This alteration was initialled by the respondent.

By writ issued on July 9, 1957, the respondent commenced a new action for divorce against the appellant and Kruger. In this action Mr. Gerard Beaudoin Q.C., acted as solicitor and counsel for the respondent.

On March 4 and 5, 1958, this action was tried before McRuer C.J.H.C. and at the conclusion of the trial, he pronounced a judgment nisi of divorce by reason of the adultery of the appellant with Kruger. Paragraph 3 of the formal judgment provided as follows:

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, Vera Leona Booker, upon her undertaking to this Court to discontinue any associations by her with the defendant, Richard Kruger, be and she is awarded the sole custody and control of the infants Susan Clair Booker, born on the 27th day of October, 1951 and Jennifer Lynn Booker, born on the 3rd day of November, 1953, subject however to the right of the Plaintiff, Ernest William Booker, to have access to the said infants on Saturday of each week from 9.00 A.M. to 6.00 P.M. and for three days during Easter vacation and for three days during Christmas vacation and for three weeks during summer school vacation in each and every year.

Paragraph 4 of the judgment ordered the respondent to pay $350 per month to the appellant for the support of the daughters so long as they should remain in the custody of the appellant and until they should attain 16 years of age or until the Court should otherwise order.

On June 13, 1958, Kruger served a notice of intervention.

On September 5, 1958, Mr. Beaudoin served a notice of motion on behalf of the respondent returnable before McRuer C.J.H.C. asking that the judgment of March 5,

1958, be varied to give sole custody of the daughters to the respondent, the ground alleged in the respondent's affidavit filed in support of the motion was that the appellant had failed to carry out her undertaking given to McRuer C.J.H.C. to discontinue any association by her with Kruger. The respondent deposed to his belief that the appellant was "still in constant association" with Kruger. The hearing of this motion was adjourned.

Between September 10, 1958, and November 6, 1958, negotiations were carried on between the solicitors for the parties.

On November 6, 1958, an agreement was arrived at following a discussion at which the following persons were present: the respondent, his counsel Mr. Beaudoin, the appellant, her counsel Mr. Brooke, and Mr. Hughes counsel for Kruger. This agreement was reduced to writing and is as follows:

PRESENT. G. Beaudoin, Q.C.
Wm. Booker,
R. Hughes,
Mrs. Booker
John W. Brooke

Agreed as follows

John Brooke Office
Nov. 6th, 1958.

1. Custody of the 2 girls to Mrs. Booker and custody of the son to Mr. Booker with mutual access in alternate weekends and at Christmas Easter Summertime as per Minutes of Settlement attached.

2. Mr. Booker will pay 250 per month for November and December 1958. The claims of Mr. Booker for rent paid 642.00 is considered as satisfied against the claim of Mrs. Booker for allowance for September and October 1958. The claim of Mr. Booker 300.00 for his car is settled.

3. Mr. Booker will apply for Judgment Absolute forthwith, and following Judgment absolute he consents to Mrs. Booker seeing Mr. Kruger pending marriage, and he consents to their marriage and that the association referred to in this paragraph shall not be raised as a ground for a further application for custody by Mr. Booker. It is understanding of the parties that marriage will take place in the immediate future. (Jan. 1, 1958)

4. If by Jan. 1st 1959 Mrs. Booker has decided against marriage to Kruger then Mr. Booker, Mrs. Booker and their solicitors shall meet to consider what financial arrangements are necessary for the welfare of the children and their future.

7A. Pending application custody to be abandoned.

8. If they marry (Kruger and Mrs. Booker) then husband will create trust fund referred to in draft minutes of settlement attached.

9. Provision as to telephone calls to children agreed per draft.

10. Provision as to removing the children from the jurisdiction agreed as per draft.

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11. Re item 4D pages 3 and 4 draft, upon return the spouse shall have that weekend with the children and thereafter weekends alternate once more.

(Signed) "Wm. E. Booker"
"Gerald Beaudoin"
Sol. for Wm. E. Booker
"Vera L. Booker"
"John W. Brooke"

Between November 6 and November 12, 1958, the notice of intervention filed by Kruger and the notice to vary the judgment of March 5, 1958, served by Mr. Beaudoin were withdrawn.

On November 12, 1958, judgment absolute of divorce was granted by Aylen J.

On December 13, 1958, the appellant and Kruger were married.

On December 23, 1958, the respondent and Miss Ulrike Ehlers were married.

On May 8, 1959, the respondent served a notice of motion returnable before McRuer C.J.H.C. for an order varying the judgment of March 5, 1958, so as to give custody of the daughters to the respondent on the grounds that:

1. The said Vera Leona Booker, now Vera Leona Kruger, did not adhere to the undertakings given at the trial upon which she was awarded custody of the two youngest children.

2. Since trial the said Vera Leona Kruger has shown herself unfit to have the custody of the two youngest children and it is not in their interest that she have their custody.

3. The right to access was an integral part of the judgment at trial but for all practical purposes access cannot be exercised by this applicant.

4. Such further and other grounds as counsel may advise and the court may permit.

On May 14, 1959, McRuer C.J.H.C. made an order directing the trial of an issue as to who should have the custody of the daughters.

On June 15, 1959, the issue came on for trial before McRuer C.J.H.C. but the learned Chief Justice decided that the issue should not be tried at that time. Some *viva voce* evidence was heard and it was directed that the issue should be tried on September 8, 1959, and that in the interim, commencing with July 1, 1959, the respondent should have the custody of the daughters with rights of access to the appellant.

The issue was tried before Spence J. on September 8, 9, 10, 11, 14, 15 and 16 and judgment was reserved.

On October 22, 1959, Spence J. delivered judgment.

From time to time during the course of the trial Spence J. appeared to rule that he was concerned only with events subsequent to March 5, 1958, the date of the judgment nisi. For example on the first day of the trial during the examination in chief of the respondent who was the first witness called the learned judge said:

> Just a moment. I am wondering what is the relevancy of all the evidence we have been having here. You have the Chief Justice of this Court has held a trial in which he considered the conduct of the parties up to the date of the judgment which he gave. I am not by any means a Court of Appeal to consider whether his findings would have been made by me. Surely we have to consider the conduct of the parties only in relation to the undertakings given at that time and the conduct of them both subsequently.

On the fourth day of the trial Mr. Williston, counsel for the appellant, asked a question relating to an occurrence in 1956; Mr. Robb, counsel for the respondent, intervened and the record proceeds:

> Mr. Robb: Excuse me, my lord. Just so that there can be no misunderstanding as to my position on these aspects, I do think that the Judgment of the Chief Justice cannot be gone behind. This matter was gone into there, and I think the Chief Justice expressed his opinion on the evidence, with respect. I cannot object to my friend, as it were proceeding with it if he says it has some other relevance, but I do wish to make it clear that on the argument we cannot go behind the Chief Justice.
>
> Mr. Williston: I don't suppose it is going to be necessary for my lord to make any specific finding of adultery or not; but I believe, if my lord is going to decide who the children should go to, he should have a certain background, even though possibly incidentally some of these matters were touched on before.
>
> His Lordship: Touched on? They were ruled on, surely, and I have no jurisdiction to arrive at any different conclusion if I had any intention of doing so.
>
> Mr. Williston: I am not asking my lord to.

In his reasons for judgment, however, the learned trial judge says:

> I think a critical review of the conduct of the defendant in the issue from 1952 up to the time of the trial of the issue is necessary in order to determine her fitness to be the custodian of her infant daughters as against the claim of her former husband, the plaintiff in the issue.

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The apparent inconsistency between these views may be explained by the need felt by the learned trial judge to determine how large a part the undertaking given by the appellant had played in bringing McRuer C.J.H.C. to the conclusion that the daughters should be committed to her custody and the weight which should be attached to its breach.

The undertaking was given under the following circumstances. The appellant was the only witness called for the defence. Her evidence takes up 92 pages of the record. At the conclusion of her cross-examination the transcript reads:

> By His Lordship:
>
> Q. If the custody of these two little girls is awarded to you, are you willing to undertake that any associations that have been carried on between you and your co-defendant, Kruger, will be discontinued?
>
> A. Yes, sir, I do.
>
> Q. The little girls won't come under his influence at all?
>
> A. No, sir.
>
> Q. You will undertake that?
>
> A. Yes, sir, I do.
>
> HIS LORDSHIP: All right. That is all.

Paragraph 3 of the formal judgment of McRuer C.J.H.C. shewing how this undertaking was embodied therein has already been quoted.

There is no doubt that the undertaking as embodied in the formal judgment was breached by the appellant on a number of occasions between the date of that judgment and November 6, 1958, the date of the last agreement between the parties; but the appellant denies that there was during that period any illicit relationship between her and Kruger and there is no finding against her on that point, nor is it shewn that at any time during that period did the daughters come under the influence of Kruger.

The breach of an undertaking given to the Court is never to be regarded lightly, but the fact of it having occurred cannot in this case be treated in isolation. I think it clear from reading the reasons of McRuer C.J.H.C. in their entirety that he regarded the appellant as a proper person and indeed the best person to have the custody of the daughters, provided she did not continue her association with Kruger and that the daughters did not come under his

influence. Mr. Robb submits that if the appellant had refused to give the undertaking the learned Chief Justice would not have awarded the custody to her; it is not possible to say just what would have occurred in that event; it may be that after discussion with counsel the terms of the undertaking would have been clarified and provision made for the eventuality of the appellant and Kruger being married. Be that as it may, the important fact remains that the learned Chief Justice was of opinion that apart from the part played by Kruger in the matter the mother was the person to whom in their own best interests the daughters' custody should be given.

It is important to remember that to the extent of keeping the daughters from coming under the influence of Kruger the undertaking appears to have been observed.

An affidavit of the respondent sworn on September 5, 1958, in support of the application made by Mr. Beaudoin to vary the judgment of McRuer C.J.H.C. as to custody shews that early in April 1958 he was aware that the appellant was associating with Kruger; but as has already been mentioned this application was withdrawn and the negotiations between the parties resulted in the agreement of November 6, 1958.

In my respectful view Spence J. in dealing with the effect of the breach of the undertaking failed to give due weight to the complete change in circumstances resulting from the marriage of the appellant and Kruger and to the fact that with full knowledge of that breach the respondent had on November 6, 1958, signed the agreement set out in full above, and containing, it will be remembered, the following provision:

> Mr. Booker will apply for judgment absolute forthwith, and following judgment absolute he consents to Mrs. Booker seeing Mr. Kruger pending marriage, and he consents to their marriage and that the association referred to in this paragraph shall not be raised as a ground for a further application for custody by Mr. Booker. It is understanding of the parties that marriage will take place in the immediate future.

In his reasons for judgment Spence J. said in reference to this agreement:

> Therefore I am of the opinion that if the agreement, exhibit 16, had been an agreement between the parties on well nigh any subject except the custody of children, it would be an effective and binding agreement upon them both and no attempt of the plaintiff to rescind it months after

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its execution and when it had been acted upon could be effective. Two factors, however, in the present situation very much alter the result. In the first place, it is an agreement which purports to amend a judgment of the Court and secondly, it is an agreement as to the custody of children.

On the argument before us Mr. Williston was proceeding to develop the submission that the parties were acting in good faith with the interest of the daughters in mind in entering into the agreement of November 6, 1958, when he was told by the Court that we would assume this good faith unless it was challenged in which case he could deal with it in reply; it was not challenged.

Counsel united in informing us that Mr. Beaudoin who advised the respondent to sign the agreement is a counsel of the highest standing and of great experience in cases of the sort with which we are concerned.

With the greatest respect to those who hold the contrary view, I am of opinion that the agreement was a proper one and in the best interest of the daughters.

Spence J. was of the opinion that until the judgment nisi was amended upon application the agreement of November 6, 1958, would be ineffective. I am unable to agree with this. The express power given to parents of an infant who are not living together to enter into a written agreement as to which parent shall have the custody of the infant is not, in my opinion, abrogated by the circumstance that an order of the Court dealing with the custody is in effect. Counsel very properly informed the Chief Justice that the agreement had been made and in my opinion nothing more was necessary. It may also be observed that the order as to who should have the custody of the daughters was not varied. The change was the releasing of the appellant from an undertaking which would obviously cease to have any object after her marriage to Kruger.

It was not argued that the Court has not jurisdiction to make an order contrary to the terms of an agreement between the parents as to the custody of an infant if this should be necessary for the welfare of the latter. It is not difficult to think of cases where a change of circumstances might make such a course imperative.

In the case at bar the respondent a highly intelligent and successful business man advised by eminent counsel and with the fullest knowledge of the appellant's breach of

undertaking and of all the conduct on the part of the appellant and Kruger with which they have been reproached, and in contemplation of their forthcoming marriage agreed that the appellant should have the custody of the daughters. I have already expressed my view that the agreement was a proper one.

In Ontario divorced persons are free to re-marry; no distinction is made in this regard between the "innocent" and the "guilty" party (as is done in some other jurisdictions). The evidence is that the home in which the appellant and her husband are living is a suitable one for the upbringing of the daughters.

It would, I think, require proof of a very real change of circumstances to warrant the Court disregarding this agreement of the parties. When the evidence as to what is complained of since the agreement was made is examined it appears to consist of disputes, disagreements and annoyances in regard to the access to the daughters, some of which were not inaptly described by the learned trial judge as "picayune" and "ridiculous". The evidence, in my opinion, falls far short of shewing any such change in circumstances as enables the Court to say that in the best interests of the daughters their custody should be taken from their mother.

It remains to consider the following paragraph in the reasons of the learned trial judge:

> There is, moreover, the most important circumstance that to award the defendant in the issue the custody of the two infant daughters, Susan and Jennifer, would be in effect awarding such custody to the defendant Kruger. Counsel for the plaintiff on the argument put it that Kruger was the moving spirit in this alliance and that he was the person who was in control and directed the conduct of the defendant in the issue throughout. Everything in the trial would seem to indicate such a conclusion to be the sound one. The defendant Kruger was a close friend of the plaintiff for ten years prior to the action for dissolution of marriage and what is more was an object of the plaintiff's bounty on more than one occasion. The plaintiff advanced the defendant Kruger large sums of money, which were subsequently repaid, and yet the Chief Justice of the High Court, in the dissolution action and I in this action have found that the conduct of the defendant Kruger throughout was, in reference to the plaintiff, about as disgraceful as can be imagined. It would be with some very considerable misgiving that I would make an order which would have the practical effect of giving him the custody of the plaintiff's two infant daughters. Therefore, and for these reasons and despite the fact that it is with the utmost reluctance that I award the custody of the infant daughters to anyone but their mother, I must find that as between the plaintiff and the defendant, the plaintiff is the more proper person to have the custody of Susan and Jennifer Booker.

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With great respect, I am unable to agree with this view. I will not repeat what I have said as to the agreement made with the fullest knowledge of Kruger's conduct. I think the error in this passage lies in approaching the matter as if the question were whether Kruger or the respondent should have the custody and upbringing of these little girls. That is not the question. The question is rather whether they shall be brought up by their mother or by their step-mother. I say this not merely because it is common knowledge that in the normal home the responsibility of bringing up young children, especially young girls, falls upon the mother rather than the father but also because the evidence in this case shews that the respondent is very fully occupied by the business in which he has been so successful and that the demands of that business necessitate his frequent absence from his home. Nothing has been said, and I certainly have nothing to say, against the respondent's wife but the record is replete with evidence, much of it coming from the respondent himself, that the appellant is a good and affectionate mother well fitted to care for and bring up her daughters.

Before parting with the matter I would deal in more detail with the effect of the evidence as to the fitness of the mother to have her children and the suitability of the home in which she is now established and would make reference to some relevant authorities were it not for the fact that, in my opinion, these matters have been so dealt with in the reasons of Laidlaw J.A. that there is nothing which I can usefully add. I wish to adopt those reasons in their entirety and to found my judgment upon them as well as on what I have said above and I refrain from further repetition of them.

It is most desirable in the interests of the parties that there should be an end to this litigation but under the terms of the order directing the issue and on the pleadings delivered pursuant thereto the question of what payments if any are to be made by the respondent for the benefit of the infants while they are in the custody of the appellant does not appear to me to be before us on this appeal.

I would allow the appeal, set aside the judgment of the Court of Appeal and the judgment of Spence J., except in so far as the latter deals with the custody of and access to the

infant John Scott Booker, and direct judgment to be entered awarding, until further order, the sole custody and control of the infants Susan Claire Booker, born October 27, 1951, and Jennifer Lynn Booker, born November 3, 1953, to the appellant Vera Leona Kruger subject to the right of the respondent Ernest William Booker to have access to the said infants as provided in the agreement of November 6, 1958, marked as Exhibit 16 at the trial of the issue and the draft minutes of settlement therein referred to and marked as Exhibit 15 at the said trial, and further directing that neither of the said infants shall be removed by either of the parties from the Province of Ontario without the consent in writing of the other party or leave of the Court. The appellant is entitled to recover from the respondent her costs of the issue, including the costs referred to in paragraph 8 of the order of McRuer C.J.H.C. made on June 15, 1959, her costs in the Court of Appeal and in this Court.

Appeal allowed with costs, KERWIN C.J. *and* LOCKE J. *dissenting.*

Solicitors for the defendant, appellant: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitor for the plaintiff, respondent: Malcolm Robb, Toronto.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.