September 1918, *that the respondent have the general costs of the action since that date except the costs of the issue raised by the contention that the contract was terminated on* 21*st March* 1918, *and that the respondent pay the costs of that issue to the petitioner. Each party to bear its own costs of this appeal. All costs to be taxed and set off.*

Solicitor for the appellant, *F. L. Stow*, Crown Solicitor for Western Australia, by *Lawson & Jardine.*

Solicitors for the respondent, *Leake, James & Darbyshire*, Perth, by *Malleson, Stewart, Stawell & Nankivell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BOYD . . . . . APPLICANT;

AND

MACPHERSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Practice—High Court—Appeal from Supreme Court of State—Special leave—Special circumstances—Custody of child—Application by father—Judiciary Act 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 35 (1) (*b*).

An order made on habeas corpus by a Judge of the Supreme Court of Victoria refusing to give the custody of a child to her father, who resided out of the jurisdiction, was reversed by the Full Court.

Held, on the facts, that no special circumstances were disclosed justifying the granting of special leave to appeal to the High Court.

Special leave to appeal from the Supreme Court of Victoria: *R.* v. *Boyd*; *Ex parte Macpherson*, (1919) V.L.R., 538; 41 A.L.T., 46, refused.

H. C. OF A. 1919.

BOYD v. MACPHERSON.

APPLICATION for special leave to appeal.

An order *nisi* for habeas corpus was obtained from the Supreme Court of Victoria by James Simpson Macpherson, directed to Mrs. Edith Boyd, for the purpose of his obtaining the custody of his daughter Mary Violet Thornley Macpherson (hereinafter called Mary Macpherson). The applicant on 21st March 1905 married Vera Beatrice Thornley, daughter of Nathan Thornley, deceased; and of the marriage the only issue was Mary Macpherson, who was born on 23rd June 1906 in Borneo, where her father carried on his profession of a medical practitioner. Mrs. Macpherson died on 13th November 1907, and the applicant married again on 8th June 1912, and of this marriage there were, at the time of these proceedings, two children, the elder being about six years of age. In 1910 Mary Macpherson went in charge of the applicant's sister to England, and remained there until 1912, when she came to Victoria at the invitation of her grandmother, Mrs. Thornley, widow of Nathan Thornley, with whom she lived. In May 1913 the applicant left Borneo and went to England, and while there, on 3rd July 1913, wrote a letter to Mrs. Thornley consenting to her being appointed guardian of Mary Macpherson until she attained the age of eighteen years, and, in the event of Mrs. Thornley's death, to her daughter Mrs. Boyd's being appointed in her place.

Mary Macpherson was entitled under the will of Nathan Thornley to a contingent interest in his estate amounting to about £1,500 a year; and on 16th December 1913 an order was made by the Supreme Court permitting the trustees to apply a portion of the income of the estate to her maintenance and education, and thereafter they applied £200 a year for that purpose. Mrs. Thornley died in November 1914, and Mary Macpherson thereafter lived with Mrs. Boyd. The applicant, with his wife and their two children, went to live in British Columbia about August 1913, and after the death of Mrs. Thornley he wrote, on 10th December 1914, to Mrs. Boyd stating that he proposed to have Mary Macpherson brought to him as soon as the circumstances of the War would permit. He joined the Canadian military forces as a medical officer, and continued as such until he was demobilized in April 1919; he then came to Victoria for the purpose of obtaining the custody of Mary Macpherson and

taking her to his home in British Columbia. As Mrs. Boyd refused to give him custody of Mary Macpherson, he instituted these proceedings.

On the return of the order *nisi* *Hood* J., after hearing oral evidence and interviewing the child, made an order discharging the order *nisi*; but on appeal to the Full Court the order was made absolute, and Mrs. Boyd was directed to give Mary Macpherson into the custody of the applicant, he undertaking not to act upon the order pending further order of the Court or a Judge: *R.* v. *Boyd*; *Ex parte Macpherson* (1).

Mrs. Boyd now applied for special leave to appeal from the decision of the Full Court.

J. R. Macfarlan, for the applicant. This is a case in which special leave should be granted. [He was stopped.]

Starke, for the respondent. This is not a case for special leave. There is no mistake on a question of law, but the appeal is entirely upon a question of fact.

[RICH J. Is not the form of the order wrong? Is it not usual to require the applicant who wishes to take a child out of the jurisdiction to give an undertaking or security that future orders of the Court will be obeyed, and that the child will be brought back if required, and will be properly maintained while abroad?]

Technically the child is not a ward of Court, nor was she ever domiciled in Victoria. The fund in which she is interested is in the hands of the trustees, and no security is wanted. The Court has never granted special leave to appeal on a question of fact. There is no circumstance of the nature referred to in *Dalgarno* v. *Hannah* (2).

[ISAACS J. The Court has an unfettered discretion (*In re Eather* v. *The King* (3)).]

Special circumstances must be either that the case involves a question of important public interest, that some principle of law has been set aside, or that the matter is of a very substantial character.

(1) (1919) V.L.R., 538; 41 A.L.T., 46.

(2) 1 C.L.R., 1, at p. 8.

(3) 20 C.L.R., 147.

H. C. OF A. 1919.

BOYD v. MACPHERSON.

J. R. Macfarlan, in reply. One special circumstance is that the Full Court has infringed the principle of law laid down by this Court, that a Judge who has seen and heard the witnesses is the best tribunal to determine the facts. A *primâ facie* case of error as to a question of fact which involves a grave decision is a special circumstance. The Court should not allow even a father in a case of this kind to take his child out of the jurisdiction. Another special circumstance is that the Full Court ignored the fact that there had been a previous arrangement for the custody of the child. That arrangement throws on the applicant the onus of showing that it should be upset. The Full Court went broadly upon the principle that the fact that the applicant is the father is practically the only fact that should have weight.

The judgment of the COURT, which was delivered by BARTON J., was as follows :—

We wish to refer again to what was said by the High Court, including all the members of the Court except myself, in *In re Eather* v. *The King* (1) : " As we interpret sec. 35 (1) (*b*) of the *Judiciary Act*, the Court has an unfettered discretion to grant or refuse special leave in every case, but we think that the term ' special leave ' connotes the necessity for making a *primâ facie* case showing special circumstances." We have no desire to limit that discretion. It must remain unfettered ; but, having considered the arguments on both sides as to whether, having that discretion, we should grant special leave to appeal on the ground that a *primâ facie* case showing special circumstances has been made, we think that on the whole Mr. *Macfarlan* has not established that position, and that special leave must be refused.

Special leave to appeal refused.

Solicitors for the applicant, *Blake & Riggall.*

Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

B. L.

(1) 20 C.L.R., 147.