[HIGH COURT OF AUSTRALIA.]

STORIE . . . . . APPELLANT;
APPLICANT,

AND

STORIE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 25; SYDNEY, *July* 27.*

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Custody of Infant—Application by mother for custody—Child placed by father in care of a stranger—Welfare of child—Need of parental care—Refusal of wife's application by primary judge—Exercise of discretion—Functions of appellate court on appeal from discretionary order—Marriage Acts, 1928-1941 (*No.* 3726—*No.* 4839) (*Vict.*), *s.* 136.

S. took from his wife, who was living apart from him in Melbourne, the child of the marriage—a female, about seven years of age—and placed the child with his cousin, a married woman living in the country, with whom the child remained for about two years. It appeared that this woman and the wife were not on friendly terms and, as the child was living in the country, access by the wife was difficult and expensive. The wife applied for custody of the child. The application was opposed by S., who sought to have the child left in its present care. The wife had made arrangements to board the child and herself with a friend of many years' standing, a married woman who had no children of her own and who had promised to look after the child while the wife was at work. The primary judge refused the wife's application.

Held, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting), that, although the making of the order was a matter of discretion, the order dismissing the wife's application should be set aside because due weight had not been given to all considerations material to the welfare of the child and custody should be given to the wife. In particular, sufficient weight had not been given to the consideration that parental care was desirable for the child's welfare.

* Reported by request.

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Functions of an appellate court on an appeal from a discretionary order considered.

Charles Osenton & Co. v. *Johnston*, (1942) A.C. 130, and *Blunt* v. *Blunt*, (1943) A.C. 517, referred to.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

Agnes Cis Storie, the wife of Eric Ernest Holmes Storie, applied to the Supreme Court of Victoria for the custody of Lynette Violet Storie, the child of the marriage. The husband opposed the application. The facts given in evidence on the hearing of the application appear sufficiently in the judgments hereunder. *Lowe* J. dismissed the application, and an appeal by the applicant from his decision was dismissed by the Full Court of the Supreme Court (*Gavan Duffy*, *Martin* and *O'Bryan* JJ.).

From this decision the applicant appealed, by special leave, to the High Court.

R. G. Menzies K.C. and *H. Woolf*, for the appellant.

J. V. Barry K.C. and *T. K. Doyle*, for the respondent.

Counsel referred to *Evans* v. *Bartlam* (1); *In re Thain* (2); *Goldsmith* v. *Sands* (3); *R.* v. *Boyd*; *Ex parte MacPherson* (4); *R.* v. *Dunkin* (5).

Cur. adv. vult.

July 27.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal in proceedings taken under the *Marriage Acts* 1928-1941 (Vict.) by Mrs. Agnes Cis Storie in order to obtain the custody of her child, Lynette Violet Storie, a girl of the age of nine years. The husband, Eric Ernest Holmes Storie, was a respondent to the proceedings, but did not himself claim to have the custody of the child. Upon prior proceedings of the same character, *Mann* C.J. had expressed the opinion that the husband was unsuited by reason of sex, age and temperament to have the care of the child, but had refused to order that the mother should have the custody of the child, because the mother was then unable to provide a suitable home for her. In the present proceedings it was held by *Lowe* J. that the mother was not disqualified in any way from having the custody of the child, and that she had a suitable

(1) (1937) A.C. 473.
(2) (1926) 1 Ch. 676.
(3) (1907) 4 C.L.R. 1648.
(4) (1919) V.L.R. 538.
(5) (1917) V.L.R. 655.

home for her. He was of opinion, however, that upon a consideration of all the circumstances, and regarding the welfare of the child as the paramount element, the child should be left where she is at present, namely, in a good home with a female cousin of the husband, Mrs. Smith of Noojee. He therefore refused to make any order upon the application of the mother. Upon appeal the Full Court affirmed this decision and an appeal is now brought by special leave to this Court.

It was strongly urged for the respondent that *Lowe* J. had exercised his discretion in the matter, taking into account all relevant considerations, and that this Court should not interfere with such an exercise of discretion.

The principles according to which an appellate court should exercise its powers upon appeal in a matter in which a judge has exercised a discretion entrusted to him by law have recently been examined and stated by the House of Lords. In *Evans* v. *Bartlam* (1), it was emphasized by Lord *Atkin* that it was a mistake to hold that the jurisdiction of the Court of Appeal in such a matter was limited to a power to interfere with the exercise of discretion in cases in which some wrong principle of law had been applied. His Lordship said :—" Appellate jurisdiction is always statutory : there is in the statute no restriction upon the jurisdiction of the Court of Appeal : and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."

Lord *Wright* said (2) :—" It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

These statements of the law were referred to in *Charles Osenton & Co.* v. *Johnston* (3). In that case Lord *Wright* makes special reference (4) to the passage quoted from Lord *Atkin*—" if it sees

(1) (1937) A.C. 473, at p. 480.
(2) (1937) A.C., at p. 486.
(3) (1942) A.C. 130 : see pp. 138, 143, 147, 148.
(4) (1942) A.C., at p. 143.

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that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it." He expressed the view that Lord *Atkin* did not use the word "will" as involving certainty, or even what is called moral certainty—"The context, I think, shows that all he meant was 'may,' that is, that there is a reasonable danger of injustice."

In *Blunt* v. *Blunt* (1) the same question was again considered, and citations were made from *Osenton's Case* (2). Viscount *Simon* L.C., referring to the circumstances in which an appeal may successfully be brought against the exercise of the Divorce Court's discretion, said (3) :—"If it can be shown that the Court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal."

His Lordship then quoted a statement in *Osenton's Case* (2) to the effect that the appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion exercised by the Judge, but said that "if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified."

In this case I apply the principles established by the decisions in the House of Lords that where an appellate court is reviewing an order made in the exercise of a discretion conferred by law the appellate court may reverse the order either if it is satisfied that no weight, or that no sufficient weight, has been given to relevant considerations, or if it is satisfied that an injustice has been done by the order appealed against.

In cases relating to the custody of infants, Parliament has specified certain matters which are to be taken into account by the Court. The relevant provisions of the *Marriage Acts* are (s. 136) :—"Where in any proceeding before any Court (whether or not a Court within the meaning of this Part) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father in respect of such custody

(1) (1943) A.C. 517.
(2) (1942) A.C. 130.
(3) (1943) A.C., at p. 526.

upbringing administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father." And s. 145 :—" The Court may upon the application of the mother of any infant (who may apply without a next friend) or of the father of any infant make such order as it thinks fit regarding the custody or control of such infant and the right of access thereto of either parent having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father and may alter vary or discharge such order on the application of either parent or after the death of either parent on the application of any guardian under this Part and in every case may make such order respecting the costs of the mother and the liability of the father for such costs or otherwise as to costs as it thinks just."

It is clear that *Lowe* J., and the Full Court upon appeal, took into account all the matters mentioned in these sections. The questions which in my view arise upon this appeal are whether insufficient weight has been attributed to one or more of these matters, and whether an injustice has been done by the order which has been affirmed by the Full Court.

None of the findings of fact made by *Lowe* J., with one exception, have been challenged. That exception is to be found in a statement that the child had been placed in the custody of Mrs. Smith with the consent of the mother. It is conceded that this was not the case, and that the mother strongly resented the action of the husband in forcibly removing the child from her and placing her with Mrs. Smith. *Lowe* J., however, was consulted by *Martin* J. and explained that he had not taken as the basis of his decision any assumption that the mother had consented to the child being in the custody of Mrs. Smith, but had regarded the facts proved before him as tending to show only that Mrs. Smith was a not unsuitable person to have the custody of the child. I therefore do not regard the judgment of *Lowe* J. as based upon any view that the mother had consented to the child remaining in the custody where she now is.

The facts found by the learned judge upon which he based his decision were that the child was in a good home and was happy and healthy and in good surroundings ; that the parents cannot, or will not, agree to live together ; that the arrangements made for access of the mother to the child have been unsatisfactory and a constant source of expense and irritation to both parents ; and that he had no reason to suppose that the home which was offered by the mother would be unsatisfactory. *Lowe* J. interviewed

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the father, the mother, the child, and Mrs. Smith, and was favourably impressed by Mrs. Smith. His Honour stated that the question which faced him was whether, "Having on the one side a good home in which the child is living happily and healthily and in good surroundings, and on the other side a home offered by the mother which I think, from all I can see, would be a satisfactory home, what is best to do in the interests of the infant herself?" His Honour referred to the direction in the *Marriage Act* that he was to take into account as a first and paramount consideration the welfare of the child, and said that consideration of the welfare of a child involved attention to the desirability of a child having parental care and training where such care and training was available. His Honour saw no sound ground for preferring the mother's wishes to those of the father. He was impressed with the desirability of the little girl having the care and attention of at least one parent, and said that that might have been a decisive consideration "if the child had been a younger child, but the child is nine years of age and for over two years has been in the custody in which both parents put her, and, bearing that in mind, I think that I have no sound reason for preferring the mother's custody to that in which the little child is at present."

It is evident, therefore, that his Honour paid attention to all the considerations mentioned in the sections which I have quoted, the wishes of the mother and father, without preferring the wishes of either to the wishes of the other, the conduct of the parents, and, as a paramount consideration, the welfare of the infant. Upon appeal to the Full Court his Honour's decision was upheld, it being stated that the case was nicely balanced, but that there was no ground for interfering with the exercise of his discretion by the learned judge.

The father makes no claim to the personal custody of the child, and therefore this case should not be regarded as a competition between a father seeking custody and a mother seeking custody. The child is a girl of nine years of age living with the consent of her father with a stranger at Noojee, which is about seventy miles from Melbourne, where both mother and father live. The arrangements made for the access by the mother have been most unsatisfactory, producing a great deal of ill-feeling and friction. The mother is earning £4 a week, and the expense of her visits to the child is not inconsiderable. The present position is that the child is receiving no parental care at all.

Thus the result of the order which has been made is that, though no claim is made by the father for the personal custody of the

child, though the mother is not disqualified in any manner from exercising what in such circumstances is her natural and legal right as against any stranger, and though the mother can provide a suitable home, the child is to remain in the custody of a stranger. It is clear that very real animosity and mutual resentment exist between the mother and Mrs. Smith. Mrs. Smith wrote to the mother stating that she was a very false woman who always side-stepped things by telling lies and that she was satisfied that she (the mother) was not straight-forward and honest. The mother has written to the child, who has never replied. Mrs. Smith did not exercise any authority to see that the child did reply, but has sworn in an affidavit that she asked the child if she wished to write to her mother, and, upon receiving a negative answer, let the matter rest. Mrs. Smith appears to be quite satisfied that such a course of conduct is proper. The inevitable result of the child remaining with Mrs. Smith must be to alienate her affections from her mother.

Prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a stranger can also provide a good (or even, I should say, a better) home is in such circumstances an element of only slight, if any, weight. If it were shown that the change of custody in this case would probably cause lasting unhappiness to the child, that fact certainly ought to weigh very heavily in reaching a decision as to the welfare of the child. But no such case is here made. It is true that the child is happy where she is, but that fact does not show that she would be unhappy with her mother, and it should not be presumed that this will be the case.

In my opinion, when the order sought by the mother was refused, sufficient weight was not given to the profound importance of giving a child parental care, affection and control, where that is possible, in a suitable home. This is an element which is of the greatest significance in relation to the welfare of a young child. When to this fact is added the fact that the continuance of the present state of affairs will certainly result in estranging the child from her mother, it should be held that the welfare of the child requires her to be returned to the custody of her mother. I add that in my opinion the authorized continuance of the present position by refusing to make an order as asked by the mother constitutes an injustice alike to the child and to the mother.

In my opinion the appeal should be allowed and the case remitted to the Supreme Court to make orders as may seem proper with

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respect to access and maintenance. The Supreme Court has made no orders as to costs, and I consider that the interests of all parties will be best served by making no order as to the costs of the appeal to this Court.

RICH J. In this matter we are exercising our appellate jurisdiction and it is our duty to consider whether the judgment under appeal is wrong. The circumstances in which an appeal may be successfully brought against the exercise of the Court's discretion have been stated in two cases in the House of Lords. The first case is *Charles Osenton & Co.* v. *Johnston* (1), in which Viscount *Simon* L.C. states the circumstances to be borne in mind before a master or judge decides to exercise his discretion by transferring a trial to an official referee. The second case is *Blunt* v. *Blunt* (2) where his Lordship, quoting his remarks in the first case, considers the circumstances in which an appeal may be successfully brought against the exercise of the Divorce Court's discretion. There he says (3): "If it can be shown that the Court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the Court's discretion will have been exercised on wrong or inadequate materials, but, as was recently pointed out in this House in another connection in *Charles Osenton & Co.* v. *Johnston* (4): 'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reached the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified.'" These rules were applied in *Winter* v. *Winter* (5). His Lordship also cites from *Holland* v. *Holland* (6) the following passage from the judgment of *Swinfen Eady* M.R.:— "The question for consideration by this Court is whether his (the primary Judge's) judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the Judge

(1) (1942) A.C. 130, at pp. 138, 139.
(2) (1943) A.C. 517.
(3) (1943) A.C., at pp. 526, 527.
(4) (1942) A.C. 130, at p. 138.
(5) (1944) P. 72.
(6) (1918) P. 273, at p. 280.

below did. There is no appeal from his discretion to our discretion, and the appellant is not entitled to succeed unless the judgment is erroneous."

These considerations are, I think, applicable when this Court is considering an appeal in matters relating to the custody of infants. I shall refrain from re-stating all the details of the instant case and am content to refer briefly to the main facts. In the course of all the applications in this case no order for custody has been made. In the first instance an application for custody was made by the mother to *Mann* C.J. At that time the child had been snatched by the husband from his wife's care and placed by him without his wife's consent with Mrs. Smith—who was living at Noojee, a country town some seventy-five miles from Melbourne. At the time of the application neither father nor mother had a home to which the child could be taken to live. If the mother had had such a home his Honour would have given her the custody. He stated that the husband was " by reason of sex, age and temperament unsuited to have the care of the child." His Honour in dismissing the wife's application characterized the husband's removal of the child as high-handed. Thus no order for custody was made. Next came questions of access and troubles arising from the directions given and then an application by the wife to *Lowe* J. for custody of the child. This time the wife had a suitable home in Melbourne in which to house the child. In the interval between the two applications considerable friction had occurred between the child's mother and Mrs. Smith. It is apparent from the affidavit filed in the case that Mrs. Smith was hostile to the applicant and had not encouraged the child to write to her mother or establish even friendly relations with her. It must be borne in mind that the controversy is not between the father and the mother but between the mother and Mrs. Smith who has no claims to the custody of the child. The father had clearly abnegated any rights he had. The matters which are applicable in cases of this character are (1) the welfare of the infant; (2) the conduct of the parents, and (3) the wishes as well of the mother as of the father. These matters are set out in s. 145 of the *Marriage Acts* 1928-1941 (Vict.) which with some additions embodies s. 5 of 49 & 50 Vict. c. 27 —an Act described by *Lindley* L.J. as " essentially a mother's Act."—*In re A. and B.* (1). This Act and previous legislation had mitigated the severity of the common law. Under these Acts the primary consideration is the welfare of the infant. *Lowe* J. saw the parties, Mrs. Smith and the infant but beyond saying at the

(1) (1897) 1 Ch. 786, at p. 790.

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end of his judgment that he was " much impressed on seeing Mrs. Smith " makes no further comment. In the course of his judgment *Lowe* J. said " At one stage of the argument I was strongly impressed with the view that here at any rate was the possibility of this little girl having the care and attention of one parent, and that might have been a decisive consideration, I think, if the child had been a younger child, but the child is nine years of age and for over two years has been in the custody in which both the parents put her, and, bearing that in mind, I think I have no sound reason for preferring the mother's custody to that in which the little girl is at present." The child is a female child of tender years rising to puberty who particularly requires a mother's care. And the mother far from consenting has continuously protested against the father's " high-handed " taking of the child and its present custody. The lapse of two years before this application was made is due to the fact that the mother had no suitable home to which the child could be taken. This was the ground upon which the refusal of *Mann* C.J. was based. The wishes of the father are not in the balance with or to be pitted against those of the mother. He had no desire to exercise his parental duties delegating the care of his child to a stranger who as against the mother has no claims to her custody. Nor should any contrast be drawn between Mrs. Smith's home and that now offered by the mother. Indeed *Lowe* J. said that from all he could see it " would be a satisfactory home."

From the decision of *Lowe* J. an appeal was made to the Full Court. The reasons of all their Honours appear to be altogether in favour of the applicant's claim but they hesitated to interfere with the discretion exercised by the learned primary judge either because " his order was not wrong in principle " or because of some " uncertainty " in the proposal with regard to the home offered by the mother. There is no substance in the latter suggestion in view of the finding of the primary judge that the " home offered by the mother " would be a satisfactory home. With regard to the question of principle " the jurisdiction of the Court of Appeal on appeal is not limited so that the Court of Appeal have no power to interfere with the Judge's exercise of discretion unless we think that he acted upon some wrong principle of law." In my opinion the question still to be determined is whether he exercised his discretion according to justice and a complete appreciation of some considerations by which he should have been guided : *Evans* v. *Bartlam* (1). In my opinion he has not done so.

(1) (1937) A.C., 473 at pp. 480, 486, 487.

"Amongst these (considerations) the wishes of an unimpeachable parent stand first": *In re Thain*; *Thain* v. *Taylor* (1). The present case is not concerned with a question of practice and procedure but with a question of substantive right—a right which the applicant has not forfeited. It is, I consider, of paramount importance that a female child of nine years of age should have her mother's attention, care and training and have the opportunity of winning her affection and for that purpose should be brought into intimate relation with her.

The appeal should be allowed.

STARKE J. Appeal by special leave from an order of the Supreme Court of Victoria dismissing an appeal from an order of a judge in chambers dismissing a summons seeking an order that the appellant have the custody of her daughter who was born on 13th August 1935.

The law of the case is governed by the *Marriage Acts* 1928-1941 (Vict.), s. 136: "Where in any proceeding before any Court . . . the custody or upbringing of an infant . . . is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father in respect of such custody upbringing . . . is superior to that of the mother, or the claim of the mother is superior to that of the father."

Differences have arisen between the father and the mother of the child, and they separated some time in the year 1942. About June of that year the father of the child took her, without her mother's consent, to the home of his cousin, a married woman, at Noojee, some seventy or eighty miles from Melbourne. At that time the child was pale and anæmic and suffered severely from asthma. About the same time the father made an arrangement with his cousin for the care and upbringing of the child in her home, and there the child has ever since remained. In November of 1942 the appellant applied to *Mann* C.J. for the custody of the child. But he declined to make any order, mainly on the ground that the appellant had no settled home and could not in her then circumstances give much personal supervision or attention to the child. In July 1944 the appellant made another application for the custody of the child, which, as already stated, was dismissed, and that decision was affirmed on appeal.

(1) (1926) Ch. 676, at p. 684.

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Mann, C.J. truly said that the father in this case by reason of sex, age and temperament is unsuited to have the care of the child. But he arranged with his cousin to look after the child and still desires that she should remain in that custody because she is thriving and is happy there. Even so it must be a strong case that would induce the Court to deprive a young girl of the care and attention of her mother. And this is especially true if, as here, the mother and the present custodian of the child are not on friendly terms ; the affection of the child for her mother appears to be weakening and access of the mother to her child is both difficult and expensive. But what are the facts ? The father asserts that his wife never properly looked after the child ; but the learned judges of the Supreme Court have not so found nor have they said that the mother is an unsuitable custodian of her child. The child has been very well cared for by the present custodian, who much impressed the primary judge. The child is with a kindly, experienced woman who has brought up children of her own ; she is in healthy surroundings and now in excellent health and spirits and apparently happy and contented. The mother has no settled home and is a working woman who must be away from her place of residence during working hours. She has, however, made arrangements with a friend of many years' standing to board the child and herself. This friend is a married woman, who has no children of her own, and has promised to look after the child when the mother is at work and the child is not at school. She has a comfortable home suitable for the residence of the child and her mother. Her husband is at present a prisoner of war in Malaya, but what will happen if he returns is uncertain, though his wife believes that he will welcome the mother and child in his home and allow them to remain. Next door lives the mother's sister and her young children, and the sister promises to co-operate in looking after the child. The learned judges in the Supreme Court were not, however, unmindful of the fact that the father of the child, who is attached to her, and upon whom the burden of her maintenance and support must ultimately fall, desired that the child should remain in her present custody, and, though the statute provides that his position is not superior to that of the mother, nevertheless the position of the mother is not superior to his. The father and the mother have not competing or any rights, properly so called, for the welfare of the child is, as the statute provides, the first and paramount consideration. All the learned judges, however, thought that changing the custody of the child, in present circumstances, was giving up the substance for the shadow, a certainty for an experiment. That may be

described as the short view of the case, the immediate happiness and welfare of the child, but the long view regards not only the present but the future protection and welfare of the child. There is of course an element of uncertainty involved in a change of home and surroundings (cf. *R.* v. *Boyd*; *Ex parte MacPherson* (1)). But even the existing custody of the child involves some uncertainty, for it depends upon the life of the present custodian, the willingness of her husband and herself to have the child in their home and perhaps other circumstances that cannot be foreseen. The welfare of the child in the long view requires that the child should have the protection care and attention of one of her parents. And in this case the mother is marked out by all the circumstances as that parent. Moreover in the mother's custody the child will be in Melbourne and access of the father to her can be more easily arranged than was possible for the mother when the child was at Noojee.

Special leave to appeal has been granted in this case, which connotes some prima-facie case showing special circumstances: *In re Eather* v. *The King* (2); *Boyd* v. *Macpherson* (3). But the case involves no question of important public interest, no principle of law has been set aside, and no miscarriage of justice has occurred in any relevant sense, but at most a somewhat different appreciation of the facts. An appeal, however, is brought to this Court pursuant to that leave against the unanimous judgments of the trial judge, who saw the parties and the child in his chambers, and of the Full Court on appeal from him. No doubt this Court must as a matter of judicial obligation hear and determine the appeal and reach its own conclusion upon the facts appearing in the affidavits. But it should remember that it is in a position of great disadvantage as against the trial judge, who saw the parties and the child. And it should not forget that "we should not make further difficulties for ourselves by assuming that the trial judge has not understood the case, if his views do not agree with our own." "It is, of course, true that the trial judge may have been imposed upon" or placed too much reliance upon his estimate of the parties whom he saw, "but it is more useful," said Lord *Sumner*, "that we should be on our guard against imposing on ourselves" (*S. S. Hontestroom* v. *S. S. Sagaporack* (4); *Powell* v. *Streatham Manor Nursing Home* (5)). That is a very necessary warning in this Court, and I hope in this case that it has not been wholly disregarded. Giving due weight, however, to the opinion of the learned judges of the

(1) (1919) V.L.R. 538.
(2) (1915) 20 C.L.R. 147.
(3) (1919) 27 C.L.R. 245.
(4) (1927) A.C. 37, at pp. 47-49.
(5) (1935) A.C. 243, at pp. 264-268.

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Supreme Court, the welfare of a child is so bound up with the care and protection of her parents, particularly, in the case of a young girl, of her mother, that, as I said before, the circumstances must be strong to induce the Court to deprive a girl of that custody, care and attention, whatever kindness and care others have shown and taken of her.

It will be, I hope, for the ultimate welfare of the child that this appeal be allowed and her custody given to her mother.

DIXON J. I agree that the appeal should be allowed.

Notwithstanding the discretionary character of the jurisdiction exercised by the learned primary judge and the fact that the Full Court of the Supreme Court had refused to disturb his order, I concurred in granting special leave to appeal in this case, though not without hesitation. I did so because the mother's claim to the custody of the girl not yet ten years of age appeared to have been denied on no specific or tangible ground, certainly none involving personal disqualification, and the child to have been left in the actual custody of neither parent, partly because in her present surroundings she seemed happy and healthy and partly because the father had so wished. In addition, it appeared that the father had taken the child clandestinely from the mother on 13th June 1942, that ever since she had persistently sought to regain her daughter and that the manner in which the mother lost control of the child had not been noticed by the primary judge, who had been left under the impression at the time he made the order, that she had concurred in confiding the child to her present custodian. Further, the judgments delivered in the Full Court of the Supreme Court contain observations showing that their Honours felt rather that the discretion of the learned judge should not be disturbed than that the manner of its exercise should be independently confirmed. Prima-facie reasons, therefore, existed for giving special leave in order that the circumstances of the case might be submitted to further examination.

Upon the argument of the appeal, however, more attention was paid to the principles governing the review by an appellate Court of discretionary orders and the general considerations affecting the determination of applications for the custody of children, than to the detailed facts of the case. Perhaps it was thought that little assistance could be obtained from a narrative of facts which concern the infelicities of a matrimonial union formed when the parties were in their middle thirties and which, moreover, are the subject of contradictory affidavits long and numerous.

Since the hearing of the appeal, however, I have read the affidavits filed in the two applications before *Mann* C.J. and, for what it is worth, the correspondence exhibited, as well as the affidavits filed in the application which is the subject of the appeal. Unsatisfactory as in many respects this material is, its perusal has left me with a distinct impression that the welfare of the child will not be best served by excluding her mother from her upbringing. Without attempting to reconcile or resolve the conflicting accounts of various matters which the affidavits give, it is possible to obtain from them a reasonably clear picture of the course of events and to assess the value of the considerations relied upon by the father for taking the child from her mother. It is also possible to form some estimate of the unfortunate hostility to the child's mother which prevails not only with the father but also in the home in which the child dwells. But to discuss the facts in detail at this stage would probably be more harmful than useful. It is perhaps enough for me to say that I think that, as between the husband and wife, good reasons are disclosed for preferring her wishes to his, that there are no real reasons, or at all events none that survived the hearing before *Mann* C.J., for doubting the maternal affection and solicitude for the child's welfare, or her ability and anxiety to fulfil her parental duties, and that the only reason why *Mann* C.J. did not place her daughter in her custody in December 1942 was that at that time she was unable to provide a satisfactory home for the child, a reason no longer subsisting.

The child is not at present under parental influence and control. No order for custody has been made. The responsibility of Mrs. Smith, who has charge of her, must be to the father. He perhaps, may be considered to have constructive custody of his daughter and to have entrusted her to Mrs. Smith. It is not, however, a question between parental control of the father and the parental control of the mother. In truth it is a question between the mother as the person to bring her daughter up and care for her and a stranger or very remote relative. In these circumstances it would ordinarily be considered that the true welfare of the child would best be promoted by restoring her to her mother. Section 136 of the *Marriage Acts* 1928-1941 (Vict.) is based upon the provisions of s. 1 of the *Guardianship of Infants Act* 1925 of Great Britain. It makes the welfare of the child the first and paramount consideration. The word " first " as well as the word " paramount " shows that other considerations are not entirely excluded and are only subordinated. The provision proceeds, however, to deny superiority to the claim of one parent over

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the other "from any other point of view" scil. other than the welfare of the child. Section 145, which comes from the earlier *Guardianship of Infants Act* 1886 s. 5, gives the Court power to make such order as it thinks fit "having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father."

In administering these provisions the courts do not assume the functions of a children's welfare board seeking to discover, independently of parental and family relationship, the most eligible custodian, locality and environment for the upbringing of the infant: cf. per Lord *Clyde* and Lord *Sands*, *Hume* v. *Hume* (1).

The traditional view is still followed in the courts that prima facie it is for the welfare of a child that it should enjoy the affection and care of parents and be brought up under their guidance and influence. Where, because of the separation of the parents or for other reasons, the child is deprived of the advantage of the combined parental responsibility, the courts do not find in that fact a reason for preferring a stranger. Moreover, when the choice is between the parents, the advantages of a young girl being with her mother usually outweigh the considerations in favour of the father. Where, as in the present case, the actual custody and control of the father is out of the question, there should surely be some definite ground possessing cogency, or at least plausibility, for saying that another situation is important to the child's welfare before the mother is excluded as the natural custodian of her daughter: see *Re Thain* (2); *Hume* v. *Hume* (3); *Re Carroll* (4).

If we think that the order under appeal was not the result of a proper application of principle to the detailed circumstances and history of the case, we are, as a court of appeal, bound to interfere. There are, however, two features in the case which must weigh with us on the other side. The first is that the primary judge interviewed the persons concerned and was much impressed on seeing Mrs. Smith. The second is that the health of the child is now good though formerly it was not, and this may be the result of a change from the city to the country, though other explanations are open.

On the whole, however, I think that these two considerations cannot overcome the effect of the conclusion to which the other materials in the case lead, namely, that at bottom there was no better reason for excluding the mother than that the child had

(1) (1926) S.C. 1008 at p. 1014 and p. 1015 respectively.
(2) (1926) 1 Ch. 676, at pp. 682, 684, 689, 690, 691.
(3) (1926) S.C. 1008, at pp. 1014, 1017, 1019.
(4) (1931) 1 K.B. 317, at pp. 334, 343, 351, 355.

prospered in her present environment. Wise as may be the counsel to let well alone, it is not a sufficient reason for placing the girl of such an age outside the range of maternal care, influence and affection and leaving her in the hands of a stranger, and at that one antagonistic to the mother; a course which, moreover, in the circumstances of the case appears to leave the future unprovided for and to attach but little importance to the past.

In my opinion the order dismissing the mother's application should be discharged and an order should be made declaring that it appears for the welfare of the infant that she should be placed in the custody of the mother until further order or until the infant attains the age of sixteen years with proper provision for access by the father, and remitting the matter to the Supreme Court to give directions for such access and to determine what, if any, sums should be paid by the father pursuant to s. 146 of the *Marriage Acts* and otherwise to deal with the matter according to law.

McTIERNAN J. In my opinion the appeal should be dismissed without costs.

The application was made under s. 145 of the *Marriage Acts* 1928-1941 (Vict.). The parties to the proceedings were the mother and father of a young girl, the only child of their marriage. The present appellant was the applicant and the present respondent was the respondent in the proceedings.

Lowe J. who heard the application dismissed it: and an appeal to the Full Court of Victoria from his Honour's order dismissing the application was unanimously dismissed.

The reasons of *Lowe* J. for dismissing the application show that he purported to follow the directions in s. 145 of the *Marriage Acts* under which the application was made and also the directions in s. 136 which also applied to the case. His Honour was right in directing himself by the provisions of these sections. It is not necessary to repeat the provisions of these sections.

As his Honour's statement of his reasons shows that he did not apply any wrong principle in deciding the case nor omit to apply any principle which was applicable to the case, I think that his order dismissing the application should stand, unless this Court should hold that his Honour ought in the circumstances of the case, as a matter of law, have made an order giving the custody of the child to the applicant. Before deciding to reverse his Honour's order I should need to be convinced that although he purported to follow the directions given by the Act for deciding an application under s. 145, he failed to do so or that his Honour did not give the

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weight which is right in law to any factor which under those directions is relevant or that he was influenced by some irrelevant matter. It is argued that it is so manifestly better for the child's welfare that she should be placed in her mother's custody rather than that she should be brought up by Mrs. Smith in her home that his Honour should have given the custody of the child to her mother the appellant.

The facts and circumstances of the case are proved by affidavit. These show, in my opinion, that the contest is between the appellant and her husband, the respondent. His Honour had an advantage which this Court has not had. He saw the appellant, the respondent, Mrs. Smith in whose home and to whose care he entrusted the child, and the child herself. None of the members of this Court has seen any one of these persons. His Honour's decision, therefore, has a twofold basis: the evidence adduced by the affidavits and his impressions of the principal persons in the case. These impressions formed part of the foundation for the order dismissing the appellant's application. Before reversing his Honour's order it seems to me that I should have to make assumptions—and to make them in the dark—about matters which formed part of the foundation of his Honour's decision: and that I should need to make assumptions on such matters at variance with his Honour's impressions about them. To reverse his decision upon the evidence adduced by the affidavits and without the knowledge such as *Lowe* J. could gather from seeing the above-mentioned persons, would be to make a decision affecting the welfare of the child upon incomplete materials: and there would, I think, be only the smallest possibility, if indeed any possibility, that to remove the child from Mrs. Smith's home to a house in the suburbs where the appellant and the child would be boarders would be more conducive to the child's welfare than to have her in Mrs. Smith's home and under her care and attention. The affidavit of Mrs. Churches, to whose house the appellant has stated that she would take the child if given the custody, shows that the appellant and the child would be boarders.

The child, a girl, was nine years of age at the time the appellant made this application for her custody. The appellant and the respondent had separated: it does not appear upon which of them the blame lies. Their disagreement extends to the custody of the child: it is not in Mrs. Smith's custody but in the respondent's. He wishes to retain the custody and that the arrangement, which he made with Mrs. Smith, that the child should live in her home and under her care and attention, to continue. It would not be feasible for him to undertake personally the upbringing of the

child : and it seems to me that by entrusting her to a guardianship in which the welfare of the child has been well safeguarded and promoted, the respondent has done nothing to prejudice his right. At the time of the application, the child had been living in Mrs. Smith's home for two years. The appellant lives and works in Melbourne. The respondent took the child to Mrs. Smith's home without reference to the appellant except that, according to her version of the facts, in December 1941 she signed " evacuation papers " for the child. In her affidavit she said " At the respondent's suggestion, the Smiths of Noojee were named as the people to whom the child could be evacuated. He pointed out to me that they were the only country people we knew, and he would not allow the child to go to strangers. He told me, after he had taken the child to Noojee in June 1942 that I 'would have hard work to get out of it, having signed the evacuation paper!' " But neither *Lowe* J. nor any member of the Full Court considered that the appellant's application was in any way adversely affected by acquiescence in the arrangement which the respondent made for the child to live with Mrs. Smith.

In a prior application to the Supreme Court, conditions governing access to the child were settled, and under these the applicant has visited the child at Mrs. Smith's home, and the child has lived with her in Melbourne during part of school vacation. But it appears that the arrangement for access has not worked smoothly.

The affidavits in the application are voluminous. As I have stated *Lowe* J. saw the applicant, the respondent, Mrs. Smith and the child, and that this Court has not done so : *Lowe* J. makes these findings : the child is in a good home : she is now a healthy and happy child and is " admittedly " in good surroundings : the parents cannot or will not agree to live together : the arrangements for access of the applicant to the child have proved unsatisfactory and are a constant source of irritation and expense to both parents.

It would appear from these findings that in her present home the child's health and happiness have not been affected by the differences between her parents. A point was made on behalf of the respondent that if the child goes to Melbourne to live with her mother she would be brought closer to the quarrels between her parents.

It is the clear result of his Honour's findings that such important elements in the child's welfare as health and happiness, a good home and good surroundings are all enjoyed by her in Mrs. Smith's home and under her care and attention. Mrs. Smith is a first

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cousin of the respondent. There is therefore a natural bond of affection between her and the child. There is no finding that the welfare of the child would be as well safeguarded by the arrangements which the appellant has made with Mrs. Churches. On this important consideration his Honour made only this statement —" The mother now says that she is able to provide a home at which she can give some attention to the child before and after the work in which she is engaged, and in her absence she says that the care of the child will be attended to by a Mrs. Churches, or, if she is not able to do so, by the applicant's sister." The sincerity of the applicant is not impugned, but this is not a finding that it would be better for the welfare of the child to live in that home and receive such attention as the applicant would have time to give her before and after her work. It is clear that his Honour's finding about the home which the appellant says she can provide for the child is less favourable than the home which the respondent provided for her, although the finding is not adverse to the former. The finding is in these terms, " I have no reason to suppose that the home which is offered in that way would be an unsatisfactory home."

In these circumstances his Honour posed this question " Having on the one side a good home in which the child is living happily and healthily and in good surroundings, and on the other side a home offered by the mother which I think, from all I can see, would be a satisfactory home, what is best to do in the interests of the infant herself."

It is argued that his Honour should have decided in favour of the latter alternative because it was manifestly better for the welfare of the child that she should be under the guardianship of her mother than of Mrs. Smith.

It is not disputed, nor could it be, that generally it is better for the welfare of a child to be brought up by the parents than by a stranger, even if the stranger is materially better off than the parents.

His Honour said :—" I am directed by the Act of Parliament to take into account as a first and paramount consideration the welfare of the child. That of course, does not exclude but I think actually implies that I must have regard to other factors, and in those other factors I think I must include the desirability of a child having parental care and training where such is available. I should not regard the welfare of the child on the one hand and the parental care and training on the other hand as separate and independent factors in the consideration of an application under s. 145 for custody : but should regard the latter as a factor which

generally would be of preponderating weight in the determination of what is best for the welfare of the child. His Honour's words, however, show that he took into consideration the importance of parental upbringing to the welfare of the child and did not regard the material comfort of Mrs. Smith's home and the beneficial effect of her care for the child as the only factors to be considered in the case or as the paramount considerations. Continuing his statement of the reasons by which he reached his conclusion, *Lowe* J. said he had regard to the age of the child—" a little girl of nine years," that the parents cannot agree to live together or as to the custody of the child, that the father supports the existing arrangement and the mother desires to have the custody of the child, and that the Act directs that the wishes of the mother as well as of the father should be taken into account and that the claims of one are not to be regarded as superior to the other. His Honour added, " Now, having all these matters in mind, I can see no sound ground for preferring the mother's wishes to those of the father." His Honour continued with the following statement: before quoting the statement it should be mentioned that it contains an observation which is not in fact correct: the observation is that both parents put the child in her present custody: however there is no reason for supposing that *Lowe* J. acted upon the view that the application should fail because of any acquiescence by the appellant in the arrangement made with Mrs. Smith. His Honour's statement is as follows: " At one stage of the argument I was strongly impressed with the view that here at any rate was the possibility of this little girl having the care and attention of one parent, and that might have been a decisive consideration, I think, if the child had been a younger child, but the child is nine years of age and for over two years has been in the custody in which both the parents put her, and, bearing that in mind, I think that I have no sound reason for preferring the mother's custody to that in which the little child is at present. I should add that I was much impressed on seeing Mrs. Smith, the present custodian of the little girl. I am left then with the final consideration, which is also the first consideration to which I have to direct my attention as a paramount one, the welfare of the child itself, and on full consideration I think that the welfare of the child will be best served by leaving her in her present custody."

The parents are the natural guardians of their child and there is a presumption that parental guardianship is better for the welfare

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of a child than other guardianship. This presumption is a strong one but it will not prevail in every case.

It is not to be assumed that the arrangement which the father made with Mrs. Smith to bring up the child in her home did not proceed from his love and affection for the child or that it was not made with an intelligent appreciation of what in the circumstances was best for her spiritual and material welfare. The Act says that the wishes of one parent are not to be preferred to the wishes of the other. The existing arrangement, therefore, ought not to be disturbed merely to satisfy the wishes of the mother nor retained merely to satisfy the wishes of the father.

The paramount consideration, that is, the child's welfare, does not necessarily require that the arrangements made by the father should be replaced by those made by the mother. It was not erroneous in this case for his Honour not to treat the desirability of parental guardianship as the decisive factor. I do not know to what extent his Honour's conclusion was influenced by his view of the applicant and Mrs. Smith, or of the father and the child herself. That the view he formed after seeing the parties contributed to his conclusion I can have no doubt. In my opinion it would have been open to the learned Judge to say upon the affidavit evidence, if he had thought fit, that he was not satisfied that the conditions under which the applicant said she could provide a home for herself and the child would conduce as much to the child's welfare as living in Mrs. Smith's home. He has positively found that the child had lived happily and healthily and in good surroundings in her home for two years.

There is no finding that the welfare of the child would be as fully maintained in all these respects in the house where her mother desired the child to be ; and it is at least doubtful whether it would be safe to make such a finding. The applicant and the child would be boarders in that house : the child would not have the attention of her mother daily from a period beginning before the child went to school in the morning and after she returned from school ; during this period the mother would be engaged in her employment away from the house. The mother's plan for the child depends on making arrangements with other persons to look after her and the duration of it depends upon the attitude which would be taken by the husband of the lady who offered to board the applicant and her child, when he returned to Australia. He is at present a prisoner of war.

The Full Court of the Supreme Court rejected the view urged before us by the appellant that *Lowe* J. did not give due weight

to the beneficial effect which would result to the child from being brought up by her mother in the house which she offered to provide. His Honour decided the case upon the correct criterion that the paramount consideration was the welfare of the child. Upon the material before me I cannot hold that the learned Judge ought to have given the custody of the child to the applicant. It is regrettable that the unfortunate differences between father and mother have led to litigation the result of which must necessarily involve a disappointment of the wishes of one of them regarding the upbringing of the child.

WILLIAMS J. This is an appeal by special leave from an order of the Full Court of the Supreme Court of Victoria dismissing an appeal against an order made by *Lowe* J. on 3rd October 1944 refusing an application by the appellant, Mrs. A. C. Storie, for the custody of the one child of her marriage with the respondent, a girl who attained the age of nine years last August.

The appellant and respondent separated about June 1942 and the child was then sent by the father, without the mother's consent, to Noojee, a small country town about seventy-five miles from Melbourne, to be brought up there by his cousin, Mrs. M. L. M. Smith, a married woman with two grown-up daughters. The child at the time was suffering from attacks of asthma and was generally in poor health, but her tonsils were removed in January 1943, and her health has since greatly improved, either as a result of the operation, or the change to Noojee, or both, and she no longer has these attacks. The father and mother both live and work in Melbourne, the father as a shop assistant and the mother as a secretary receiving a wage of £4 per week. The appellant had made a previous application which came on for hearing before Sir *Frederick Mann* C.J. in November 1942, when his Honour also refused the application for custody, but gave directions which resulted in the appellant having access during one week-end in each month, alternately in Melbourne and Noojee.

The application before *Lowe* J. was heard on affidavit evidence, none of the deponents being cross-examined, but his Honour, with the consent of the parties, interviewed the father, the mother and Mrs. Smith in private chambers, and also saw the child. The only express statement in his Honour's judgment relating to these interviews is that he was " much impressed on seeing Mrs. Smith, the present custodian of the little girl."

The *Marriage Acts* 1928-1941 (Vict.), s. 136, provides that in any proceedings before any Court in which the custody or upbringing

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of an infant is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. The effect of this section, like its prototype in English legislation, is to bring the law generally into accord with the principles which have always been applied by a Court of Equity in applications for the custody and appointment of guardians of the persons of infants. The section makes the welfare of the infant the paramount but not the sole consideration. By a long series of judicial decisions, most of which existed at the date of the Act, the Courts have made it clear that many factors enter into the consideration of what is best for the welfare of an infant. They have made it particularly clear that there are the strongest reasons, based on fundamental natural and social laws for holding that, in the absence of very special circumstances, the best interests of the child will be served by leaving it in the custody of one of its parents, and in the case of a female child of tender years in the custody of the mother. Thus in *Austin* v. *Austin* (1) Lord *Romilly* said :—"No thing and no person and no combination of them can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that care. It is the notorious observation of mankind that the loss of a mother is irreparable to her children, and particularly so if young. If that be so, the circumstances must be very strong indeed to induce this Court to take a child from the guardianship and custody of her mother. It is, in point of fact, only done where it is essential to the welfare of the child. There are cases of unnatural mothers, and of immoral mothers, where the Court is obliged to take away the child from the mother, finding that a bad mother is really worse than no mother at all, but in these cases it acts solely for the benefit of the child."

In *R.* v. *Gyngall* (2) Lord *Esher* M.R. after referring to a statement by *Knight Bruce* V.C. in *In re Fynn* (3) that a child should not be taken from the custody of its parents unless it is proved that it is clearly right for the welfare of the child in some very

(1) (1865) 34 Beav. 257, at p. 263 [55 E.R. 634, at pp. 636, 637].

(2) (1893) 2 Q.B. 232, at p. 243.

(3) (1848) 2 De G. & Sm. 457 [64 E.R. 205].

serious and important respect that the parents' rights should be suspended or superseded, and to the classic passage in the judgment of *Lindley* L.J. in *In re McGrath* (1) (in which it must be remembered that the somewhat lukewarm concluding words " nor can the ties of affection be disregarded " were made in a case where both parents were dead) said :—" The Court has to consider therefore the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. Prima facie it would not be for the welfare of a child to be taken from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that generally speaking the best place for a child is with its parents."

After referring to the form of religion, as to which fortunately there is no contest in the present case, the Master of the Rolls continued :—" Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other considerations, to the natural rights and feelings of the parent, or the feelings and views which have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these."

In *In re Thain* (2) *Eve* J., a judge who was very experienced in applications for custody, in a case where a child had been brought up by the married sister of the father's late wife and her husband for several years whilst the father was not in a position to make a home himself, said (3) :—" It is happily a case in which no suggestion of unfitness on either side is involved, and I am satisfied the child will be as well cared for and be the object of as much solicitude in the one home as in the other. In these circumstances, according to well settled practice, the claim of the father must prevail, unless the Court is judicially satisfied that the welfare of his child requires that his parental right should be superseded. *FitzGibbon* L.J. in *In re O'Hara* (4) states the rule thus, ' where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities . . . the court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord *Esher*) " that the best place for a child is with its parent " '."

(1) (1893) 1 Ch. 143.
(2) (1926) 1 Ch. 676.
(3) (1926) 1 Ch., at p. 682.
(4) (1900) 2 I.R. 232.

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On appeal *Warrington* L.J. (as he then was) said (1):—"The welfare of the child is no doubt the first and paramount consideration, but it is only one among several other considerations, the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parent and be brought for that purpose into intimate relation with the parent."

In *In re J. M. Carroll* (2), where the child was illegitimate, the Court of Appeal again approached the problem in the same way, and reversing the decision of the Court below, gave the custody to the mother. And cf. *Goldsmith* v. *Sands* (3); *Moule* v. *Moule* (4).

The evidence states that the appellant who, it is not disputed, is of good moral character and has a deep affection for her child, is in regular employment and can provide a home which may not be as suitable as a separate dwelling but should, as *Lowe* J. held, not be unsatisfactory. There are suitable schools in the vicinity, and the appellant, although working during the day, should have sufficient leisure thoroughly to supervise her upbringing, and can make satisfactory arrangements to have her cared for when she is not at home. When the first application came before *Mann* C.J. the appellant was unable immediately to offer any satisfactory home, and this was one of the matters which weighed heavily against her with his Honour. It is true that her ability to maintain the child depends upon her being able to retain her present employment or to find other work, but the father must do his share. A somewhat precarious future is the lot of most children of parents of small means, but the Courts have never held this to constitute a sufficient reason, against the wish of a parent, for placing them in the custody of some relative or stranger who is better off and would like to adopt them. The circumstances must be very special, as they were in *Mathieson* v. *Napier* (5), before the Court will make such an order.

The question is whether, having regard to the strong presumption already mentioned, the evidence is sufficient to show that it would be clearly for the benefit of the child to supersede the mother's natural right. The custodian has the sanction of the father, but the child is living seventy-five miles away and he sees her, apparently, about twice a month and possibly more in the school holidays. She is not in any real sense in his custody and Sir *Frederick Mann* C.J. considered that he would not be a

(1) (1926) 1 Ch., at p. 690.
(2) (1931) 1 K.B. 317.
(3) (1907) 4 C.L.R. 1648.
(4) (1911) 13 C.L.R. 267.
(5) (1918) 119 L.T. 18.

suitable custodian on account of age, sex and temperament. *Lowe* J.'s finding that Mrs. Smith is a suitable custodian must be accepted, but it is evident that she bears an animosity for the appellant, when, to use her own words, she considers her a very false woman who always sidesteps things by telling lies, and whom she is satisfied is not straightforward and honest. A very clear case is required before the Court should come to the conclusion that the affection of a child for its mother should be prejudiced by being placed in the custody of a woman who holds such an opinion. It is evident that Mrs. Smith is not taking any active steps to preserve the affection of the child for her mother, even if she is not discouraging it. For instance, the appellant has written to her daughter every week, and has sent stamped and addressed envelopes and a pad to enable the child to reply. But no replies have been sent, according to Mrs. Smith because the child of her own volition has chosen not to reply. Assuming this to be true, Mrs. Smith might well have suggested that she ought to answer letters from a mother who is seventy-five miles away and sees her once a month. A child of nine, who has been to school for several years, should be quite capable of writing a few words to its mother. Another episode was when the appellant was at Noojee for her weekend in December 1943 and the Monday was a school holiday. The appellant asked to have the child for the extra day but Mrs. Smith refused on a trumpery excuse that she was taking the child shopping to Warragul.

The appellant no doubt is by no means well disposed to Mrs. Smith whom she regards as having stolen her child. There is evident discord and contention between the two women. They have quite different ideas of upbringing, and it can hardly tend to the welfare of the child to be subject at the same time to their rival influences. It would surely be preferable to commit the child to the complete custody of the one or the other, in which event every natural and social consideration points to the custody being given to the mother.

There is medical evidence that the child is enjoying excellent health at Noojee, but there is no evidence that Melbourne would not also be a suitable climate. There are many healthy children in Melbourne, and I have not heard it suggested that the climate is unhealthy.

All these considerations lead to the conclusion that the evidence falls far short of establishing that in some serious and important respect it is in the best interests of the child that the ordinary natural right of the mother to have the custody should be super-

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seded. *Lowe* J., it would appear, saw no reason to suppose that the appellant would not take proper care of the child, and he does not suggest that the child was opposed to returning to the appellant. In any event she has not attained an age at which the Court would, generally speaking, pay very much attention to her wishes. His Honour appears to have reached his ultimate conclusion mainly because the present arrangement under which the child is thriving has existed for two years, and being bound by the Act to give equal consideration to the wishes of both parents, he thought that on the whole the wishes of the father should be preferred to those of the mother. He said in two places in his judgment that the appellant had consented to this arrangement, but that was a mistake. In December 1941 the appellant had consented to the child being evacuated to Noojee in the event of there being a risk of Melbourne being bombed, but this had nothing to do with what occurred at the time of the separation. When the respondent then took the child to Noojee the appellant followed and brought her back to Melbourne, but the respondent took her out of her cot early in the morning and motored her back to Noojee. As appears from the judgment of *Martin* J. his Honour later said, when the mistake was brought to his notice, that he would have reached the same result in any event, so that I must read his judgment on this basis, but it appears to me that the result is somewhat to weaken the respondent's case. It seems that the separation was mainly caused by the respondent making the matrimonial home in a house owned by his mother, where the parties lived with her and a brother for most of their married life, including the last six years. As *Mann* C.J. pointed out "It requires little penetration to see that matrimonial troubles in this case must exist where the parties were living with the mother-in-law." The appellant has since offered to resume cohabitation in a home of their own. The respondent is therefore responsible for a choice having to be made between giving the child to the mother or himself, and this is a slight additional reason in favour of the appellant. With great respect to *Lowe* J., his judgment does not give sufficient weight to the principles stated in the cases cited, or in other words to what *Scrutton* L.J. refers to in *Carroll's Case* (1) as "the whole tenour of the authorities," and that the judgments of the Full Court are open to the same criticism.

For these reasons I am of opinion that the courts below came to an erroneous conclusion, and that the appeal, as in *Carroll's Case* (2)

(1) (1931) 1 K.B., at p. 337. (2) (1931) 1 K.B. 317.

should be allowed: cf. *Osenten & Co.* v. *Johnston* (1); *Blunt* v. *Blunt* (2); *Rochfort* v. *Rochfort* (3).

Appeal allowed. Order of Supreme Court set aside. Order that Eric Ernest Holmes Storie do within fourteen days of the service of this order upon him deliver up the infant child Lynette Violet Storie into the custody of Agnes Cis Storie, the mother of the said infant, and that the said infant do remain in the care and custody of her said mother, but so that the Supreme Court shall have power to alter vary or discharge this order. Case remitted to Supreme Court to deal with right of access by father of the said infant and with maintenance, education and otherwise as shall be necessary or proper according to law. No order as to costs. Liberty to apply.

Solicitor for the appellant: *J. C. Stedman.*
Solicitors for the respondent: *P. J. Ridgeway & Pearce.*

E. F. H.

(1) (1942) A.C., at pp. 138, 142, 148.
(2) (1943) A.C., at pp. 526, 527.
(3) (1944) 44 S.R. (N.S.W.) 238.