[HIGH COURT OF AUSTRALIA.]

MORRISON AND ANOTHER . . . APPELLANTS;
APPLICANTS,

AND

JENKINS AND ANOTHER . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1949.

MELBOURNE, *Oct.* 13, 14, 17, 18; *Dec.* 22.

Latham C.J., Rich, Dixon, McTiernan and Webb JJ.

Custody of Infant—Right of parents to custody—Welfare of child—Applicants and respondents both claiming parentage—Allegation of confusion of identity of two babies at maternity hospital—Marriage Acts 1928-1941 (*No.* 3726—*No.* 4839) (*Vict.*), *s.* 136.

In proceedings to obtain the custody of a child the applicants, Mr. and Mrs. M., alleged that there had been a confusion of identity between their child and that of Mr. and Mrs. J. at the hospital at which the two children were born at about the same time and that each mother had been given the child of the other. They accordingly sought an order for custody of the child which was—and had been for some four years—in the custody of Mr. and Mrs. J. The primary judge found that the child was in fact that of Mr. and Mrs. M., and he ordered that they have the custody of the child.

Held, by *Rich*, *Dixon* and *Webb* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that the order should be set aside because, *per Rich* and *Dixon* JJ., the evidence left the parentage of the child so much in doubt that it would not be for the child's welfare to remove it from its present custody; *per Webb* J. (*Latham* C.J. and *McTiernan* J. *contra*), the evidence as a whole did not warrant the conclusion of the primary judge that the child belonged to the appellants.

Decision of the Supreme Court of Victoria (Full Court), (1949) V.L.R. 277 affirmed.

APPEAL from the Supreme Court of Victoria.

William Henry Morrison and his wife, Alberta Gwen, obtained from the Supreme Court of Victoria an order nisi for a writ of habeas

[EDITOR'S NOTE:—On 3rd July 1950 the Judicial Committee of the Privy Council refused special leave to appeal from this decision.]

corpus whereby they sought an order for the custody of a child called Nola Jenkins, who was in the custody of the respondents Noel Henry Jenkins and his wife, Jessie. The applicants alleged that, at the hospital at which Mrs. Morrison and Mrs. Jenkins each gave birth to a child at about the same time, a mistake was made as a result of which Mrs. Jenkins was given the child known as Nola, who was in fact the child of Mrs. Morrison, and the latter was given a child known as Johanne Lee Morrison, who was the child of Mrs. Jenkins. On evidence which appears sufficiently in the judgments hereunder, *Barry* J. found that Nola was the child of the applicants, and he made an order absolute for the issue of the writ. On appeal by the respondents, the Full Court of the Supreme Court (*Herring* C.J., *Lowe* and *Fullagar* JJ.) set this order aside.

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

C. A. Sweeney (with him *R. V. Monahan* K.C.), for the appellants. In so far as the decision of the Full Court of the Supreme Court is based on the ground that the proceedings for habeas corpus were not appropriate here, it is wrong (*R.* v. *Nash* (1); *In re Carrol* (2); *R.* v. *Waters* (3)). See also *Cox* v. *Hakes* (4); *Dickinson* v. *North Eastern Railway Co.* (5); *Poulett* v. *Chatto & Windus* (6); *Colquitt* v. *Colquitt* (7). In referring to proceedings *in rem*, *Herring* C.J. appears to have had in mind the special procedure now provided for in England by s. 188 of the *Supreme Court of Judicature (Consolidation) Act* 1925. There is no such procedure in Victoria. The view of *Fullagar* J. on this point is correct. No objection to the appropriateness of these proceedings was taken before *Barry* J. or in the notice of appeal to the Full Court of the Supreme Court. The finding of *Barry* J. that the appellants were the parents of the child, Nola, is supported by the evidence and should not be disturbed. *Barry* J. applied a very high standard of proof, and he had the advantage of hearing the witnesses: see *In the Estate of L.* (8); *Wright* v. *Wright* (9). *Fullagar* J. applied a wrong standard; he required that the evidence satisfy him—not *Barry* J. who had seen the witnesses. Once the finding of *Barry* J. is accepted, the interests of the child require that she be given into the custody of the parents, where, as here, it cannot be suggested

(1) (1883) 10 Q.B.D. 454.
(2) (1931) 1 K.B. 317.
(3) (1912) V.L.R. 372.
(4) (1890) 15 App. Cas. 506, at p. 514.
(5) (1863) 2 H. & C. 735 [159 E.R. 304].
(6) (1887) W.N. (Eng.) 192, 230.
(7) (1948) P. 19.
(8) (1919) V.L.R. 17, at pp. 36-38.
(9) (1948) 77 C.L.R. 191, at p. 198.

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that they are in any way unfitted to have custody (*Storie* v. *Storie* (1); *Goldsmith* v. *Sands* (2); *In re Carrol* (3)).

E. H. Hudson K.C. (with him *H. A. Winneke*), for the respondents. Whether the proceedings are appropriate or not, the considerations mentioned by *Herring* C.J. go to show that the order made by *Barry* J. should not have been made. The evidence did not justify the finding that Nola was the child of Mr. and Mrs. Morrison. It did not even show that any mistake had been made at the hospital. Even if it did show that some mistake had been made, it did not show that the child Mrs. Jenkins received was in fact that of Mrs. Morrison. There were other babies in the hospital, born near the same time as those of the parties here, and, if any mistake was made, Mrs. Morrison may have got one of them. Even if the finding of *Barry* J. on parentage is accepted, it does not follow that his order is correct. The predominant consideration is the welfare of the child. When all the circumstances of the case are considered, her welfare would not be served by removing her from her present custody.

R. V. Monahan K.C., in reply.

Cur. adv. vult.

Dec. 22.

LATHAM C.J. On 22nd June 1945 a baby girl was born to Mrs. Alberta Gwen Morrison in the labour ward at the Kyneton Hospital in Victoria. Within the preceding five minutes a baby girl had been born in the same ward to Mrs. Jessie Jenkins. Mrs. Morrison and her husband claim that the baby known as Nola Jenkins, who has lived with the Jenkins family ever since Mrs. Jenkins left the hospital, is her (Mrs. Morrison's) baby and that the girl known as Johanne Lee Morrison who was given to Mrs. Morrison at the hospital as her baby is not in fact her child. Mr. and Mrs. Morrison took proceedings against Mr. and Mrs. Jenkins by way of habeas corpus, claiming the custody of Nola. The Supreme Court of Victoria (*Barry* J.) held that the evidence showed that Nola was the daughter of Mr. and Mrs. Morrison, that prima facie it was for the welfare of any child that it should be brought up by its parents and not by strangers, that Mr. and Mrs. Morrison were not disqualified by character or circumstances in any way from discharging the duties and responsibilities of parents in respect

(1) *Post*, p. 597.
(2) (1907) 4 C.L.R. 1648, at pp. 1652, 1654.
(3) (1931) 1 K.B., particularly at p. 353.

of custody and nurture, and that in the circumstances of the present case the welfare of Nola required that she should be given into the custody of her parents. Upon appeal to the Full Court the order of *Barry* J. was discharged. *Herring* C.J. was of opinion that habeas corpus proceedings were unsuitable for the determination of the parentage of a child where that matter was in dispute, and that such a question should be determined only in proceedings which were described as proceedings *in rem*; that is, proceedings which would be binding on all persons whomsoever and, in this case, in respect of both children. There is provision for proceedings *in rem* in the *Legitimacy Declaration Act* 1858 (Imp.), s. 1. The law of Victoria, however, makes no provision for such proceedings and no suggestion was made to this Court of any proceeding which Mr. and Mrs. Morrison could take which would in any single proceeding, determine the parentage of both children. Application for a writ of habeas corpus is an appropriate procedure whereby a parent may obtain the custody of a child. The law is as stated in *Halsbury, Laws of England*, 2nd ed., vol. XVII., p. 666—"a father, whose infant child is not in his custody, and a mother, where she is entitled to the custody, may, in the absence of good reason to the contrary, obtain the custody of the child by a writ of habeas corpus"—and see *R.* v. *Waters* (1). *Herring* C.J. was also of opinion that the parentage of Nola was not satisfactorily established by the evidence. The Chief Justice said:—"However convincing on the balance of probabilities the proof may be it is not such as to conclude the matter beyond all possible doubt." *Fullagar* J. based his judgment upon the view that there was room for doubt as to the parentage of Nola and that in view of the gravity of the consequences following upon a decision as to parentage no order should be made if there was "even the slightest room for doubt." *Lowe* J. agreed with the other members of the court.

The matter was determined upon affidavits of the four parties to the proceedings, of doctors, of nurses employed at the hospital, and of other persons, and upon cross-examination of several of the deponents. The learned trial judge also had the assistance of a skilled assessor, Dr. Frederick Grantley Morgan, in relation to the significance of certain blood tests which were made of Mr. and Mrs. Morrison and the child Johanne Lee.

The standard of proof which *Barry* J. applied was that he should reach his conclusions "not upon a bare balance of probabilities, but as the result of the thorough conviction of my mind, founded

(1) (1912) V.L.R. 372.

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upon a careful and patient attention to all the evidence in the case " : per Lord *Lyndhurst* in *Morris* v. *Davies* (1).

The respondents relied upon the *Marriage Acts* 1928-1941, s. 136, which provides that " Where in any proceedings 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 administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father." It will be observed that the concluding words of this provision relate to the relative claims of a father and a mother where there is a contest between them as to the custody of their child. They do not lend any support to such a proposition as that the parents of a child have no claims which are to be regarded when the welfare of the infant as the first and paramount matter is under consideration by a court. It was, however, argued for the respondents in this Court that the parentage of Nola was a minor and relatively unimportant consideration ; that Nola was happy where she was, and that a change in her custody would (it was assumed) make her unhappy and that therefore the consideration of the welfare of Nola required that she should be left in her present custody. It has not yet been held by any court that the claim of a parent to the custody of a child, whether he be the father who has begotten the child or the mother who has borne it, is to be regarded as of small moment because it is shown that, at the time when the question arises, the child is happy in the custody of some other person, or even that the child will probably be happier in the custody of another person than in the custody of one or both of its parents. If such a view were adopted people who were both rich and of good and pleasing character would be able to acquire the children of other persons and retain them against the will of the parents. The law in my opinion affords not the slightest support to such a proposition. The provisions contained in the *Marriage Acts* 1928-1941 (Vict.), s. 136, are derived from the English *Guardianship of Infants Act* 1925. It has been decided that that Act did not introduce any new principle, but merely put into statutory form the rule which had been acted on in courts of equity : *In re Thain* ; *Thain* v. *Taylor* (2). In that case the statement of the law made by *Fitzgibbon* L.J. in *In re O'Hara* (3),

(1) (1837) 5 Cl. & F. 163, at pp. 221, 222 [7 E.R. 365, at p. 387].
(2) (1926) Ch. 676.
(3) (1900) 2 I.R. 232.

was approved: "Where a parent is of blameless life and 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.'" In this Court the same principle was recognized in *Goldsmith* v. *Sands* (1). That was a case where the father claimed the custody of a child nine years old who from her earliest infancy had been in the care of her grandparents. The Court approved the statement of *James* L.J. in *In re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (2), that "The right of the father to the custody and control of his children is one of the most sacred of rights," though the law might take it away or the parent might forfeit or abdicate the right. *James* L.J. further said: "In the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right" (3). In the present case there is no conflict of rights, claims or desires between the father and the mother—the situation to which the provisions of the *Marriage Acts*, s. 136, are directed. The question arises between Mr. and Mrs. Morrison, who claim to be the parents of Nola, and Mr. and Mrs. Jenkins, who have had Nola in their care from the day of her birth. The evidence shows that the contesting parties, the Morrisons and the Jenkins, are respectable well-conducted people, and that both of them have happy homes with other young children and that there is no reason why a child should not be happy in either of those homes. I have referred to the cases mentioned for the purpose of showing that in such circumstances the application of the principle that the welfare of the child is the paramount consideration does not mean that the claims of parenthood are to be excluded or that no attention is to be paid to the general belief in society as at present constituted that in the absence of disqualifying circumstances affecting the parents the interests of a child are best consulted by giving the custody of the child to the parents as against the claims of any stranger whomsoever. I therefore, in the circumstances which I have mentioned, regard the parentage of Nola as a most important element in the case.

The case for Mr. and Mrs. Morrison was supported by their own affidavits and by affidavits of Mrs. Amelia Williams (Mrs. Morrison's mother) Dr. Douglas John Thomas and Dr. Lucy Meredith Bryce —clinical pathologists highly skilled in the making of blood tests,

(1) (1907) 4 C.L.R. 1648.
(2) (1878) 10 Ch. D. 49, at pp. 71, 72.
(3) (1878) 10 Ch. D., at p. 72.

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which is a very specialized form of medical practice. Mr. and Mrs. Jenkins made affidavits in reply, as also did Sister Lockhart and Sister Cass of the Kyneton Hospital. These two nurses attended upon the occasion of the confinement of the two ladies, Mrs. Morrison and Mrs. Jenkins. The parties, the nurses and Dr. Lucy Bryce were cross-examined upon their affidavits. An affidavit by Dr. Gerald Loughran, who delivered both children, was also filed on behalf of Mr. and Mrs. Jenkins. Dr. Loughran at the time of the trial was absent in Singapore and was not available for cross-examination.

The learned trial judge examined the evidence in detail and approached the question of the parentage of Nola by asking four questions, which were as follows:—"1. Was the female child to which Mrs. Morrison gave birth on June 22, 1945, in the labour ward of the Kyneton District Hospital the offspring of the union between her and her husband William Henry Morrison? 2. Was the female child that was brought to Mrs. Morrison before she left the labour ward the female child to which she had given birth about half an hour earlier? 3. If the female child so brought to her was not the child to which she had given birth, was there an opportunity for a mistake to be made by which some other female child could have been substituted for the child to which she had given birth? 4. If there was such an opportunity, what other child could have been mistakenly substituted for the child to which Mrs. Morrison had given birth?"

The answers which his Honour gave to these questions were as follow: 1. Yes; 2. No.; 3. Yes.; 4. Johanne Lee. Bearing in mind the gravity of the issues before the Court, his Honour was thoroughly convinced that Nola was the daughter of Mr. and Mrs. Morrison and, after considering what course of action would be for the welfare of Nola, he made an order that Nola should be delivered up to Mr. and Mrs. Morrison, and that they should have the custody of her.

As to some matters there is no room for doubt. In the first place, it is established beyond question that a female child was born to Mrs. Morrison in the Kyneton Hospital on 22nd June 1945.

In the second place, I regard it as also completely established that that child (whoever she was) was the issue of Mr. and Mrs. Morrison. Mrs. Morrison gave evidence that she had never had sexual intercourse with any person other than her husband. She was not cross-examined upon this matter. The learned trial judge believed her evidence. There is in my opinion no ground whatever for suggesting at this stage in the proceedings that Mrs. Morrison

had been unchaste and that the child which was born to her was not the child of her husband.

The three separate sets of blood tests applied to Mr. and Mrs. Morrison and Johanne Lee show, according to the uncontradicted scientific evidence, that the child Johanne Lee, although she might be the child of Mrs. Morrison, cannot possibly be the child of Mr. and Mrs. Morrison. This proposition has not been challenged at any step of the case. The scientific evidence on this point is conclusive. In the Full Court, *Fullagar* J. stated as one of the grounds for differing from *Barry* J that the scientific evidence was relevant not only to the determination of the question whether Mrs. Morrison got the right baby (the second question asked by *Barry* J.) but was also relevant to the determination of the first question—whether the child born to Mrs. Morrison was the offspring of the union between her and her husband. But no scientific evidence can have any relevance to the first question until the identity of the child born to Mrs. Morrison is established and tests have been applied to that child as well as to Mr. and Mrs. Morrison.

The first question which *Barry* J. propounded was whether the child which was actually born to Mrs. Morrison is the child also of her husband. No witness has suggested in this case that any scientific evidence could show that any particular child was actually the child of any two particular parents. The scientific evidence given in the case with reference to blood tests has significance only to Johanne Lee in relation to Mr. and Mrs. Morrison. That evidence shows that she was not the legitimate child of Mr. and Mrs. Morrison and therefore was not the child born to Mrs. Morrison, and can have no bearing upon the question whether the child actually born to Mrs. Morrison was begotten by her husband, because that child is conclusively shown not to have been Johanne Lee. The blood-test evidence as to Johanne Lee might have shown that she could have been the child of Mr. and Mrs. Morrison. In fact it establishes the opposite proposition.

The first question is a question as to the legitimacy of Mrs. Morrison's baby whoever that baby is. The answer to the first question depends entirely upon the chastity of Mrs. Morrison. It is not possible to reach any other conclusion than that that child is the legitimate child of Mr. and Mrs. Morrison.

Mr. and Mrs. Jenkins submitted an affidavit by Dr. Loughran (who could not be cross-examined) to the effect that he made blood tests of them and of Nola and that according to his recollection the tests showed that Nola *could* be their child. They declined to have any further tests made by the highly-qualified experts

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who were available. No evidence was given by any witness to the effect that Dr. Loughran's evidence, even if completely accepted, showed or even tended to show that Nola actually *was* the child of Mr. and Mrs. Jenkins or that she could not be the child of Mr. and Mrs. Morrison. It is established that Johanne Lee is the child which was brought to Mrs. Morrison within not more than half an hour of the birth of her child and is the child which has been in her custody ever since. It is therefore clear that a mistake was made in the hospital and that Mrs. Morrison was given the wrong baby.

His Honour accepted on the whole the evidence of Mrs. Morrison. He did not believe the evidence of Sisters Cass and Lockhart where that evidence was in conflict with that given by Mrs. Morrison. Another nurse, Sister Atkinson, who was not a midwifery nurse, was called by his Honour with the consent of the parties. She was present on the occasion of the birth of the two children, but professed to have no memory of what happened. The evidence of the two nurses who made affidavits was directed to showing that no mistake was made and, indeed, that no mistake could have been made. The affidavits of Sister Lockhart and Sister Cass each conclude with the statement: "I say and verily believe that no mistake was made on 22nd June 1945 as stated in paragraph 17 of Mrs. Morrison's affidavit"—i.e., they say that Mrs. Morrison got the right baby. It is quite certain that she did not get the right baby and that a mistake was made.

Sisters Cass and Lockhart gave evidence to the effect that before the two babies were born to Mrs. Jenkins and Mrs. Morrison either two cots containing clothes marked with the names of the mothers or one cot containing such garments was in the labour ward. The learned trial judge rejected this and other evidence of the nurses and accepted the evidence of Mrs. Morrison. He also accepted the evidence of Mrs. Morrison that the two babies were taken out of the labour ward at the same time in the arms of Sister Atkinson. I cannot see how a court of appeal could justify a reversal of the decision of the learned judge with reference to evidence of this character by believing evidence which the learned judge had rejected by reason of his opinion of the credibility of the witnesses. But, in any case, the evidence as to whether there were two cots or only one cot in the ward and where any cot was in the ward and as to whether Sister Atkinson took the babies out in her arms or otherwise is on the margin of the case.

The findings of the learned trial judge as to the credibility of the evidence of the various witnesses were hardly challenged. Upon appeal, though not at the trial, considerable attention was directed

to evidence given by Mrs. Williams, the mother of Mrs. Morrison, that on the day when the children were born she was shown a baby by Sister Lockhart as being Mrs. Morrison's child and that that child had a fair complexion. Johanne Lee has a dark complexion. This evidence appears to me to be unimportant. Whether the evidence of Mrs. Williams is accepted or not, it leaves untouched the certain conclusion that Johanne Lee is not Mrs. Morrison's baby. Sister Lockhart may have shown Mrs. Williams the right baby, but even if the confusion arose at a later time than that found by the learned trial judge, it still leaves for determination the problem of the identification of Mrs. Morrison's child.

Some criticism was directed against Mr. and Mrs. Morrison because they did not take legal proceedings at an earlier stage and did give an interview to a journalist, with the result that a newspaper published an article on the subject of the confusion of the babies. I am unable to see that a reluctance to embark upon legal proceedings should discredit a witness or that giving an interview to a newspaper should have that effect. The case should be considered quite independently of any views as to the propriety of giving an interview to a journalist—a matter upon which opinions may differ. Mr. and Mrs. Morrison gave evidence that they became uncertain as to whether they had the right baby, more particularly because Mrs. Williams was very insistent that they had the wrong baby. They explained the delay in bringing proceedings by stating that they understood (and the evidence of the doctors showed that many people understood) that blood tests could not usefully be made until a child was twelve months old. When the child was a little more than twelve months old they had no less than three separate blood tests made. They also explained that financial considerations led to the delay in instituting proceedings. I cannot see that any of these extraneous matters can justify a court of appeal in setting aside findings of the learned trial judge as to the credibility of witnesses whom he has seen and heard.

Johanne Lee was substituted for the baby born to Mrs. Morrison. The question for determination is whether Nola was Mrs. Morrison's baby for whom Johanne Lee was substituted. The circumstances of the two births, which were practically simultaneous, the fact that Sister Atkinson had no midwifery experience as to tagging babies with some identifying label, that the two babies were taken out of the ward together by Sister Atkinson to be bathed by Sister Lockhart, wrapped up in some wrapper provided by the hospital, though possibly also with bunny rugs round them, that there was only one bath in which to bathe them, that the baby which

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was brought to Mrs. Morrison half an hour after birth as her baby was unclothed, wearing no identifying garments, that the learned trial judge did not accept the evidence of the nurses, that there were cots in the ward tagged with the names Morrison and Jenkins, that there was every opportunity for confusion between the Morrison and Jenkins babies, and the most important fact that Johanne Lee is not the child of Mr. and Mrs. Morrison, so that Mrs. Morrison got the wrong baby, all go to support the conclusion that the Jenkins baby was by mistake given to Mrs. Morrison.

But it was argued that two other female children were born in the hospital at about the same time, namely to Mrs. Hayes on 19th June and to Mrs. Perry on 20th June, and that one of these babies might have been substituted for the baby born to Mrs. Morrison. Mrs. Morrison's baby was born on 22nd June. Sister Lockhart gave evidence that she did not think it was possible to mix up a newly-born baby with a baby who was even only twenty-four hours old. This evidence was apparently accepted at the trial by all parties as obviously true. No cross-examination was directed against it. The Hayes baby was about three days and the Perry baby about two days older than Mrs. Morrison's child. No evidence was given to support the speculation that Mrs. Morrison's baby was given to Mrs. Hayes or Mrs. Perry or that she was given one of their babies. In my opinion there was ample evidence to support the finding of the learned trial judge that Nola is the child of Mrs. Morrison.

The decision of the Full Court in reversing the order made by the learned trial judge was based upon the view of the Chief Justice that it was not for the welfare of Nola that any order should be made for change of custody if there was any possible doubt as to her parentage, and of *Fullagar* J., with whom *Lowe* J. agreed, that there should be no order for change of custody if there was even " the slightest doubt " as to parentage. These are standards of proof which have not, as far as I am aware, ever been applied by courts of law. In a civil case matters are determined upon a balance of probability, regard being had to the importance and gravity of the issue. In criminal cases matters are determined upon satisfaction beyond reasonable doubt. I am not aware of any authority for the proposition that a court is to abstain from determining a matter properly submitted to it unless the court can say that there is " no possible doubt " as to the conclusion to be reached or that there is not even " the slightest doubt."

I therefore proceed to consider the question of the welfare of Nola upon the basis that it has been shown with the high degree

of certainty which the circumstances of the case require that Nola is the child of Mr. and Mrs. Morrison. I have already referred to the importance of a child being brought up by its parents unless the parents are definitely disqualified from being entrusted with the care of the child. Nola is now a little over four years old. Doubtless a change of custody will cause her some temporary unhappiness. But upon a long view it is much better for her that she should be brought up in the family of those whom a court has found to be her parents if a court does so find. In the Full Court attention was paid to the position of Johanne Lee and it was said that if her custody were changed she would suffer some unhappiness. It is not at all certain that Mrs. Jenkins would take Johanne Lee. Mr. and Mrs. Morrison have said that they are fond of her and that they are quite prepared to keep her. But I do not see how considerations affecting a child who is not a child of Mr. and Mrs. Morrison should be used for the purpose of depriving them of the custody of their own offspring. Finally, it was considered that attention should be paid to the position of Mrs. Jenkins. Mrs. Jenkins stoutly asserts that Nola is her child and that she will continue so to believe, whatever doctors and lawyers may say. The position of Mrs. Jenkins is that she has become fond of Nola and that therefore Nola should be left with her. In my opinion the effect of any order upon the feelings of Mrs. Jenkins should not be taken into account in determining the custody of Nola if, as I think is the case, it is established that Nola is the child of Mr. and Mrs. Morrison.

For the reasons which I have stated I am of opinion that the appeal should be allowed with costs, that the decision of the Full Court should be set aside and that the order of *Barry* J. should be restored, the respondents paying for the costs of the appeal to the Full Court of the Supreme Court.

RICH J. In this matter special leave was granted from the judgment and decision of the Supreme Court of Victoria. The facts of the case are sufficiently set out in the judgment of *Fullagar* J. and need no repetition. I agree entirely with his Honour's reasons. But as the matter is of very great importance I consider that I should state shortly my own reasons. The procedure adopted in this case is unfortunate as the children the subject of the controversy are not parties and will not be bound so far as the question of parentage is concerned by any order the Court may make. Usually in cases relating to the guardianship of infants no issue as to parentage is raised. Moreover one must

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bear in mind that proceedings by way of habeas corpus are discretionary. The question for determination in reality is whether it is for the welfare of the child that a change of custody should be ordered. Originally in England courts of law interfered by habeas corpus for the protection of the person of anybody who is suggested to be improperly detained. The old Court of Chancery interfered for the protection of infants *qua* infants by virtue of a prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal: *Re Spence* (1). Now under the *Judicature Act* the High Court in England has inherited the combined powers of the courts whose functions were transferred to it.

In the instant case as the matter is governed by the law of Victoria it is essential to have regard to the *Marriage Acts*, 1928-1941 (Vict.) which in s. 136—adapted from s. 1 of 9 & 10 Geo. V. c. 71—provides that the Court in deciding the question of the custody or the upbringing of an infant shall regard the welfare of the infant as the first and paramount consideration. "The duty of the Court," said *Lindley* L.J., "is in our judgment to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken": *In re McGrath* (2). And this being the basal consideration this Court as a Court of Appeal "must approach the matter independently and not as a matter determined by the discretion of the Court below": *In re J. M. Carroll* (3). The Court sits primarily to guard the interests of the infant and its jurisdiction is in this respect parental and administrative and the disposal of controverted questions is an incident only in the jurisdiction—*Scott* v. *Scott* (4) per Viscount *Haldane* L.C.—and this doctrine should, I think, be observed by this Court in the exercise of its appellate jurisdiction.

The appellants treated parentage as the sole issue in the case instead of something merely supplemental to the main issue, namely the welfare of the child. No evidence or none that is convincing was led to prove that a change of custody would in any way benefit the child. On the contrary, it appears that the present custody is satisfactory and conducive to the health, happiness and general well-being of the child. The appellants, on whom the onus lies, have not proved that any change is necessary. The claim made and the issue raised by the appellants are that of parentage and I cannot conceive that any advantage or benefit would at this stage

(1) (1847) 2 Ph. 247 at p. 252 [41 E.R. 937, at p. 938].
(2) (1893) 1 Ch. 143.
(3) (1931) 1 K.B. 317, at p. 333.
(4) (1913) A.C. 417, at p. 437.

accrue to the infant even if it would gratify the female appellant. The evidence shows that the male appellant was not anxious to make any application. His relations towards the child are shown in the following passages from his evidence :—" I was not anxious to go on with the matter. I take it that you are very fond of Johanne Lee and so is your wife ?—Yes. May we take it that Johanne Lee has been at all times brought up as an integral member of your family ?—Yes. At no stage has she ever been given cause to think that she was not a member of your family ? No, at no time. There is no question that she unquestionably regards you as her father and your wife as her mother ?—No question whatever. And the other two children believe that she is their sister ?—Yes. So that, as far as your family circle is concerned, Johanne Lee always has been and is now an integral part of your family ?—That is true. And we may take it that you and your wife have a strong attachment for the child ?—Yes. Does she get on with the other two children as one of themselves ?—Yes. When was it that you first consulted your solicitor about the matter ?—I came down to town and knew nobody in Melbourne. I had not been there for any length of time and had not had any dealings with any solicitors at all and I was advised to go and see Mr. *Galbally*. When was it that you first consulted your solicitor ?—Some time early this year, I think. We have a letter from Mr. *Galbally* dated 6th February 1948 to Mrs. Jenkins at Kyabram. It must have been some time early this year, don't you think ?—That is right. That would be after the article that appeared in ' Truth ' ?—Yes. I take it that you saw the article that appeared in ' Truth ' newspaper some time in January ?—Yes, I did."

No doubt in ordinary circumstances a child should be with its parents but in the instant case the circumstances are unique or at least unusual. Between the parties to this proceeding a *de facto* relationship has existed for four years and four months and each child was suckled by the respective mother from the hour of its birth. In the ordinary litigation there is no doubt or issue as to parentage and the child knows the parent as its parent. After this length of time a change of custody would wrench the child from its present happy and contented condition and throw it into an unknown place and among persons strangers to her. The result would be a menace not only to its health and happiness but would also affect the welfare of the other child: cf. *R.* v. *Murdoch* (1). For nearly five years a *de facto* parentage has existed and also a *de facto* relationship of brother and sister with the other

(1) (1940) V.L.R. 61, at pp. 65, 66.

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children of each family. In these circumstances it would be disastrous to upset the present conditions and cause unrest and unhappiness to both children. Moreover, there is real doubt whether Nola is the child of the Morrisons and this is another factor to be taken into consideration in determining the issue of welfare. I am not satisfied that the scientific evidence is infallible. At most it goes to show that Johanne Lee is not the child of the Morrison union. But it neither shows nor purports to show that Nola Jenkins is the child of that union although it does show that Johanne Lee could be the child of Mrs. Morrison. On this issue the appellants must exclude every other reasonable hypothesis. Did a mistake in fact occur? The evidence of Mrs. Williams is inconsistent with that of her daughter, the female appellant, and is also inconsistent with the finding of the learned primary judge that the exchange of babies occurred shortly after birth. Moreover at the time of the alleged mistake two other recently born babies—the Perry and Hayes children—were born on the 19th and 20th June in the same nursery in the same hospital. The appellants led no evidence as to these children or their mothers or that either mother had ever seen her child before the morning of 22nd June. In these circumstances the possibility of a mistake with either of these children cannot be excluded. Thus the probability of a mistake with the Jenkins' child to the exclusion of any other is considerably lessened, if, indeed, a mistake did in fact occur. A decision as to parentage will not bind the child and at a later stage in other proceedings—for example under a will or settlement—in which the child should be a party a decision contrary to that in the instant case would be a grievous blow to the happiness and welfare of the child. Indeed in a proceeding to which the child is not a party the Court has no jurisdiction to decide a question of legitimacy.

I would dismiss the appeal.

DIXON J. In my opinion this appeal involves no question of law and is concerned only with a very special set of facts raising a problem of judicial discretion. The judicial discretion is committed to the Supreme Court but this Court has jurisdiction upon an appeal by special leave to review the decision of that Court if we think the discretion has not been soundly exercised. I was not able to agree in the order granting special leave to appeal from the order of the Supreme Court because I thought that the matter was not of a description falling within the principles upon which we exercise our power of giving special leave. But special leave

being granted, the question is simply whether we should be satisfied of the unsoundness of the conclusion of the Full Court of the Supreme Court. The very fact that the parentage of the two children has been the subject of litigious proceedings is itself a misfortune for both of them and I think that it will be in the future interests of both of them if in disposing of the appeal we confine our reasons to a bare statement of the essential steps leading to the conclusion.

I am not satisfied that the view taken of the case in the Full Court of the Supreme Court is unsound. The closely-reasoned judgment of *Fullagar* J. appears to me to be quite satisfactory and I think that in all substantial respects it has withstood the criticism to which it was subjected. *Herring* C.J. and *Lowe* J. expressed their agreement with the views of *Fullagar* J. I cannot however, concur in the first ground given by *Herring* C.J., namely, that the proceedings were inappropriate and that unless all possible doubt were excluded the Court should require a decision *in rem* as to parentage before it decided upon any change of custody based solely on the parentage of the child. This ground must, I think, be attributable to a mistaken supposition that the provisions of the *Legitimacy Declaration Act* 1858 have been transcribed in Victoria.

In deciding a question as to the custody of an infant the Court is bound by statute to regard the welfare of the infant as the first and paramount consideration. In ordinary circumstances an infant's welfare is best consulted by being placed under the care and control of his or her parents. We all take it for granted and the courts in dealing with infants proceed from that presumptive position. In the present case, however, the child Nola has from birth been accepted by Mr. and Mrs. Jenkins as their own offspring. She is now over four years of age and has been reared as one of their children. They have never doubted that she is their child and she has of course never doubted that they are her parents. At present her life and happiness are bound up with her membership of the family, with the sisterly and brotherly affection of the other children and the parental affection of Mr. and Mrs. Jenkins. Nothing that has happened in the course of the litigation seems to have shaken Mrs. Jenkin's conviction that Nola is her child. If therefore she is left in the custody of Mr. and Mrs. Jenkins Nola will be brought up by those who suppose that she is their child and, it may be added, by estimable people and in conditions of comfort. It is manifest that if she is to be torn by judicial decree from this family life it can only be for a very strong reason which is regarded as forming an overriding consideration decisive of her more lasting welfare.

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The reason assigned is that however strong may be the conviction of Mrs. Jenkins to the contrary Nola is in truth the child of Mr. and Mrs. Morrison but by some tragic mistake committed at the Kyneton Hospital was given to Mrs. Jenkins, instead of her own child, immediately or soon after each woman had given birth to a daughter.

Now the foundation of the decision of the Full Court of the Supreme Court is that before, on such a ground, the Court overturns the existing state of things and takes Nola from the Jenkins and entrusts her custody to the Morrisons, it should be completely assured that it is true. Unless the proofs exclude all real doubt and risk of error in the conclusion, Nola should be left with those who have brought her up in the confident belief that she is their daughter.

This view of the Full Court appears to me to be clearly sound. The whole future happiness and welfare of the child is at stake. Not only is her happiness and welfare involved, but so is that of the other child, Johanne Lee, whom the Morrisons have hitherto brought up as their child. What is to happen to her if the Court were to transfer the custody of Nola to the Morrisons does not appear. The Jenkins of course repudiate her as their child and could not be required to receive her into their family. It would militate against Nola's future happiness and welfare if the transfer were made notwithstanding the continued existence of reasonable cause for doubt as to the child's parentage and it would be little short of disastrous if afterwards further information made it appear more likely that after all the Jenkins were her parents. The inference that Nola is the child of the Morrisons rests of course wholly on circumstantial evidence. Notwithstanding the wealth of detail gone into, particularly as to the circumstances of the birth of the two children, the whole case depends upon a chain consisting of a very few evidentiary facts or circumstances and some steps in reasoning which together are relied upon as warranting the inference. The first of these facts or steps is the conclusion deposed to by scientific witnesses that Johanne Lee belongs to a blood group that is inconsistent with her being the child of Mr. Morrison. This conclusion the Jenkins are powerless to deny. The second step is the inference that she is therefore not the child of Mrs. Morrison. Any other inference would reflect upon Mrs. Morrison and the Jenkins make no such reflection. The third is the fact that from the time that Mrs. Morrison left the hospital with a girl child and until the scientists took the blood tests there has been no change in the identity of that child and she is Johanne Lee and was the child submitted to the blood tests. This fact is proved by the

Morrisons. Nothing of course could be more probable and it may be accepted as possessing as much certainty as attaches to the proof of any fact in human affairs. But as it is an essential step in the reasoning it must not be omitted. The fourth step is proof that at the hospital where both women were confined there was a real chance of confusion between the female child which Mrs. Morrison bore and some other female child. The fifth step is the elimination of the possibility that any other child but Mrs. Jenkins' could have been attributed to Mrs. Morrison. The sixth step is the inference that correspondingly Mrs. Jenkins must have received Mrs. Morrison's child.

By this chain of reasoning the result that Nola is Mrs. Morrison's child is said to be established. To make good the last three steps a great deal of evidence was adduced at the hearing. The events of the morning of 22nd June 1945 when both women were delivered of female children within ten or fifteen minutes in the same labour ward were inquired into in great detail. I should have thought that neither nurses nor patients could be expected to observe or recall so much and that their attempts to reconstruct the incidents of the morning could not safely be relied upon. But two conclusions emerge which are clear enough. One is that there was no routine for identifying babies which excluded the possibility of mistake and the other is that because two women were delivered by the same doctor and nursing staff in the same ward within such a short time there was a greater liability to confusion.

But in my opinion the further inference or conclusions which have been drawn as to the precise manner in which the babies were handled and exactly by whom are doubtful and in some respects speculative and they are unsafe.

Two other recently born female children were in the hospital, one born on 20th and the other on 19th of June. It does not appear whether they were full-time children nor was the condition of the mothers or any other circumstances proved really relevant to the possibility or impossibility, likelihood or unlikelihood, of the confusion (if one took place) being with either of those children. The case for the Morrisons naturally was that their child was confused with the Jenkins' child immediately after the birth of the children. That was the view which *Barry* J. adopted and acted upon. But Mrs. Morrison's mother, who visited the hospital later on the same day, in the afternoon, said that she was shown a child as her daughter's which was not the child her daughter brought home from the hospital. The tendency of her evidence if it were correct was to show a confusion at some later time and not as a result of the

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birth of two children at nearly the same time in the same ward. There would therefore be little or no reason to suppose that the confusion was with Mrs. Jenkins' child rather than with one of the other two girl babies.

The only further fact I shall mention is that little or nothing is known concerning the blood grouping of the Jenkins and Nola. They submitted themselves to their medical adviser for a blood test and he reported that it disclosed that Nola might be their child, that is that their blood grouping was consistent with their being the parents of Nola. He made an affidavit to that effect but he was abroad and not available for cross-examination. The Jenkins declined to submit themselves and the child to further blood tests.

I shall not go into the question of when and why the Morrisons began to doubt that Johanne Lee was their child and how their claim to Nola originated and came to be litigated. No doubt every element in the case has a bearing upon the exercise of the Court's discretion in determining whether Nola should be transferred to Mr. and Mrs. Morrison's custody. But the Supreme Court has dealt sufficiently with these additional matters. To my mind the chief issue is whether the chain of fact and of reasoning I have briefly set out establishes the inference that Nola is the child of Mr. and Mrs. Morrison with such a high degree of certainty that the Court should give effect to their claims at the expense of the considerations which otherwise would make it imperative for the child's welfare that she continue as a member of the Jenkins family.

In my opinion this issue was properly decided in the negative by the Full Court of the Supreme Court.

With any chain of circumstantial evidence the chances of error in the conclusion arise first from the chances of error in each fact or consideration forming the steps and second from the chance of error in reasoning to the conclusion from the whole of those facts and considerations. It is therefore wrong to take each fact or consideration separately, to assess the possibilities of error in finding it is established and then if you think it should be found afterwards to treat it as a certainty and pass to the next fact or consideration and so on to the conclusion. The possibilities of error at all points must be combined and assessed together.

In the present case I think that when all the possibilities are taken into account there is too much uncertainty in the inference that Nola is the child of Mr. and Mrs. Morrison to warrant an order taking her from Mr. and Mrs. Jenkins and placing her in the

custody of Mr. and Mrs. Morrison. It was a sound exercise of the discretion of the Supreme Court to leave her in the custody of Mr. and Mrs. Jenkins.

I do not think that we should interfere with the order of the Full Court of the Supreme Court as to costs.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. In my opinion the appeal should be allowed and the order of *Barry* J. restored.

The Chief Justice has analysed the evidence and it is not necessary for me to review it again. I agree with his Honour's reasons for allowing the appeal.

The evidence proves that the child born to Mrs. Morrison on 22nd June 1945 in the labour ward of the Kyneton District Hospital was begotten by her husband. This fact is an irresistible inference from the evidence, given by Mrs. Morrison, that she never had sexual intercourse with any man other than her husband. *Barry* J. believed this evidence. There is no ground upon which an appeal court could properly decide that his Honour erred in believing this evidence or why the Court itself should disbelieve it or suspect that the child born to Mrs. Morrison was not begotten by her husband. The scientific evidence of the blood tests, the validity and the reliability of which are established by the evidence, proves that Johanne Lee, a child under the custody of the appellants, could be the child of Mrs. Morrison but not of her and her husband. The evidence further proves that Johanne Lee is the baby who was given to Mrs. Morrison after she had given birth to a child at the above-mentioned time and place, upon the supposition that it was the child to which she had given birth; she was the child whom Mrs. Morrison took with her from the hospital when she returned to her home.

These facts establish beyond any reasonable doubt that Mrs. Morrison was given a baby to which she did not give birth and the baby is Johanne Lee.

The next crucial question is when was the mistake made at the hospital which led to the substitution of Johanne Lee for the baby to which Mrs. Morrison gave birth. The answer to this question is that the mistake was made within half an hour of the birth of Mrs. Morrison's own child. This fact is proved by the following evidence elicited by the cross-examination of Mrs. Morrison:—

Q. "May we take it that that was the baby that was brought back to you within half an hour at the outside of its birth and that you took away with you when you ultimately left the hospital?—

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Yes." Q. "So that, if any mistake was made, in the transposition of these babies, it was prior to that time ?—Yes."

Barry J. accepted this evidence. It proved that the result of the mistake was complete before the afternoon of 22nd June. Mrs. Morrison's baby was then in the possession of some other woman.

In the light of this fact, Mrs. Williams' evidence, to which importance was attached in the Full Court, can have but small significance. It probably provides the reason why *Barry* J. paid no attention to Mrs. Williams' evidence (a fact noticed in the Full Court); she was not cross-examined. Mrs. Williams is Mrs. Morrison's mother; her evidence is in an affidavit filed in support of the appellant's application.

To whom was the baby born to Mrs. Morrison given ?

The evidence proves that the parturitions of Mrs. Morrison and Mrs. Jenkins occurred at the same time and place and their babies were born within five to ten minutes of each other: their simultaneous parturitions created an emergency described in the evidence; arrangements had to be made quickly to cope with it.

The evidence further proves that in this hospital a female baby was born on 19th June 1945; and another female baby was born on 20th June 1945.

Assuming that each of these babies was born at the latest point of time to make those dates respectively their birthdays, then on the morning of 22nd June, when Mrs. Morrison and Mrs. Jenkins gave birth to their babies, the first of the two other babies would then be fifty-five hours old, and the second thirty-one hours old. If either was born at an earlier hour she would of course be older.

It is reasonably certain that before the morning of 22nd June these older babies would have been placed under the usual routine of a baby's life. They would have been more than once bathed, dressed, fed, and have been in the possession of their mother. It is hardly probable that either would at that stage of her life have been placed with a woman not her mother.

Sister Lockhart, a double-certificated nurse, said in the course of her evidence that she did not think it was possible to mix up a newly-born baby with a baby forty-eight hours old.

It is less probable that confusion could have taken place between Mrs. Morrison's baby and one of the older babies, than between her baby and Mrs. Jenkins' baby. The births of their babies were almost contemporaneous.

Barry J. found that a nurse carried them out, one on each arm, from the labour ward to the nursery to be bathed, and they were left unattended until Sister Lockhart bathed them.

The field within which the mistake could occur, upon any reasonable view, must be limited to the two mothers and the two babies who were all together in the comparatively small labour ward, receiving the attention of the doctor and nurses : these two mothers and babies were involved in the same set of circumstances.

Lowe J. said that he would want blood tests of all four children before he could be satisfied that Mrs. Morrison's baby was given by mistake to Mrs. Jenkins. If blood tests of Nola and Mr. and Mrs. Jenkins showed that they could not be her parents, there would be no need for any other tests.

There is no evidence which could raise a doubt that the members of the hospital staff did give each of the babies born on 19th June and 20th June respectively to her mother. It is not a probable hypothesis that Mrs. Morrison's baby was exchanged for one of those babies, upon a reasonable view of the circumstances.

Argument is directed against the primary judge's findings of fact and his views of the credibility of the witnesses. In the case of *Powell* v. *Streatham Manor Nursing Home* (1), there is a passage in the judgment of Lord *Macmillan* which I will take leave to use to describe the disadvantages of an appeal court in this case :—" I have had an uneasy feeling, as I listened to the able arguments of counsel in this appeal, that I was remote from the poignant realities of the case and that I was being asked, as it were, to dispose of the fate of the parties in their absence. It is only the written evidence which reaches this House ; the other evidence which the judge of first instance tells us that he has relied upon cannot be reproduced or subjected to review here, and I have never felt more conscious of the disability imposed by the absence of this aid to judgment."

It is not necessary that there should be evidence showing precisely how a wrong baby was given to Mrs. Morrison before the conclusion that she was not given her own baby can be reached. The mistake no doubt was unintentional and it is not surprising that the nurse who made it has not revealed how it occurred.

The short facts proved by the evidence are that Mrs. Morrison did not get her own baby ; necessarily some other mother got her baby, and Mrs. Morrison got that other woman's baby.

The only rational conclusion is that the other mother is Mrs. Jenkins, and that she got Mrs. Morrison's baby and Mrs. Morrison got her baby.

In *R.* v. *Burdett* (2) *Best* J. said : " We are not to presume without proof. We are not to imagine guilt, where there is no evidence to

(1) (1935) A.C., at p. 257.

(2) (1820) 4 B. & Ald. 95, at pp. 121, 122 [106 E.R. 873, at p. 883].

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raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord *Mansfield*, in *The Douglas Case* gives the reason for this. 'As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.' "

Barry J. was very mindful of the gravity of the issue whether the appellants are Nola's parents. The issue involves the welfare of children and the happiness of parents. The learned judge's reasons show that he thoroughly appreciated that the issue is fraught with these consequences. He said: "I bear in mind the gravity of the issues before the Court and I have reached my conclusions in the words of Lord *Lyndhurst* 'not as I think upon a bare balance of probabilities but as a result of the thorough conviction of my mind founded upon a careful (and patient) attention to all the evidence in the case.'" The principle by which his Honour guided himself in reaching his conclusions is correct: *Briginshaw* v. *Briginshaw* (1); *Helton* v. *Allen* (2).

I agree that in a case like the present a mere balance of probabilities is not sufficient to establish the affirmative of the issue raised by the appellants namely that they are Nola's parents. But I do not agree that it ought not to be decided in the affirmative unless the proof excludes "all possible doubt." It is sufficient if the proof excludes "all reasonable doubt." The proof in this case does not lack that force.

A learned writer has said that "a reasonable certainty" is the "converse of reasonable doubt": *Legal Duties & Other Essays in Jurisprudence* by *C. K. Allen* (1931), p. 287.

(1) (1938) 60 C.L.R. 361, at pp. 362, 372.

(2) (1940) 63 C.L.R. 712, at p. 713.

In the opinion of *Fullagar* J. the evidence of Mrs. Williams detracts from the reliability of the evidence which Mrs. Morrison gave as to the time the baby was given to her. Mrs. Morrison said that it was brought to her "within half an hour of its birth." Mrs. Williams gave evidence by affidavit. There is no material upon which to form any conclusion about her reliability as a witness in comparison with Mrs. Morrison.

The primary judge accepted the evidence of Mrs. Morrison; he was satisfied that she was a trustworthy witness. *Fullagar* J. rightly observes that no point was made at the trial that Mrs. Williams' affidavit might cast doubt upon the reliability of Mrs. Morrison's evidence. It seems to me that an appeal court would not be justified in deciding that Mrs. Williams' affidavit is sufficient in itself to enable the Court to find that the primary judge erred in relying upon the evidence of Mrs. Morrison to reach his conclusions.

I would add that if a baby was substituted for Mrs. Morrison's baby, it is more probable that the mistake occurred within a short time after birth, before the babies were dressed. The identity is ascertained by the baby's clothes. A mistake could more easily occur before the newly-born babies were clothed than afterwards. It could be caused by carelessness after they were clothed: for instance if a nurse undressed them and bathed them at the same time; but it is not necessary to suggest that there was that degree of carelessness in this case.

Mrs. Morrison said that the child brought to her within half an hour of the birth was dark and unclad and was the child she took home with her. Mrs. Williams said the baby shown to her on that afternoon and which a member of the nursing staff told her was her daughter's baby was a fair-skinned baby and resembled Mrs. Morrison's other children. This incident might possess significance only if Mrs. Morrison was present. She was not present.

Fullagar J. added that Mrs. Morrison's evidence "proves only that a substitution may have taken place, not that it did take place."

I respectfully make this comment. If Mrs. Morrison gave birth to a baby begotten by her husband she was not given that baby. The evidence of the blood tests establishes this fact beyond reasonable doubt. The conclusion that there was a substitution is inescapable unless the Court doubts that she has been faithful to her husband. The Court cannot doubt that she has been faithful to him unless it rejects or declines to accept her sworn evidence that the child to which she gave birth was begotten by her husband. There is no proper ground for an appeal court to take either of these courses.

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Fullagar J. also said : " It must not be overlooked that the only direct scientific evidence with regard to Nola, while admittedly weak, suggests that Nola is the child of Mr. and Mrs. Jenkins." This is Dr. Loughran's affidavit. The Assessor's Report made to *Barry* J. has the following comments on Dr. Loughran's evidence— " Thus little significance can be attached to the finding of Dr. Loughran that Noella's blood group is compatible with parentage by Mr. and Mrs. Jenkins." There is also this comment in the same Report—" Furthermore in the absence of factual data regarding the blood tests performed by Dr. Loughran, it is doubted whether any significance can be attached to his affidavit in respect of blood tests." Further Dr. Loughran was not available for cross-examination.

The Full Court decided that it was erroneous for *Barry* J. to adjudicate upon the issue whether the appellants are Nola's parents, because it was not for her welfare to make a finding that they are her parents unless the proof that they are excludes all possible doubt and not perhaps even then, because of the circumstances. With respect I do not agree.

The parents are the natural and lawful guardians of their child : they have a legal right to the child's custody : they may enforce the right of habeas corpus : at the instance of the parents the Court issues a writ of habeas corpus directed to a person detaining their child for the production of the child to the Court, and upon the production of the child in obedience to the writ, the Court makes an order for the delivery up of the child to the parents if it is for the child's welfare to be under their custody. The appellants applied for a writ of habeas corpus directed to the respondents for the production of Nola to the Court. They alleged that they are her parents and there is, upon any view, substantial evidence to support their allegation. It would be a denial of justice to the appellants not to adjudicate upon the issue which they raised, whether they are Nola's parents. It is clearly raised by the application and it is a material issue in the proceedings.

Barry J. took the issues in their right order. First he tried the issue of parentage and having found that the appellants are Nola's parents, he considered the question whether it was for her welfare to be placed under their custody. Whatever Parliament has done to make the respective rights of father and mother equal when one is contending against the other for the custody of their child, leaving the Court to settle the dispute by the criterion of the child's welfare, which is made the paramount consideration, it has not enacted any law which places strangers on the one hand and parents

on the other hand on an equal footing when there is a contest between them for the custody of a child ; in that case the parents' right to custody may be asserted against the strangers, but the Court would not enforce the right if it would not be for the child's welfare to be under the parents' custody. Applicants for custody of a child could not have a more excellent reason for asking for an order for the custody or a better right to the order than that they are the parents and their fitness to be the guardians is unassailable.

The care and affection of a child's parents are most important elements in the child's welfare.

The appellant's case having raised, at any rate, a strong doubt whether the Morrisons or the Jenkins are Nola's parents, it was for her welfare that *Barry* J. should resolve the doubt by making a finding on that issue upon all the evidence before the Court.

If the appellants are Nola's parents it is for her welfare that she should be removed to their custody as soon as possible. The fitness of the respondents to be her guardian is not in question. The appellants are equally fit to be her guardians ; upon the finding of *Barry* J. they have the advantage of being her parents. Regarding the finding as one that ought not to be disturbed, *Barry* J. was right in giving the custody of Nola to the appellants. He was guided by the principle that it would be better for the child's welfare to be in the custody of the appellants whom he found to be her parents than in the custody of the respondents, who upon his finding are not her parents. His Honour did not take any irrelevant or extraneous matter into consideration or fail to take any material matter into consideration in determining that it is for Nola's welfare to remove her from the respondents' to the appellants' custody.

WEBB J. I would dismiss this appeal.

If there had been only two infants in the Kyneton District Hospital on 22nd June, 1945, namely those born on that day, this Court would, I think, be obliged to restore the judgment of *Barry* J. and give the custody of Nola to the Morrisons as their child. The onus of proof was on the Morrisons, but the credibility of witnesses was for the learned judge to determine. His Honour believed Mrs. Morrison when she said that the child born to her on 22nd June, 1945, was by her husband, and he naturally accepted the evidence of the blood tests that Johanne was not a child by Mr. Morrison. So he could properly have concluded that Nola was the child of the Morrisons, if there were only the two infants in the hospital on 22nd June, 1945. The same result

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would follow if it had been common ground that Mrs. Morrison and Mrs. Jenkins each received a newly-born baby on the morning of 22nd June, 1945. Mrs. Morrison and Mrs. Jenkins each claim to have received a newly-born infant that day. Mrs. Morrison contends that Mrs. Jenkins did receive a newly-born baby, because Mrs. Morrison is claiming Nola from Mrs. Jenkins. But the case for Mrs. Jenkins is that if Mrs. Morrison did not get her own baby she got one of the older babies born on 19th and 20th June, 1945, and not the baby of Mrs. Jenkins. The conduct of the proceedings and the judgment indicate that there was no common ground that Mrs. Morrison and Mrs. Jenkins each received a newly-born baby. Sister Lockhart who made an affidavit on behalf of Mr. and Mrs. Jenkins, was cross-examined with a view to showing that Mrs. Morrison's child was not given to one of the mothers of the two older infants born on 19th and 20th June, 1945, and the judgment gives grounds for holding why Mrs. Morrison's child was not given to one of these two mothers, namely, an assumption by his Honour as to the ability of mothers generally to recognize their infants, and the evidence of Sister Lockhart as to the impossibility in ordinary circumstances of mixing up a newly-born baby with one twenty-four hours old.

Part of the cross-examination of Sister Lockhart was as follows :—

" Is there much difference between a newly-born baby and a baby twenty-four hours old from the point of view of telling the difference to a nurse or a mother ? . . . Sometimes there is. Are they any more lively, any better developed, any different characteristics ? . . . Oh ! the features settle a bit sometimes. Would you think it possible to mix up a newly-born baby with a baby twenty-four hours old ? . . . I don't think so."

These questions suggest that the possibility that the infant born on 20th June was born about midnight of that date. Of course the baby born on 20th June was at least thirty-one hours older than the babies born about 7 a.m. on 22nd June ; but the older the baby is the less likely is it to be mistaken for a newly-born baby.

His Honour in his judgment under the heading " What other child could have been substituted for Mrs. Morrison's ? " says :—

" It appears that between the 19th June 1945 and 22nd June 1945, four female children were born at the Kyneton District Hospital. A female child was born on the 19th, another on the 20th and the two children, the circumstances of whose births have been examined, on the 22nd. It was submitted by Mr. Hudson that the evidence did not exclude the possibility that some baby other than Mrs.

Jenkins' child may have been mistakenly exchanged for Mrs. Morrison's baby. I do not think there is any substance in this submission. It appears to me most unlikely that a mother of a child born on the 19th or 20th would fail to detect the mistake if a child born on the 22nd were brought to her. Moreover, Sister Lockhart was asked, 'Would you think it possible to mix up a newly-born baby with a baby twenty-four hours old?' and she answered, 'I don't think so.' If this be excluded as a possibility the findings of fact I have set forth earlier leave open only one conclusion, and it is that the only baby that could have been exchanged for Mrs. Morrison's baby was the baby born to Mrs. Jenkins."

Neither the cross-examination of Sister Lockhart nor the judgment of *Barry* J. deal with the actual condition of the two mothers of the older infants or the appearance of those infants. It is confined to mothers and infants generally. There was no evidence to show the actual condition of these two mothers on 22nd June. Neither may have been in a condition to receive or to recognize her infant. Further there was no evidence that neither of the two older infants could have been mistaken on 22nd June for a newly-born infant. Either or both could have been prematurely born. There was no evidence to the contrary. It is not a matter of common knowledge that under no circumstances could a baby two or three days old be mistaken for a newly-born infant. Sister Lockhart said twice that *sometimes* there is a noticeable difference before saying she did not think it possible to mix up a newly-born baby with a baby twenty-four hours old; that is, of course, if both mothers and both infants are normal at the time of the exchange, in which event no evidence is really necessary to show a mistake would not be likely to occur. I do not think that any presumption arose that the other two mothers and infants were normal, or that the Morrisons had given enough evidence, as a result of getting these obvious answers from Sister Lockhart, to shift the onus of proof to Mr. and Mrs. Jenkins that one of the two other mothers or one of the two older infants was not normal in condition or appearance on 22nd June, 1945. The onus of proof is not shifted by a mere statement of what is common knowledge. Although Mrs. Morrison had ether administered to her at the birth of her child on 22nd June she appears to have been in a normal condition when she received Johanne; but if Johanne was prematurely born on 20th June, or even on the 19th, she might have appeared newly-born on 22nd June.

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So far I have assumed that the standard of proof in these proceedings was according to a mere balance of probabilities and have decided against the appellants, the Morrisons, because they failed to discharge the onus of proof. However *Barry* J. said in his judgment that he reached his conclusion not on a bare balance of probabilities but as a result of thorough conviction. Of course, he may still have regarded the standard of proof to be according to a balance of probabilities, as I think was the case; but before the Full Court and this Court it appears to have been assumed that where a birth certificate is challenged as not disclosing the true parentage of the child, the Court is required to be thoroughly convinced that the certificate is wrong before disregarding it. A Court cannot change the standard of proof, but it can and should insist on exact or cogent proofs on issues of grave importance like that of parentage. Such being the case then, even if the onus of proof shifted to the respondents, Mr. and Mrs. Jenkins, as a result of the cross-examination of Sister Lockhart, I am unable to hold that on all the evidence the Full Court should have shared, and that this Court should share, the conviction of *Barry* J., that Nola was the child of the Morrisons. He based his conclusion on this the most important issue on an assumption as to the condition on 22nd June 1945 of the mothers of the older infants and as to the appearance of those infants which, I think, was unwarranted, and on evidence of little, if any, weight, namely that of Sister Lockhart. I am not now referring to the fact that he did not regard Sister Lockhart as entirely truthful, but to the nature of her evidence as quoted above. There was of course no other way of reaching a conclusion that Nola was the child of the Morrisons on the evidence.

Briefly, ether was administered to Mrs. Morrison at the birth of her child but it does not appear to have dulled her perception. It can be safely concluded that if she received one of the two older infants she would have realised the mistake, unless for some reason it appeared to her to be newly-born, as might have been the case if it had been born prematurely. But *Barry* J. assumed in favour of the parties with the onus of proof, the Morrisons, that both infants and their mothers were normal on 22nd June, 1945. To find that they were normal he was obliged to make that assumption, because there was no evidence as to their condition. However he also relied on Sister Lockhart's evidence that she did not think that a newly-born infant could be mixed up with one twenty-four hours old; but that could be true only where the mothers and infants were normal. If she intended to say that under no circumstances could two such infants be mixed up, then, apart from making

an incredible statement, she had twice said just previously that *sometimes* there is a noticeable difference. Yet it was on this assumption, for which I can find no warrant in law, and on this evidence of Sister Lockhart, which was not evidence bearing on the actual appearance of the older infants and the condition of their mothers on 22nd June, 1945, that his Honour based his finding on the most important issue, Nola's parentage. Beyond question his Honour exercised great care, but, in my opinion, he arrived at his conclusion without convincing proof. The evidence as a whole did not warrant his conclusion, even if the onus of proof had shifted to Mr. and Mrs. Jenkins after Sister Lockhart gave her evidence. The evidence as to the condition of the mothers of the older infants and of the appearance of those infants on 22nd June, 1945, may not have been available but that did not dispense with the need for proof of those matters to warrant the finding that Nola was the child of the Morrisons. It becomes unnecessary for me to decide the other questions raised. However I do not see how worthy people like the Morrisons could properly be deprived of the custody of Nola if she were shown to be their child. In the case of a child so young and with such respectable parents it could not be said to be in its paramount interests to leave it in the custody of strangers. I can well understand the determination of the Morrisons to secure the custody of a child which they believe to be theirs and the support given to them for that purpose. But what at the outset probably appeared to them and those supporting them to be a simple matter of establishing parentage by blood tests has proved not to be so, because of happenings which they could not have anticipated. The Morrisons and those supporting them might well have thought that the parents concerned would be as anxious as they to settle the questions of paternity by blood tests, but such was not the case. However, in fairness to Mr. and Mrs. Jenkins it should be pointed out that when the question of Nola's parentage was first raised they had blood tests of themselves and Nola made by Dr. Loughran who had attended Mrs. Morrison and Mrs. Jenkins at the births of their infants on 22nd June, 1945. Dr. Loughran was not in Australia during the proceedings before *Barry* J., but he made an affidavit which was filed on behalf of Mr. and Mrs. Jenkins and in which he claimed to have been experienced in making blood tests and to have found that Nola could be the child of Mr. and Mrs. Jenkins. No blood test could go further in support of the view that Nola was the child of Mr. and Mrs. Jenkins. But as Dr. Loughran was not available for cross-examination *Barry* J.

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gave no weight to his evidence, although this was the only blood test of Nola. However the Full Court of Victoria gave it some weight and I am not prepared to say that Court was not justified in so doing, although I have arrived at my conclusion without regard to that affidavit. But whatever may be the value of this affidavit as legal evidence it is unlikely that the faith of Mr. and Mrs. Jenkins in Dr. Loughran's blood test would be shaken by the absence of any cross-examination of Dr. Loughran. This blood test explains, if it does not warrant, the refusal of Mr. and Mrs. Jenkins to submit Nola to any further blood test. In conclusion it is observed that his Honour saw each child in the company of the appellants and of the respondents and saw them together but did not derive any assistance from this inspection. He said both children were attractive and well-developed but he was unable to observe any features of resemblance that he could feel were of such a kind that he could place reliance on them. That is an answer to the evidence, or at least to the suggestions in the evidence, for the Morrisons as to the resemblance Nola bore to them.

Appeal dismissed with costs.

Solicitor for the appellant, *J. W. Galbally.*
Solicitor for the repondents, *Bernard Nolan.*

E. F. H.