[HIGH COURT OF AUSTRALIA.]

LOVELL . . . . . APPELLANT;
RESPONDENT,

AND

LOVELL . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 24, 26, 27; SYDNEY, *Nov.* 27.

Latham C.J., McTiernan, Webb and Kitto JJ.

Custody of Infant—Wife living apart from husband without his consent—Application by wife for custody of young daughter—Application opposed by husband—Dismissal of application—Discretion of primary judge—Functions of appellate court on appeal from exercise of discretion—Marriage Act 1928-1929 (*No.* 3726—*No.* 3816) (*Vict.*), *Part VII.*

A wife left her husband without his consent, taking with her the only child of the marriage, a daughter of about three years of age. The husband subsequently took the child into his custody, and the wife applied to the Supreme Court of Victoria for an order giving her the custody of the child. The wife was living at the house of her father, who was in comfortable circumstances and was willing that his daughter and her child should live with him. The wife had accepted employment which took her away from the house from about 8 a.m. until 6 p.m. on each day of the week from the Monday to Friday and also on Saturday morning. During such times the child would, if the wife was given its custody, be left to the care of the wife's sister, a single woman who was not experienced in the care of children. The primary judge refused the wife's application. He was of opinion that the child would be at least as happy in the custody of the husband as in that of the wife and in addition would be more properly looked after because she would be in the care of the husband's mother. Moreover, the judge was not satisfied that the wife's application was due to affection for the child.

Held, by *Latham* C.J., *McTiernan* and *Kitto* JJ. (*Webb* J. dissenting), that in the circumstances of this case the primary judge had not erred in the exercise of his discretion in refusing the wife's application and there was no ground on which a court of appeal was warranted in disturbing his decision.

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

Charles Osenton & Co. v. *Johnston*, (1942) A.C. 130, *Blunt* v. *Blunt*, (1943) A.C. 517, and *Storie* v. *Storie*, (1945) 80 C.L.R. 597, referred to.

Decision of the Supreme Court of Victoria (Full Court) reversed, and order of *Coppel* A.J. restored.

APPEAL from the Supreme Court of Victoria.

Lorna Hazel Lovell, left her husband, Edward Victor Lovell, without his consent, taking with her the only child of the marriage, a girl, Pamela Diane Lovell, aged about three years. The husband subsequently took the child into his custody, and the wife applied to the Supreme Court of Victoria under Part VII. of the *Marriage Act* 1928-1929 (Vict.) for an order that she have the custody of the child. On facts which appear sufficiently in the judgments hereunder, *Coppel* A.J. dismissed the application, and the wife appealed to the Full Court of the Supreme Court.

The Full Court (*Gavan Duffy*, *O'Bryan* and *Smith* JJ.) set aside the order of *Coppel* A.J. and ordered that the wife have the custody of the child.

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

M. J. Ashkanasy K.C. (with him *T. Rapke*), for the appellant. *Coppel* A.J. exercised his discretion correctly on the facts of this case as found by him in refusing the wife's application, and the Full Court of the Supreme Court was wrong in setting aside his decision and substituting its own discretion. In particular, the Full Court was wrong in treating *Storie* v. *Storie* (1) as establishing something in the nature of a rule of law or presumption in favour of the mother where the custody of a young child is in question. In that case the custody was given to the mother because on the facts it was held to be in the best interests of the child that the mother should have the custody. The wishes of an unimpeachable parent come first if other considerations as to the welfare of the child are equal (*In re Thain*; *Thain* v. *Taylor* (2)): see also *In re Elderton* (3). In the present case the wife, having left home without justification, is not unimpeachable: cf. *Daniel* v. *Daniel* (4). Moreover, it is not at all clear that the wife has any real affection for the child. The order of the primary judge was based on sound principles and should be restored.

(1) (1945) 80 C.L.R. 597.
(2) (1926) Ch. 676.
(3) (1883) 25 Ch. D. 220, at p. 229.
(4) (1906) 4 C.L.R. 563, particularly at pp. 567, 568.

J. B. Tait K.C. (with him *B. L. Murray*), for the respondent. The Full Court of the Supreme Court acted in accordance with what has been laid down by the House of Lords and stated in *Storie* v. *Storie* (1). The wife in that case was in much the same position as the wife here; if regard is had to the same considerations as in that case, the decision of the Full Court should be upheld. The basis of that decision was that *Coppel* A.J. had not given sufficient weight to the consideration in particular that, unless for a strong reason, the mother is the best person to have the custody of a female child of tender years and therefore that he had wrongly exercised his discretion. No sufficient reason appears in this case for refusing the wife the custody of the child. The child's welfare must not be disregarded for the purpose of punishing the wife for leaving her husband. This does not mean that the wife's conduct is irrelevant; but what has happened in the past is irrelevant unless it colours the present position. A wife's conduct might be such as to show lack of affection for the child whose custody she claims and thus to show her to be unfitted to have the custody; but that is not the case here. It is true that *Coppel* A.J. expressed a doubt as to whether the wife's application was actuated by affection for the child, but he made no finding unfavourable to the wife on this point; indeed, on the evidence—particularly that of the husband—such a finding would not have been reasonable. [He referred to *McKinley* v. *McKinley* (2); *In re Mayo* (3); *In re Webb* (4).]

T. Rapke, in reply.

Cur. adv. vult.

Nov. 27.

The following written judgments were delivered:—

LATHAM C.J. This is a contest between a husband and wife as to the custody of the only child of the marriage, Pamela Diane Lovell, a girl aged three and one-half years at the time of the institution by the wife of proceedings for custody. *Coppel* A.J. dismissed the wife's application. Upon appeal the Full Court of the Supreme Court of Victoria set aside the order made and gave the custody of the child to the wife. The Full Court stated that it accepted the findings of fact of the learned trial judge but formed a different opinion as to the significance of those facts with respect to the order which ought to be made.

The application to *Coppel* A.J. was made upon affidavits of the wife, her father and sister, two friends or acquaintances and a

(1) (1945) 80 C.L.R. 597.
(2) (1947) V.L.R. 149.
(3) (1917) 17 S.R. (N.S.W.) 438, at pp. 442, 443, 446; 34 W.N. 184.
(4) (1947) Q.S.R. 143.

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doctor. There were answering affidavits of the husband, his mother, his married sister, his sister-in-law and a woman friend. All the deponents knew the child well and, with the exception of the doctor who deposed as to the state of the health of the child, were relatives or friends of one or other party. The learned judge interviewed the husband and wife in his chambers separately, the interviews occupying about an hour and a half. The wife and the husband were cross-examined upon their affidavits.

The parties were married on 16th September 1944. The wife became jealous of an association between the husband and a female employee with whom he regularly worked back at his father's factory on one night a week. Upon cross-examination the wife admitted that the work which they did was work which only the woman in question could do and as to which her husband "had to manage." In July and August 1949 differences had arisen between the parties and the wife through her father and sister suggested that they should separate. The husband always maintained that he was anxious to continue living with his wife. In August 1949 the wife left him without his consent and took the child with her. The wife went to live with her father, who is "comfortably off" and who is willing to have his daughter and her child living with him. On 12th September there was an interview between the parties and the husband agreed to pay a pound a week for the maintenance of the child on condition, as he said, that the appellant did not go to work and that she occupied herself in looking after the child. A few days later, without informing her husband, the wife did accept employment. Her employment meant that she had to leave home about 8 o'clock in the morning and did not return until after 6 o'clock at night. In December 1949 the child became ill. She had sores on her face and the husband was of opinion that her mother had been neglecting her. The medical evidence, however, satisfied the learned trial judge that this was not the case and that the sick condition of the child was due to the fact that her tonsils were infected. The child was taken to a hospital and the tonsils were removed. The husband took the child from the hospital on 17th January 1950. He gave evidence that until March the wife made no attempt to visit the child. She said to him that she did not want to see the child, and when asked to return home refused, saying that "she had her own life to lead as well as the child". When application was made to her to send the child's clothes to the father she refused to send them.

The learned trial judge in his reasons for judgment stated that where the wife's evidence conflicted with that of the husband he

did not accept her as a reliable witness. He further found that the charges of improper association with another woman which she made against her husband were without any foundation whatever. He found that she had no grounds for leaving him at all and he was satisfied " that it is owing to her suspicious, intolerant and obstinate attitude that she has not made a success of married life ". His Honour held that there was no financial necessity for her to accept employment. Her father deposed that he was in comfortable circumstances and would be glad to have his daughter and child living with him and she did not give any evidence of any need for her obtaining work in order to support herself and the child. His Honour was impressed by the fact that she would be away from the child during nearly the whole of the waking hours of the child and by the fact that the child during that time would be in the charge of the wife's sister, a single woman who had had no experience in the bringing up of children. His Honour was unable to find affirmatively that her application for the custody of the child was due to affection for the child, saying—" Having regard to what I have seen of her, I very much doubt whether this application is not motivated by bitterness against the husband rather than affection for the child. Of that bitterness and its unreasonable nature I have already spoken ".

The learned trial judge was of opinion that as far as the child was concerned there was no reason to think that if the child was left with her father she would not be perfectly happy—" at least as happy as she would be at the home in Caulfield [the home of the wife's father] and, I think, more properly looked after by a woman who is more experienced in these matters ". If the child remained with the husband she would be looked after by his mother, aged fifty-four, who has had experience in the bringing up of children. His Honour expressly stated that in the case of a child of tender years, particularly where the child was a female, the mother of the child would normally be granted the legal custody of the child—but, by reason of the circumstances mentioned, was of opinion that the welfare of the child would be best promoted by leaving her in the custody of her father, as to whose affection for her there is no doubt. The application of the wife was therefore dismissed.

Upon appeal to the Full Court their Honours in the first place dealt with the duty of the Full Court upon an appeal in a case where a statute provided for the exercise of a discretion by a trial judge. The relevant statutory provisions are to be found in the *Marriage Act* 1928-1929 (Vict.), ss. 136 and 145, which I quote in full hereafter. It is sufficient for the immediate purpose to refer

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to the provision in s. 145 that the Court may, upon the application of the mother of any infant or of the father of any infant, "make such order as it thinks fit regarding the custody of such infant".

The learned judges in the Full Court referred to *Storie* v. *Storie* (1) and *McKinley* v. *McKinley* (2), and particularly to what was said in those cases as to the power of an appellate tribunal to set aside a discretionary order because insufficient weight had been given to relevant matters or because of injustice. *Gavan Duffy* and *O'Bryan* JJ. said:—"As it is clearly an injustice that a child should be given into the wrong custody this rule may for practical purposes be paraphrased by saying that where a Court of Appeal is satisfied that the Judge of first instance has come to a wrong conclusion on the evidence it can and should allow the appeal. We say on the evidence, but of course where there is a finding by the Judge of first instance which depends in any way on the credibility of witnesses the Court of Appeal should be very slow to venture to differ from him". This statement I understand as meaning that, once the facts have been determined, the appellate tribunal is as free as the primary tribunal to exercise a discretion. *Smith* J. was of opinion that no sufficient weight in particular was attached to the fact that the mother, even if she remained in her employment, would see the child in the morning and at night and "would be with it for more than two-thirds of the week".

What was said in the cases cited had the highest authority—that of the House of Lords. The same principles had been clearly stated in this Court in *House* v. *The King* (3), by *Dixon*, *Evatt* and *McTiernan* JJ.:—"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the

(1) (1945) 80 C.L.R. 597.
(2) (1947) V.L.R. 149.
(3) (1936) 55 C.L.R. 499, at pp. 504, 505.

discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred".

In *Storie* v. *Storie* (1) it was considered by this Court that in effect no weight had been given to the claim of a parent as against a stranger to the custody of a child. The references in the various authorities on this matter to a failure to give sufficient weight to relevant considerations should not be understood in such a sense as to entitle an appellate tribunal to deal with an appeal from an order made in the exercise of a discretion in the same way as in the case of an appeal from any other order. If completely irrelevant considerations have been taken into account and they have really affected the decision the case is clear, and the order, though made in the exercise of a discretion, should be set aside. Similarly, if relevant considerations are plainly ignored the same result follows. But when the appellate tribunal is considering questions of weight it should not regard itself as being in the same position as the learned trial judge. In the absence of exclusion of relevant considerations or the admission of irrelevant considerations an appellate tribunal should not set aside an order made in the exercise of a judicial discretion (as to which see *Sharp* v. *Wakefield* (2)) unless the failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court. The words used by their Lordships in the House of Lords in this connection are not always easy to apply, but they ought not to be read as denying the long established principle (which, indeed, is expressly recognized in the cases in the House of Lords) that on an appeal from an order founded upon the exercise of a discretion the appellate tribunal has no right to substitute its discretion for the discretion entrusted to the primary tribunal. In *Blunt* v. *Blunt* (3) Viscount *Simon* L.C. quotes from *Charles Osenton & Co.* v. *Johnson* (4) the following passage :—" 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 "—as well as the passage relating to giving no sufficient weight to relevant considerations.

Similarly the references to the injustice of an order which are to be found in the authorities should be limited to cases where, to

(1) (1945) 80 C.L.R. 597.
(2) (1891) A.C. 173, at p. 179.
(3) (1943) A.C. 517, at pp. 526, 527.
(4) (1942) A.C. 130.

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use the words in *House* v. *The King* (1), " upon the facts (the order) is unreasonable or plainly unjust ". It is wrong for an appellate tribunal to say that, because it would or might have exercised the discretion in another manner, the order from which the appeal is brought is wrong, and therefore unjust, and therefore should be set aside. So to interpret the words of the House of Lords would be to give a simple general appeal from all discretionary orders. I therefore do not agree with the manner in which the Full Court has approached this case.

The Full Court, upon the basis of the view taken as to the responsibility and power of an appellate tribunal, then dealt with the matter (in my opinion) as upon an original application (so far as the exercise of discretion was concerned) but upon the basis of the facts found by the learned trial judge. In so doing the Full Court applied principles which were stated in the judgment of *Gavan Duffy* and *O'Bryan* JJ. in the following terms :—" It is a truism to say that in all these cases the first and paramount consideration is the welfare of the child. Indeed it is so much the paramount consideration that it has in practice elbowed out all other considerations, so that it is a mere academic question whether there are any other considerations (see *McKinley* v. *McKinley* (2)), but there is another principle which though it can hardly be called a rule of law has assumed almost the proportions of one and that is that in case of an infant of tender years, and more particularly a female infant, the mother is entitled to custody except where there is the very strongest evidence that her custody would be detrimental to the child ".

The learned judges appreciated the effect of such a principle as to the superior right of the mother in the case of young children when they said :—" It is true that to apply that principle in the present case is to allow the applicant without any justification after breaking up the home she shared with her husband to add to the wrong she has done him by depriving him of the child, but unless it can be properly inferred from her conduct that she will be a bad mother the result of the authorities is that she may do so ". If this statement is finally established as a correct statement of the law, the consequence will be that a wife could threaten to leave home and to take the children with her. She could do so as of right so far as the children were concerned. She could put the threat into operation if her husband did not comply with any demand which she might choose to make. Her action might be completely unjustified but, if she were not proved to be a bad mother to the children, her conduct

(1) (1936) 55 C.L.R., at p. 505. (2) (1947) V.L.R. 149.

in other matters affecting domestic relations would be regarded as irrelevant. The father of the children would have to pay for the maintenance of the children who had been taken away from him without any justification whatever. A principle which may be used to produce such disintegrating results in family life requires close examination. In my opinion, for reasons which I proceed to state, the propositions enunciated by the Full Court cannot be accepted in the wide general terms in which they are stated.

The *Marriage Act* 1928-1929, s. 136, is as follows :—" 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 upbringing administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father ".

Section 145 is as follows :—" 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 ".

Section 136 does not deny the existence of parental rights in relation to the custody of children, but the last sentence of the section prevents the application of any doctrine that the rights of the father are superior to those of the mother or that the rights of the mother are superior to those of the father.

Section 136 does not provide that the welfare of the infant shall be the only consideration to be taken into account : *Re Thain* ; *Thain* v. *Taylor* (1). Accordingly the welfare of the infant cannot properly be allowed to " elbow out " all other considerations. The welfare of the infant is, it is provided, to be regarded as the

(1) (1926) Ch. 676, at p. 690.

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first and paramount consideration. That provision means that there are other considerations as well as that of the welfare of the infant which may properly be taken into account. The word "paramount", it is true, creates a difficulty. A strict interpretation of this word would mean that the welfare of the infant should overcome all other considerations of any kind. Such a view, however, would attach no importance whatever to the use of the word "first", which, as already stated, shows that other considerations than the welfare of the infant may properly be regarded.

Further, s. 136 does not mean that the claims of father or mother are to be ignored in considering the welfare of the infant. The words "from any *other* point of view" allow, in the consideration of the subject of the welfare of the infant, a consideration of the relative claims of the father and the mother. What s. 136 does is to exclude in any approach to the decision of the question of the best custody for an infant any preliminary assumption that the claim of the father as such in the case of any infant is superior to that of the mother or (and this is important in the present case) that the claim of the mother as such in the case of any infant is superior to that of the father.

In the present case the Full Court has based its judgment not only on the proposition that the consideration of the welfare of the infant should elbow out other considerations, but also on the proposition that a mother has a superior right to the custody of an infant of tender years, more particularly in the case of a female infant, and that that right can only be displaced by the very strongest evidence that her custody would be detrimental to the child. In my opinion this approach involves a failure to apply the final words of s. 136, which exclude any suggestion of competitive superiority on the part of either the mother or the father. The provision means that the parents are to be on an equal footing as to rights or claims. Neither is to be regarded as superior to the other.

But, further, s. 145 expressly provides that in making orders as to the custody of an infant the court must make its order 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. Accordingly it is plain that it is relevant to regard the conduct of the parents, which is expressly referred to as a separate subject from that of the welfare of the infant. If the conduct of the parents and other matters are to be regarded only in their relation to the presumed welfare of the infant there would be no reason whatever for providing expressly that the court is to have regard to (1) the

welfare of the infant, *and* (2) the conduct of the parents, *and* (3) the wishes as well of the mother as of the father.

An exclusive attention to the welfare of the infant could justify a court in making an order for removing an infant from the custody of poor parents of bad character and giving the custody to other persons who could feed, clothe and educate it and provide for its future much better than its own parents. In other words, an exclusive attention to the welfare of the infant would allow rich men to adopt children against the will of poor parents. It will be said that of course no court would ever make such an order. But if the welfare of an infant is to be the only consideration which has to be taken into account in relation to its custody then certainly poor parents of bad character or weak character would, if such a principle were applied, run the risk of losing their children to people who would be much better and wiser custodians of the infant from the point of view of the welfare of the infant.

I am therefore of opinion that it is wrong to approach this case upon the basis that the welfare of the infant is the only consideration to be taken into account and that the conduct of the parents is immaterial, and that it is also a mistake to approach the case from the point of view that the mother is " entitled to custody " in the case of a child of tender years and so has a right which is superior to that of the father and which prevails over any claim that he possesses. These propositions involve no challenge to the common sense of the proposition that as a general rule small children will be better looked after by their mother than by their father, particularly in the case of female children. But there is no rule of law to that effect. As was pointed out in *Symington* v. *Symington* (1), a case cited in the judgment of the Full Court, a mother might be shown to be disqualified from having the custody and care of young children, including girls.

The statement of the proved facts which has been set out shows in my opinion ample grounds upon which the learned trial judge may reasonably have acted in holding that the mother was disqualified as against the father from having the custody of the child—though, as the judgment of the Full Court shows, a different opinion might also reasonably be entertained. But in my opinion there is no justification for substituting a different opinion from that so carefully arrived at by *Coppel* A.J. He had long interviews with the parents. In custody cases judgment of the character of the competing claimants is fundamental to the decision. The appellate tribunal has access only to a transcript. The very

(1) (1875) L.R. 2 Sc. & Div. 415, at p. 423.

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greatest weight should be attached to the opinions of the trial judge upon the question of the character of claimants for custody. In the present case the learned judge has considered, as he is directed to do by s. 145 of the *Marriage Act*, the conduct of the parents. He is not only entitled but is bound to do this. The findings of the learned trial judge as to the conduct of the wife show that she is an intolerant, suspicious, bitter, untruthful and selfish person. She prefers her own comfort to the interests of her child. Against the father, on the other hand, no charge of misconduct or misbehaviour or of absence of affection for his child or even want of sympathetic consideration for his wife has been proved. The home offered by the father would, in the judgment of the learned trial judge, be better than the home offered by the mother, possessing as she does the characteristics which I have mentioned.

In the Full Court in the judgment of *Gavan Duffy* and *O'Bryan* JJ. it was said that a matter urged on behalf of the father would have had very great weight, if they could have been satisfied of the facts, "namely that the applicant's sister who would have a considerable part in the care of the child was unfriendly to and prejudiced against the respondent. It is bad enough" [their Honours continued] "that a child should grow up in an atmosphere of broken marriage relations, but where both parents are to have access to the child it is intolerable that the one who had custody should poison the child's mind, or allow the child's mind to be poisoned against the other. We find it hard to think of any better reason for refusing custody than a belief that that will happen. In the present case it is only necessary to say that the Judge made no finding that the applicant or her sister would do any such thing and to our minds there is nothing in the evidence to justify a finding that either was likely to do so". *Smith* J. stated a similar opinion.

It is true that there is no expressed finding on the matter to which reference is here made, but the evidence appears to me to be conclusive on this subject. The wife's proposal was that the child should live in her father's home with herself, her father and her sister. In the first place, the evidence of the wife shows, and does not even attempt to conceal, intense animosity, amounting almost to hatred, against her husband. He, on the other hand, did not so regard her. Indeed he admitted that while she was living with him she was a good mother to the child. Her dislike of him has evidently increased since she left him. The husband,

who was regarded as sincere by the learned trial judge, still wants his wife to return to him and make a home for himself and the child. When the child was staying with the wife and her father, the husband went to see her, and the wife's father refused to allow him to see his daughter or to tell him where the child was. The wife herself gave evidence to the following effect, referring to her sister and her father—" Neither she nor my father has any time for respondent. I have a strong will and once I make up my mind that is the end of things ". On another occasion, when her husband pleaded with her to return to her home and take care of the child, she replied " I am not happy so that is useless. I have my own life to live and that is all about it ". As I have already said, the learned trial judge regarded the evidence of the husband as reliable. I am therefore of opinion that, apart from, but in addition to, the matters previously mentioned, the evidence shows beyond question that if the daughter is brought up with the mother she will inevitably be imbued with a strong antagonism to her father.

If the Full Court had taken the view of the evidence which I have stated, it would have affirmed the order made by *Coppel* A.J. In my opinion the appeal should be allowed, the judgment of the Full Court set aside, and the judgment of the learned trial judge restored.

McTiernan J. In my opinion the appeal should be allowed.

The order of *Coppel* A.J. from which the Full Court allowed the respondent's appeal was an exercise of a wide discretion fettered by the direction in the statute that regard shall be had to the welfare of the child, the conduct and wishes of both parents and that the welfare of the child shall be the first and paramount consideration. It is not shown that *Coppel* A.J. found any fact incorrectly, or applied any wrong principle or failed to apply any right principle.

The principle upon which the Full Court said that they proceeded is that an appellate court is at liberty to reverse an order of a judge made in the exercise of such a discretion on either of the following grounds. First, if the court is satisfied that no weight or no sufficient weight has been given to relevant considerations; or, secondly, that an injustice has been done by the order.

The first of these grounds as stated by the Full Court does not entirely accord with the statement made by Viscount *Simon* in *Charles Osenton & Co.* v. *Johnston* (1), and reaffirmed in *Blunt* v.

(1) (1942) A.C., at p. 138.

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Blunt (1). Viscount *Simon's* words are: "But 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". It is necessary to observe that the appellate court should be clearly satisfied that there was a wrongful exercise of discretion by reason of the failure of the judge to balance the relevant considerations properly.

The other ground, upon which the Full Court proceeded, raises the question of what is meant by the word "injustice". It could aptly describe the consequences of a wrongful exercise of discretion but not of an exercise of discretion that could not be impeached on settled principles.

The Full Court uses the word to refer to the consequences of an order which gives a child into the "wrong custody". The custody would not be wrong if the discretion of the judge was not wrongly exercised.

The Full Court laid down the principle that an appellate court was at liberty to decide that the discretion of the primary judge was wrongly exercised if the Court is satisfied that the judge has come to "a wrong conclusion" on the evidence, after making due allowance for the favourable position he had of estimating the credibility of the witnesses. Unless the expression "a wrong conclusion" is limited, the principle collides with another principle which the Full Court recognized to be a restraint upon the liberty of an appeal court. The principle is stated by Viscount *Simon* (2) in these terms: "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". The expression "a wrong conclusion" needs to be limited to a conclusion which is clearly wrong because it is "unreasonable or plainly unjust": see *House* v. *The King* (3). I think that the *ratio decidendi* of *Storie* v. *Storie* (4) is that the order of the primary judge from which the appeal was brought was of that description.

The facts and circumstances of the present case have been set out by the Chief Justice. They would not warrant the view that the conclusion reached by the primary judge is unreasonable or

(1) (1943) A.C., at p. 526.
(2) (1942) A.C., at p. 138.
(3) (1936) 55 C.L.R., at pp. 504, 505.
(4) (1945) 80 C.L.R. 597.

plainly unjust, however much one might be disposed to disagree with it.

I think, however, that the Full Court really reversed the order of *Coppel* A.J. upon the first, not the second, of the above-mentioned grounds. I am unable to reach the clear conclusion that the learned judge wrongly exercised his discretion in that he did not give due weight to every relevant consideration. The child was in her father's custody at the time the respondent applied for the custody. The consequence of the refusal of the application is that the child remains in his custody. That is not a wrong custody for the child. The evidence establishes that the welfare of the child has been well safeguarded while in her father's custody and there is no possible ground for thinking that this situation will alter. In any case the order refusing the respondent's application for custody is not necessarily final. The evidence does not lead to the clear conclusion that it would have been more conducive to the welfare of the child to move her to the respondent's custody. The evidence is fully reviewed by the Chief Justice. His Honour has weighed all the considerations raised by the evidence which are relevant to the question whether the respondent's application should have been granted. I agree substantially with his Honour's evaluation of all the considerations.

It is elementary that the consideration which Mr. *Tait* describes as the " mother factor " has very great weight and must be thrown into the balance on the mother's side even in a contest between her and the father on the question of who should have the custody of a child of tender years, especially when the child is a girl. That consideration would have all the weight which common sense could attach to it when the mother remained at home and devoted herself to the child. The weight of this consideration on the mother's side in such a contest must be considerably diminished in a case in which she leaves home every day except Sunday to attend to business and by reason of these circumstances leaves the child to the care and attention of another person.

His Honour had the advantage of seeing and interviewing the appellant and the respondent. This advantage could have assisted his Honour in estimating what weight he should give to various considerations from the point of view of the welfare of the child—for example, the fitness of the respondent, her conduct and her motive in making the application.

Upon the whole I think that it is not shown that his Honour's exercise of discretion was wrong.

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WEBB J. The appellant and respondent are a husband and wife who are living apart. The respondent wife left the matrimonial home in August 1949, and took with her the only child of the marriage, a girl just under three. On 15th January last the respondent placed the child in a hospital to have its tonsils removed. This was done on 16th January. On 17th January, when the child was due to leave the hospital, the appellant husband, without the respondent's consent, took it from the hospital to his parents' home, where it was cared for by his mother, a woman of fifty-four. On 18th January the respondent consulted her solicitors, who wrote to the appellant asking that the child be returned to the respondent's custody, and stating that appropriate legal proceedings would be taken by the respondent if it were not returned. However, the appellant retained the child, and on 26th January the respondent made application to the Supreme Court. The application was dismissed by *Coppel* A.J. ; but the respondent successfully appealed to the Full Court of Victoria ; and it is against the Full Court's order that this appeal is brought by special leave of this Court.

The appellant and respondent were cross-examined on their affidavits. There was no other oral evidence : the rest of the evidence on both sides was on affidavit. It is our duty to weigh the facts as we find them after allowing for the advantage that the learned primary judge possessed in seeing the witnesses give their evidence. If we think that his Honour gave no weight, or insufficient weight, to relevant considerations we may reverse or vary his order : *Charles Osenton & Co.* v. *Johnston* (1) ; *Blunt* v. *Blunt* (2) and *Storie* v. *Storie* (3). The weight of evidence depends on rules of common sense : *Lord Advocate* v. *Blantyre* (4).

Coppel A.J. found, and I think we should accept his finding, that the respondent had no sufficient grounds for separating from the appellant. She did so because of his association with a woman of twenty-six who worked with him at a factory. At times they worked together at night. This made the respondent suspicious, but there was no evidence that it was a guilty association.

When the respondent separated from the appellant she went with the child to her father's home. Her father, a widower, was living in retirement in a house with three bedrooms, a lounge, dining room, kitchen, sun verandah, and a large garden. He

(1) (1942) A.C., at p. 138.
(2) (1943) A.C., at p. 526.
(3) (1945) 80 C.L.R., per *Latham* C.J., at p. 599 ; per *Rich* J., at p. 604 ; and per *Williams* J., at p. 624.
(4) (1879) 4 App. Cas. 770, per Lord *Blackburn*, at p. 792.

desired that both mother and child should reside with him. The respondent's sister, a woman of thirty-five, also lived in the home, and kept house for the father. The respondent, after she went to live with her father, decided to accept employment as a teleprinter operator in the Post Master General's Department with a salary of £8 per week. She left for work between 8 and 8.30 a.m. and returned at 6.30 p.m. While respondent was at work the child was in the care of her sister or father.

Coppel A.J. made an order giving the custody of the child to the appellant, because the respondent was responsible for the separation from the appellant, and went out to work instead of remaining at home with the child. In so doing I think, with respect, that his Honour gave too much weight to those two facts, and too little, if any, weight to the facts in the respondent's favour.

The child was a girl of three and had been in its mother's, the respondent's, care from birth until the appellant took it from the hospital on 17th January last. The mother was a respectable young woman and was not lacking in affection for her child. The appellant during cross-examination admitted that the respondent was a good and affectionate mother. Immediately after the child was taken from her she took steps to recover its custody from the appellant. His Honour doubted very much whether the application was not motivated by bitterness against the appellant rather than by affection for the child, but his Honour did not state how he resolved his doubt, and we are in no better position than his Honour was to determine that the application was not motivated by affection. The respondent's action in going out to work was relied upon as showing lack of affection. It was submitted that if she were fond of the child she would have stayed at home to look after it. She left for work between 8 a.m. and 8.30 a.m. and returned at 6.30 p.m. on five days of the week, and she was at work on Saturday morning. But she was with the child each night; and also on Saturday afternoons and throughout all Sundays. There was no evidence that she did not remain with the child when she was not working. During the respondent's working hours the child was in charge of its aunt, against whose character nothing was alleged, as his Honour observed. Moreover, although the respondent's father was prepared that the respondent and the child should live with him, it is not clear that he was prepared to provide them with all their needs and to do so indefinitely. He had retired from business of printer and publisher and was in comfortable circumstances, but we know nothing as to the extent of his means apart from the ownership of his house. I do not think it

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displayed lack of affection for the respondent to go out to work under those circumstances. She was not guilty of any neglect of the child. The case for the appellant was based on neglect; but that was met by the evidence of the family doctor and others. However it is not necessary to deal with this question of neglect in detail, as his Honour does not appear to have based his decision against the respondent on her neglect of the child; although he found that the appellant's mother had more experience than the child's mother and aunt in looking after children. That could be said for any woman who has reared children, when comparing her with a young woman who has only one child or with a spinster who had not had the care of children; but it is not a good ground for taking the child from the custody of its mother.

The interests of the child being paramount it is the court's duty to do what is best for the child, having regard to all the circumstances. Everything that has a bearing on the question of the child's interests is to be considered. It is in the paramount interests of the child that it should be with at least one of its parents. Where the child is of tender years it is usual to give its custody to its mother when she is a respectable woman capable of taking care of it and anxious to do so, more particularly when the child is very young. But this is not a rule or presumption of law. As *Williams* J. said in *Storie* v. *Storie* (1), referring to s. 136 of the Victorian *Marriage Act* 1928 in question here, the courts 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* (2), 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,

(1) (1945) 80 C.L.R., at p. 597.

(2) (1865) 34 Beav. 257, at p. 263 [55 E.R. 634, at pp. 636, 637].

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' ".

If the mother does not possess the necessary qualifications, the child's best interests require that she should not have its custody. It is not simply a question of the competing rights of father and mother: the question is, what do the paramount interests of the child require? The best interests of a girl of three require that she should be with her mother, unless in all the circumstances the mother cannot be regarded as qualified to have the custody of even so young a child. I do not think that is contested. The respondent is not disqualified. I think her decision to go out to work during the day does not disqualify her in the circumstances of this case. They do not reveal any lack of affection for the child nor show neglect of the child, or even a tendency to neglect it. This circumstance would have more weight if it appeared that the respondent's father was not only willing, but was able to provide indefinitely for all her needs and those of her child; or if the respondent's sister or father was not suitable to have the child in her or his care during the respondent's absence at work. The respondent's father was prepared to provide a home for her and the child, but beyond that there was nothing definite. The respondent's sister and father were able and willing to take care of the child during the day. As the respondent was without means it was reasonable that she should take advantage of the opportunity, which might prove fleeting, of earning money without having to leave the child in the care of strangers. In my opinion her conduct in going out to work in such circumstances cannot be a ground for holding her unfit to have the custody of the child, as revealing neglect. The respondent's action in leaving her husband is, in my opinion, a circumstance of greater weight. She acted wrongly in leaving him and in not returning to him. It would be in the best interests of the child that it should be with both parents, and I accept the view of his Honour that it is the fault of the respondent that they are separated. It is a great hardship to the appellant that he should lose the society of his wife through no fault of his own, and that hardship will be greater if he is deprived also of the custody of his child. But ordinarily the paramount interests of a girl of three require it to be with its mother. To give the child's custody to the appellant simply to console him or to avoid adding to the hardships he has already suffered would be to subordinate the child's interests to his. I

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would take a different view if I thought the respondent, or her sister or father, would be likely to try to turn the child against the appellant. There is evidence that her sister and father have said they have no time for the appellant, and the respondent's attitude to the appellant is hostile. But I think it would be unreasonable to draw the conclusion without more evidence that any of those three persons would be likely to try to poison the child's mind against its father. The appellant will be given access to the child and if any such attempt is made it will become obvious to the appellant and may warrant an application by him for a change of custody. The appellant and his mother are well qualified to have the custody of the child should its paramount interests require that it should be taken from its mother's custody. Meanwhile I think the position is as stated by *Smith* J. in the Full Court, that the respondent mother can be expected to supervise the child's physical and mental state with care and sympathy as only a mother can, and that her maternal affection will give it the necessary feeling of security.

I would dismiss the appeal.

KITTO J. The decision of this appeal appears to me to depend upon an appreciation of the function of an appellate tribunal in reviewing a judgment given in the exercise of a discretion. It may be, as *Jordan* C.J. said in *In re Will of Gilbert* (1), that the restraint to which a court of appeal should submit itself is less stringent where the exercise of discretion is determinative of legal rights than it is where the discretion relates to points of practice or procedure. But even in the former case the court of appeal must guard against reversing a discretionary decision merely because it would itself have decided the matter differently; it is not justified in substituting its own judgment for that of the primary judge unless it is clearly satisfied that his judgment was erroneous.

If the judgment is affected by an error in point of legal principle, of course the error may be corrected. But leaving on one side mistakes of law (for it is conceded on all hands that the learned primary judge made no such mistake in this case), it is true to say of any appeal (other than one which is a re-hearing in the Quarter Sessions sense of the term) that the onus of showing that the decision under appeal was wrong lies upon the appellant: *Powell* v. *Streatham Manor Nursing Home* (2). The onus is particularly heavy where an attack is made upon findings of fact made by a

(1) (1946) 46 S.R. (N.S.W.) 318, at p. 323; 63 W.N. 176, at p. 179.

(2) (1935) A.C. 243, at pp. 249, 255.

judge who had the advantage of seeing and hearing the witnesses; in such a case each judge of the appellate court must put to himself the question: "Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong?": *Watt or Thomas* v. *Thomas* (1). And the onus is similarly heavy where the appeal is against an exercise of a discretion. "A clear conclusion that the judge . . . was plainly wrong" is the sole justification for a reversal of his decision.

In the cases on the subject a variety of expressions is to be found describing grounds upon which such a clear conclusion may be formed in a discretion case. Lord *Simon*, in *Blunt* v. *Blunt* (2), spoke of "a misapprehension of fact in that it (the primary court) either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant". His Lordship also quoted Lord *Wright's* statement in *Charles Osenton & Co.* v. *Johnston* (3), 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". The proposition that the appeal court will consider whether "no sufficient weight" has been given to relevant considerations is not inconsistent with the principle that the appeal court does not deal with the appeal as if it were exercising the original jurisdiction; even if it considers that insufficient weight has been given to some relevant consideration, it will still not substitute its judgment for that of the primary judge unless it comes clearly to the conclusion for that reason that the discretion has been exercised wrongfully. Lord *Atkin*, in *Evans* v. *Bartlam* (4), said that if the appellate tribunal "sees that on other grounds (i.e. other than grounds of law) the decision will result in injustice being done it has both the power and the duty to remedy it"; and Lord *Wright* in *Osenton's Case* (5) interpreted this as applying when there is a reasonable danger of an injustice. But it is to be noticed that Lord *Wright* prefaced his judgment (6) with a quotation from *Ormerod* v. *Todmorden Joint-Stock Mill Co. Ltd.* (7), in which *Brett* L.J. said that "This court lays down for itself the rule, which I think is the right one,

(1) (1947) A.C. 484, at p. 488.
(2) (1943) A.C., at p. 526.
(3) (1942) A.C., at p. 138.
(4) (1937) A.C. 473, at p. 481.
(5) (1942) A.C., at p. 143.
(6) (1942) A.C., at p. 142.
(7) (1882) 8 Q.B.D. 664, at p. 679.

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that it will not exercise its own discretion unless it thinks the case is perfectly clear"; and later in his speech Lord *Wright* used words (1) which I think are important: "I have already explained that, in my opinion, when the statute gives a right of appeal from an order made by a judge in exercise of his discretion and an appeal is taken, the discretion of the appellate court is substituted for that of the judge, as *Brett* L.J. pointed out in the passage which I have quoted above. The responsibility of deciding is then placed on the appellate court. No doubt that court starts with the presumption that the judge has rightly exercised his discretion. It must be satisfied that the exercise was wrong—'clearly satisfied' is the phrase used; but if the court is said to be satisfied, it must mean that it is 'clearly' satisfied. 'Clearly' strictly adds nothing, though it is useful to emphasize the strength of the presumption in favour of the judge's order being right. The appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance".

In the present case the presumption that the decision of the learned judge of first instance was right is particularly strong, because not only was the decision given in exercise of a discretion, but it depended to a considerable extent upon the opinion his Honour formed of the parties after seeing them in the witness-box and in his chambers. He did not fail to recognize that normally it is better for a female child of tender years to be placed in the custody of her mother than in that of her father where they are separated, for, although he found that the mother, when she left the father, "had no grounds for leaving him at all", he yet said that in general "in circumstances of this kind" the mother might well be expected to be granted the legal custody. But his Honour decided against giving the child into her custody, for reasons which may be thus summarized: —(1) Having regard to his own observation of the mother, and to the fact that, after taking the child to live with her father and unmarried sister, she had taken employment which meant leaving the child for most of her waking hours with the sister (without any financial need to do so and having reasons of her own which she had not seen fit to explain), his Honour very much doubted whether the application of the mother was not motivated by bitterness against the father rather than affection for the child; and he concluded that "you have the position in which the applicant (the mother) has not asked that she personally should be given the care of this child". (2) There was equally satisfactory accommodation for the child in the house

(1) (1942) A.C., at pp. 147-148.

of the mother's people or in the house of the father's parents, the child would be at least as happy in the latter house as in the former, and in the latter she would be more properly looked after by a woman (the father's mother) who is more experienced in bringing up young children.

The statement that "you have the position in which the applicant has not asked that she personally should be given the care of this child", read in its setting, clearly means, I think, that the learned judge was of opinion that the mother was not really anxious to give the child her maternal care. His Honour's conclusion on that point is not one which a court of appeal can well undertake to review, based as it was, in part at least, upon the impression the mother created before his Honour; and if the conclusion be accepted, it must necessarily weigh heavily in the scales against the normally strong inclination to regard a mother as the best custodian for a young female child. It must be remembered in this connection that his Honour was satisfied that it was owing to the mother's suspicious, intolerant and obstinate attitude that she had not made a success of married life. There was ample justification in the evidence for this view, apart altogether from the mother's demeanour before the learned judge. It is true that what his Honour said in this connection related to the attitude of the mother towards the father, and that a woman may develop towards her husband an intolerance and a bitterness which she does not exhibit towards her child; but the point of immediate importance is that there was obviously ground for his Honour's doubt as to whether the mother's motive in applying for custody was not bitterness against the father rather than affection for the child, and the persistence in the judge's mind of a serious doubt on that point is a factor which must tell heavily against the normal disposition to give the child to its mother.

I do not think it necessary to review the evidence in detail. Though I feel strongly that the custody of a girl of three should be given to her mother in the absence of very good reason to the contrary, I am unable, after anxious consideration of the evidence, the judgments delivered in the Supreme Court and the arguments of counsel, to feel satisfied that the learned judge exercised his discretion erroneously. If attention were to be confined to the affidavits and notes of evidence alone, I should have thought that there would be much to be said for a decision in favour of the mother. But, bearing in mind the principles which govern the review of a judgment given in exercise of a discretion, and remembering also that the judge of first instance who saw and heard the

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parties had an advantage which it would be wrong to overlook or underestimate, I am of opinion that there was no sufficient ground for the Full Court to hold that the presumption in favour of the correctness of his Honour's decision was displaced.

It follows that I would allow the appeal and restore the judgment of the learned primary judge.

Appeal allowed. Order of Full Court discharged. Order of Coppel A.J. restored.

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Solicitors for the respondent, *Blake & Riggall.*

E. F. H.