[HIGH COURT OF AUSTRALIA.]

MACE AND ANOTHER . . . . . APPELLANTS ;

AND

MURRAY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1954-1955.

1954, SYDNEY, *Nov.* 30, *Dec.* 1, 2 ;

1955, *March* 2.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Infants—Adoption—Illegitimate child—Consent of natural mother—Adoptive parents—Possession of child—Withdrawal of consent—Objection of natural mother—Dispensing with consent—Relationship of mother—Severance—Discretion—Primary judge—Exercise—Factors taken into consideration—Appellate court—Interference with decision—Child Welfare Act 1939-1952 (*N.S.W.*) (*No.* 17 *of* 1939—*No.* 9 *of* 1952), *ss.* 167-169.

Section 167 of the *Child Welfare Act* 1939-1952 (N.S.W.) is as follows :— "An order of adoption shall not be made unless the court is satisfied— (a) that the person in whose favour it is proposed that the order should be made is of good repute and a fit and proper person to have the care of the child or person proposed to be adopted and of sufficient ability to maintain, clothe, support, train and educate the child or person proposed to be adopted ; and (b) that the welfare and interest of the child or person proposed to be adopted will be promoted by the adoption ; and (c) if the child or person proposed to be adopted is over the age of twelve years, that the child or person consents to the adoption ; and (d) that the parents of the child or person proposed to be adopted or such one of them as is living consent or consents to the adoption, or if the child or person proposed to be adopted is illegitimate that the mother consents to the adoption, or if the child or person proposed to be adopted has a guardian, that such guardian consents to the adoption : Provided that the court may dispense with the consent referred to in paragraph (c) or in paragraph (d) of this section where, having regard to the circumstances, the court deems it just and reasonable so to do ".

[EDITOR'S NOTE.—On 10th October 1955 the Judicial Committee of the Privy Council refused a petition for special leave to appeal against this decision.]

Held, (1) that powerful reasons must be shown before a court can properly deem it just and reasonable, notwithstanding a mother's objection, to sever the relationship between her child and herself and make the child for most purposes of the law the child of other persons; (2) that an inquiry into a natural mother's fitness to have the custody and control of her illegitimate child, her ability to provide a home for him, and her probable opportunities of giving him a mother's attention, care and training is warranted in special circumstances only.

A natural mother's proved unfitness to be a mother to the child is relevant to the question whether it is just and reasonable for the court to substitute in the parental status others who have taken her place, both materially and emotionally during a period of renunciation of the child, despite a new-found desire on her part to retrace her steps.

In a case where the order of the primary judge was made in the exercise of a discretionary judgment a court of appeal is not justified in interfering with the decision appealed from unless it reaches a clear conclusion that by reason of some error, whether of fact or law, the primary judge not only has taken a view different from that which the judges of the court of appeal would have taken if they had been in his place, but has failed properly to exercise the discretion committed to him.

The jurisdiction of an appellate court to exercise the discretion is dependent upon its being satisfied that the discretion has not already been properly exercised. Until it is so satisfied even an express invitation to decide the case afresh must necessarily be declined.

Decision of the Supreme Court of New South Wales (Full Court): *Re Murray* (1954) 55 S.R. (N.S.W.) 88; 71 W.N. 256, reversed.

APPEAL from the Supreme Court of New South Wales.

An application was made under the *Child Welfare Act* 1939-1952 (N.S.W.) by Norman Frederick Mace and his wife for an order for the adoption by them of a male infant, Wayne Murray.

The applicants were married on 4th March 1944. The applicants on 30th May 1951 made an application to the Child Welfare Department for the allotment to them of a baby for the purpose of adoption. The child, which is the subject of the application, was a baby boy who was born on 12th November 1952 to the respondent, Miss Joan Murray, the child being illegitimate.

The respondent was born on 5th February 1931. She left school at the age of fifteen years and entered the Postmaster-General's Department, her principal occupation there being the delivering of telegrams. In March 1951, she entered the service of the Commissioner for Road Transport and Tramways and since that time worked as a 'bus conductress. Her earnings were about thirty-four pounds gross per fortnight.

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Facts found by the judge of first instance as leading up to the making of the application before him were as follow: prior to the birth of the child, the respondent indicated to the Department of Child Welfare and to the almoner at Crown Street Hospital that the child was to be adopted and, shortly before its birth, stated that she did not wish to see the child after it was born. On 12th November 1952 the child was born. On 14th November, the respondent was discharged from Crown Street Hospital and became a patient in the Lady Wakehurst Convalescent Home. On 14th November, Miss Horn, who was then an officer of the Child Welfare Department and had been such an officer for about two and one-half years called to see the respondent at the Lady Wakehurst Convalescent Home. She took with her amongst other documents a consent to adoption for completion by the respondent. On this occasion the respondent stated that she was not certain of her desire to have the child adopted, and on 18th November, Miss Horn again saw the respondent. On this occasion the necessary documents were signed by the respondent but, since she was still wavering, Miss Horn told her that she would hold the documents and see her on a later occasion to see if she had finally made up her mind. On 20th November, Miss Horn again saw the respondent and the respondent said that, in the interests of the child, she had decided to have the child adopted. On 24th November, the applicants called at the Child Welfare Department and received a signed authority to take to Crown Street Hospital and, having taken the authority to the hospital, the child was placed in their custody.

On 4th December, the appropriate documents were completed by the applicants and returned to the Child Welfare Department. Included amongst the documents signed by the applicants was a document in the following form: "We, the undersigned, have selected WAYNE MURRAY for adoption. We fully understand that we have no claim on the said child until the Order of Adoption is signed and in the event of the mother of the said child claiming him before the Order of Adoption is signed, we will have no option but to give him up.

4th December 1952".

On or about 7th January 1953, the respondent telephoned Miss Horn and said that she might change her mind and was advised by Miss Horn to think it over carefully. Miss Horn informed the respondent that the order for adoption had not as yet been made. On 16th January, or shortly before, the respondent told Miss Horn that she would like to withdraw her consent to the adoption and on 16th January a telegram was sent to the applicants requesting

them to ring Miss Horn urgently. Shortly after the sending of this telegram, the applicants were informed on the telephone that the respondent desired to withdraw her consent to the adoption. On or about 23rd January, the respondent called at the Department and signed an appropriate form of withdrawal of consent.

The hearing of the application before *McLelland* J. commenced on 16th June 1953, who, after hearing evidence and argument, decided that it was a proper case to dispense with the mother's consent and to make an adoption order.

Against that order the respondent appealed to the Full Court of the Supreme Court of New South Wales which, by majority (*Street* C.J. and *Maxwell* J., *Roper* C.J. in Eq. dissenting) allowed the appeal (1). From that decision Mr. and Mrs. Mace appealed, by special leave, to the High Court.

A. Larkins, for the appellants. The judge of first instance correctly exercised a very wide discretion given to him under the proviso to s. 167 of the *Child Welfare Act* 1939-1952 (N.S.W.), the exercise of that discretion being based on findings of fact which really have not been challenged. The majority of the Full Court failed to satisfy itself that the principles upon which the discretion had been exercised by the judge were wrong in law. That majority misconceived its function as an appellate tribunal in reviewing a judgment given in the exercise of a discretion. Even if it was justified in law in exercising its own discretion in substitution for that of the judge of first instance, it exercised that discretion upon wrong principles. For the purpose of examining the nature and extent of that judge's discretion regard should be had to the *Adoption Acts* of Great Britain, New Zealand and the various States of the Commonwealth as compared or contrasted with the *Child Welfare Act* 1923-1924. The scheme of the Act as it was in operation from 1924 until 1939 was referred to in *Re C. F. McGuinness* (2). There is not any doubt that the words " deserted or abandoned " which occur in the 1924 Act would have been given wider interpretation than they would have been given over the years where they occur in the *Custody of Children Act* 1891 (Imp.) and similar provisions in the *Infants' Custody and Settlements Act* 1899-1934 (N.S.W.). The *Adoption of Children Act* 1926 (Imp.) was the first Act of its kind in Great Britain and the first statutory provision which had been made in Great Britain for the adoption of infants. That Act is set out in full in *Halsbury's Statutes of England*, 2nd ed., vol. 12,

(1) (1954) 55 S.R. (N.S.W.) 88; 71 W.N. 256.

(2) (1933) 34 S.R. (N.S.W.) 108, at p. 110.

H. C. OF A. 1954-1955.

MACE v. MURRAY.

p. 962. The critical section is s. 2. A provision in almost identical terms with s. 2 (3) of that Act was considered in *Re Roumeliotes* (1). The Act itself was directly considered in *H.* v. *H.* (2); *sub nom. Harris* v. *Hawkins* (3). The width of the discretion conferred by that Act appears in *Hitchcock* v. *W.B. and F.E.B.* (4). It gives an absolute discretion. A contrary view as to the meaning of the proviso is to be found in *Re Carroll* (5). That view obviously influenced *Herring* C.J. in *R.* v. *M.* (6) where his Honour put the same limited interpretation on the proviso. *H.* v. *H.* (2) on a matter of interpretation was followed in *Re A.B.* (7). Part XIV of the *Child Welfare Act* 1923 was replaced by Pt. XIX of the *Child Welfare Act* 1939-1952 and the scheme of the Act was largely preserved, but the discretion which had previously been given under s. 126 of the 1923-1924 Acts was radically widened. In this case the discretion is in the widest terms. The matter of the width of discretion was discussed in *Blunt* v. *Blunt* (8). That case is important on three aspects: (i) the nature of the discretion; (ii) its proper exercise; and (iii) the extent to which the exercise can be reviewed.

[DIXON C.J. referred to *Henderson* v. *Henderson* (9).]

In *Pearlow* v. *Pearlow* (10) the Court looked to the intention of the Act with a view to considering how the discretion should be exercised, but the point is that here the legislature thought fit, not only to define the class of cases in which the discretion should be exercised, but it was at pains to eliminate the specific cases that had been defined in the Act of 1923-1924. That is support for the view of *Roper* C.J. in Eq. that the discretion conferred by the proviso to the 1939 Act is even wider than the Imperial Act of 1926. The Imperial Act of 1950, is set out in full in *Halsbury's Statutes of England*, 2nd ed., vol. 29, p. 466. In all States which introduced legislation after the Imperial Act of 1926, i.e., Victoria, Queensland and the Australian Capital Territory, that legislation was based on that Imperial Act and none of them has made any modification or alteration to the discretion as was done in Great Britain in 1950. The discretion conferred by this proviso is not only a wide one but is even wider than the Imperial Act of 1926, as *Roper* C.J. in Eq. thought in his dissenting judgment. The judge of first instance gave a detailed consideration to those

(1) (1939) 4 D.L.R. 265.
(2) (1947) K.B. 463.
(3) (1947) 1 All E.R. 312.
(4) (1952) 2 Q.B. 561, at p. 571.
(5) (1931) 1 K.B. 317, at p. 361.
(6) (1946) V.L.R. 106, at p. 114.
(7) (1950) V.L.R. 1.
(8) (1943) A.C. 517, at p. 525.
(9) (1948) 76 C.L.R. 529.
(10) (1953) 90 C.L.R. 70.

circumstances which he considered relevant (*Blunt* v. *Blunt* (1)). The discretion in the *Adoption Act* 1950 (Imp.) is narrow as compared with the discretion in the proviso to the New South Wales Act. Further reference as to the intention of the legislature on which the original Act, i.e. *The Adoption of Children Act* 1881 (N.Z.) is contained in *Campbell* on *The Law of Adoption in New Zealand*, 1952, pp. 1, 126. The majority members of the court below misdirected themselves as to the manner in which an appeal against the exercise of discretion should be determined. They misconceived their functions. This Court has defined the functions of an appellate court (*House* v. *The King* (2) ; *Storie* v. *Storie* (3) ; *Lovell* v. *Lovell* (4) ; *Pearlow* v. *Pearlow* (5)). The decisions in *Evans* v. *Bartlam* (6) ; *Charles Osenton & Co.* v. *Johnston* (7) and *Blunt* v. *Blunt* (8) were considered by this Court in *Storie* v. *Storie* (3) but did not obviously cut across the principles which had been laid down by the Court in *House* v. *The King* (2). Those principles have also been referred to in *Hitchcock* v. *W.B. and F.E.B.* (9) and *Moor* v. *Moor* (10). An appellate court should presume that the judge of first instance has rightly exercised his discretion (*Charles Osenton & Co.* v. *Johnston* (11)). In this case the presumption is particularly strong. The onus of rebutting that presumption lies on the person seeking to show that the decision was wrong. That onus is a heavy one (*Lovell* v. *Lovell* (12)) and was not discharged in the court below. There is no sufficient ground for this Court to hold that the presumption in favour of the correctness of the decision of the judge of first instance should be displaced.

J. W. Shand Q.C. (with him *J. P. Slattery*), for the respondent. Giving the proviso to s. 167 of the *Child Welfare Act* 1939-1952 the widest interpretation, this decision cuts across the principles laid down by the English authorities and those in Australia, and the whole legal conception of parental rights. The fact that an adoption is thought to be for the benefit of the infant is not a dominant factor ; the dominant factor in this case is the mother's wishes. To displace the dominant factor, the onus is upon the proposed adopters to show that to leave the child with her would be detrimental, and detrimental to matters of essential importance (*Re Carroll* (13) ; *Re Adoption Act* 1950 ; *Re "K"* (14)).

(1) (1943) A.C., at p. 526.
(2) (1936) 55 C.L.R. 499.
(3) (1945) 80 C.L.R. 597.
(4) (1950) 81 C.L.R. 513.
(5) (1953) 90 C.L.R. 70.
(6) (1937) A.C. 473.
(7) (1942) A.C. 130.
(8) (1943) A.C. 517.
(9) (1952) 2 Q.B. 561.
(10) (1954) 2 All E.R. 458, at p. 460.
(11) (1942) A.C., at pp. 138, 148.
(12) (1950) 81 C.L.R., at pp. 532, 533.
(13) (1931) 1 K.B., at p. 335, 336.
(14) (1953) 1 Q.B., at p. 129.

H. C. OF A. 1954-1955.

MACE v. MURRAY.

When considering the welfare of the infant regard must be had to the assumption that the mother knows better than the court and the court will not act as if it were a private person dealing with its own child (*Re Carroll* (1)). Consideration should not be given to the feelings of those who wish to adopt a child which they have had in their possession for some time (*Re Carroll* (2) ; *Re Adoption Act* 1950 ; *Re* " *K* " (3) ; *Martin* v. *Duffell* (4) ; *Re Roumeliotes* (5)). The primary matter to which regard is to be had is the mother's wish. That is the dominant factor (*Reg.* v. *Nash* (6) ; *Barnardo* v. *McHugh* (7) ; *Re Carroll* (8) ; see also *Re O'Hara* (9)). Considering the child itself it can always be a circumstance, if the child has been with the persons who wish to get an order for adoption, for a considerable time, that the child has become set in that particular situation. In *Hitchcock* v. *W.B. and F.E.B.* (10) the matter of the disposing of the permanent rights was dealt with. With regard to abandonment see *Re Carroll* (11). Section 2 (3) of the *Adoption of Children Act* 1926 (Imp.) which deals with the consent of certain persons, was considered in *H.* v. *H.* (12) and the interpretation there made was accepted in *Re Adoption Act* 1950 ; *Re* " *K* " (13). The respondent has capacity to look after the child (*Re Carroll* (14) ; *Hitchcock* v. *W.B. and F.E.B.* (15)). Should the respondent turn out to be a woman who is unable for whatever reason it may be, to care for the child, then the provisions of the *Child Welfare Act* 1939-1952 could be availed of.

A. Larkins, in reply.

Cur. adv. vult.

March 2, 1955.

THE COURT delivered the following written judgment :—

On 13th April 1953, the appellants applied by notice of motion to the Supreme Court of New South Wales in its equitable jurisdiction for an order of adoption in their favour in respect of a male child then five months old. The child, Wayne Murray, was the illegitimate son of the respondent.

(1) (1931) 1 K.B., at pp. 334, 350.
(2) (1931) 1 K.B., at p. 359.
(3) (1953) 1 Q.B. 117.
(4) (1950) 4 D.L.R. 1.
(5) (1939) 4 D.L.R. 265.
(6) (1883) 10 Q.B.D. 454.
(7) (1891) A.C., at pp. 398, 399.
(8) (1931) 1 K.B., at pp. 324, 351, 353.
(9) (1906) 2 I.R. 232, at p. 239.
(10) (1952) 2 Q.B., at pp. 568, 569.
(11) (1931) 1 K.B., at pp. 362, 363.
(12) (1947) K.B. 463.
(13) (1953) 1 Q.B., at p. 126.
(14) (1931) 1 K.B., at p. 332.
(15) (1952) 2 Q.B., at p. 570.

The application was made under s. 164 of the *Child Welfare Act* 1939-1952 (N.S.W.) which authorizes the court to make, in a prescribed form, an order for adoption of any child in favour of the person by whom or on whose behalf an application is made. By par. (a) of s. 163 (1) a husband and wife are enabled to make such an application jointly. Section 167, as it applies to the case of an illegitimate child under the age of twelve years, provides that an order of adoption shall not be made unless the court is satisfied, first, that the person is of good repute and a fit and proper person to have the care of the child and of sufficient ability to maintain, clothe, support, train and educate the child; secondly, that the welfare and interest of the child will be promoted by the adoption; and, finally, that the mother of the child consents to the adoption. The section adds, however, by way of proviso, that the court may dispense with the consent where, having regard to the circumstances, the court deems it just and reasonable so to do.

The appellants' application came before *McLelland* J., and a considerable body of evidence was adduced. His Honour was satisfied of the first two of the matters above-mentioned. As to the third, it was proved that on 18th November 1952, six days after the birth of the child, the respondent had signed a document stating that she consented to the making of an order of adoption under which the child would be the adopted child of such adopting parents as might be selected and approved by the Director or other approved officer of the Child Welfare Department. The appellants were so selected and approved. It was also proved, however, that on 23rd January 1953 the respondent in writing withdrew her consent, and that at no time had she renewed it. Accordingly at the hearing there was no subsisting consent by the respondent to the appellants' application, and in fact the application was strenuously opposed by counsel who appeared on her behalf. The learned judge, however, deemed it just and reasonable in the proved circumstances to dispense with her consent, and made an order for adoption in the appellants' favour.

The respondent then appealed to the Full Court of the Supreme Court, contending that *McLelland* J. had wrongly exercised the power which s. 167 gave him to dispense with her consent. The appeal was allowed by a majority of the court consisting of *Street* C.J. and *Maxwell* J., *Roper* C.J. in Eq. dissenting, and the order of adoption was set aside. From the order of the Full Court the present appeal is brought by special leave.

The jurisdiction of this Court is to review the decision of the Full Court, applying to the case the principles which were applicable

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

by that court, and, if necessary, to make such order as the Full Court should have made. The principles to be applied in such a case are not in doubt. The order of the learned primary judge was made in the exercise of a discretionary judgment; and it has been repeatedly laid down by this Court, following decisions of the highest authority in England, that in such a case a court of appeal is not justified in interfering with the decision appealed from unless it reaches a clear conclusion that by reason of some error, whether of fact or of law, the primary judge not only has taken a view different from that which the judges of the court of appeal would have taken if they had been in his place, but has failed properly to exercise the discretion committed to him: *House* v. *The King* (1); *Lovell* v. *Lovell* (2); *Pearlow* v. *Pearlow* (3); *Paterson* v. *Paterson* (4). Moreover, the order of *McLelland* J. was made with the advantage of having seen and heard the witnesses, and particularly the parties, as they were examined and cross-examined in the witness-box; and that was an advantage not only in considering the credibility of the witnesses but also in appreciating the character and personality of each of the three persons whose future relationship to the child the court had the responsibility of deciding. The case was pre-eminently one for the application of well-known words originally used by Lord *Shaw* and since approved by other learned lords: "In my opinion, the duty of an appellate court in those circumstances is for each judge of it to 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? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment": *Clark* v. *Edinburgh & District Tramways Co. Ltd.* (5); see *Powell* v. *Streatham Manor Nursing Home* (6); *Watt or Thomas* v. *Thomas* (7).

The learned judges who formed the majority in the Full Court were not unmindful of these principles, but they put them aside, stating as follows their reasons for so doing:—"This case has been argued throughout as if the appeal was in all respects a rehearing in the fullest sense and this Court was invited to review the whole of the evidence and form its own conclusions on all relevant matters,

(1) (1936) 55 C.L.R. 499, at pp. 504, 505.
(2) (1950) 81 C.L.R. 513, at pp. 518-520, 526, 528, 532-534.
(3) (1953) 90 C.L.R. 70, at pp. 76, 77.
(4) (1953) 89 C.L.R. 212, at pp. 218-224.
(5) (1919) S.C. (H.L.) 35, at p. 37.
(6) (1935) A.C. 243, at p. 250.
(7) (1947) A.C. 484, at p. 488.

including the question whether the discretion conferred upon the judge by the proviso to s. 167 (d) should or should not have been exercised. The whole of the facts were canvassed at length by both sides, and though, at the very end of his argument, lasting for six hours, counsel for the respondents submitted briefly that the court would not interfere with the trial judge's decision to dispense with the mother's consent unless satisfied that the discretion conferred upon him had been exercised on some wrong principle, no authorities were referred to and no real argument was addressed to the court on this point, and counsel for the appellant was apparently so far under the impression that it was not seriously pressed that he did not even refer to it in reply. In our understanding of the way in which the case was argued by both sides, this court was invited to decide for itself whether, in all the proved circumstances, about which no real doubt arises, this was a case in which the power to dispense with the mother's consent should or should not be exercised, and it is on that footing that we have considered the matter. In any event it may be that where the basic facts are not in dispute and where a question of status is involved, as in the present proceedings, an appellate court would be more inclined to review the determination of the trial judge made in the exercise of his discretion, if, in fact, it disagreed with his conclusion. But, be that as it may, the general rule which appellate courts apply, when asked to review an order made as a matter of discretion, was not seriously invoked in this appeal, and as we understood the arguments on both sides the matter was left at large for this court's decision" (1).

The first comment we would make is that it would require the clearest words to satisfy us that counsel for the respondent really intended to invite the Full Court to decide the appeal as if it were the court of first instance. In a case as strenuously contested as this has been at every stage of its history, even words appearing to have that meaning should surely have fallen upon incredulous ears. But there is nothing to suggest that the supposed invitation was conveyed in any form of words. On the contrary, as appears from the very passage we have quoted from the judgment, counsel expressly submitted, albeit at the end of his argument, that the court would not interfere with the primary judge's exercise of discretion unless satisfied that he had applied a wrong principle. Whatever had gone before, this submission showed beyond question that the Full Court was not being invited to decide the appeal as if it were an original hearing. There is no sign in the dissenting

(1) (1954) 55 S.R. (N.S.W.), at p. 95; 71 W.N., at pp. 260, 261.

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

judgment of *Roper* C.J. in Eq. that he was aware of any reason for thinking that the ordinary principles were not to be applied; and counsel for the respondent before us has not suggested that his opponent conveyed to him any intention of surrendering the advantage which those principles gave him. In addition, it is necessary to point out that the nature of the appellate jurisdiction in a case where a statutory discretion has been exercised cannot be altered by the manner in which counsel for a party chooses to present his argument. Counsel may, of course, concede that the primary judge has so erred that the case is a proper one for the appeal court to substitute its own judgment for his; but however helpful such a concession may be to the appeal court, the jurisdiction of that court to exercise the discretion is still dependent upon its being satisfied that the discretion has not already been properly exercised. Until it is so satisfied, even an express invitation to decide the case afresh must necessarily be declined. Both for this reason and because in the present case counsel did not in fact intimate a willingness to have the appeal decided otherwise than in accordance with law, it appears to us that the majority judgment in the Full Court proceeded upon a misconception of the question to be decided by that court. In the circumstances, we must decide this appeal by considering the judgment of *McLelland* J., and applying in relation to it the principles we have mentioned.

His Honour's statement of his reasons reflects a lively consciousness of the grave responsibility which the application placed upon him. He commenced his consideration of the matter by recognizing, first, that s. 167 prima facie forbids the making of an adoption order in respect of an illegitimate child if the mother does not consent, and, secondly, that the natural ties between mother and child ought not to be lightly broken. It was plainly right thus to emphasize at the outset the necessity, arising from the terms of the legislation and the nature of the jurisdiction it confers, of insisting that powerful reasons must be shown before a court can properly deem it just and reasonable, notwithstanding a mother's objection, to sever the relationship between her child and herself and make the child for most purposes of the law, and consequently for most practical purposes, the child of other persons. That this is the drastic effect of an adoption order is seen from ss. 168 and 169. Subject to certain exceptions of no great general importance it is provided that when an adoption order is made, for all purposes civil and criminal, and as regards all legal and equitable rights and liabilities, the adopted child shall be deemed a child of the adopting parent, and the adopting parent shall be

deemed a parent of the adopted child, as if such child had been born to such adopting parent in lawful wedlock, and the order of adoption shall terminate all rights and liabilities existing between the child and his natural parents; and the adopted child shall take the surname of the adopting parent in substitution for his own surname. The natural parent thenceforth has no rights whatever with respect to the custody, control, training or education of the child, and cannot even have access to the child unless by the grace of the adopting parent; and the child can no longer expect from the natural parent any of the benefits which the natural relationship ordinarily yields. It must be a rare case in which the judicial mind can be satisfied to hold it just and reasonable that such a change should be brought about against the will of a mother.

McLelland J., however, reached the conclusion that this was such a case. In doing so he mentioned and discussed five matters which he considered to be among the relevant circumstances. These were: (a) the respondent's initial consent to the adoption of her child, and the consequences which flowed from it; (b) the fitness of the respondent to have the custody or control of the child; (c) the ability of the respondent to provide a home, and the opportunity she would have of providing a mother's attention, care and training; (d) the welfare of the child; and (e) the question whether the revocation of the respondent's consent was bona fide. The last-mentioned matter may now be left out of account, for the learned judge considered that the respondent's withdrawal of her consent was made in good faith, being due to maternal emotions aroused by the birth of her child, and no criticism of his finding on this point has been submitted.

His Honour's view concerning the first of these matters, the respondent's initial consent and its consequences, provided the main point of disagreement between his judgment and the majority judgment in the Full Court. The relevant facts may be briefly recapitulated. The consent was not signed until after the birth of the child, but the respondent had been considering the question of adoption for more than two months before her confinement. She had settled a claim against the father of the child for preliminary expenses on the condition that she should adopt the child out. She was not unfamiliar with the adoption of children, for her sister had adopted out an illegitimate child in the previous July. Before the birth she frequently spoke to a Mrs. Mitchell, who had befriended her and with whom she was living, in terms indicating a fixed intention to have the child adopted. She communicated

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

that intention to the Child Welfare Department and the hospital authorities, saying that she did not wish to see the child after it was born. The birth was on 12th November 1952, and two days later the respondent had an interview with a Miss Horn, an officer of the Child Welfare Department, in which she told Miss Horn that she was not certain of her desire to have the child adopted. After another four days she signed the adoption papers although she was still wavering, and Miss Horn told her she would hold the papers and see her again. Two days later the respondent informed Miss Horn that she had decided in the interests of the child to have him adopted. Despite attempts made by the respondent at the hearing to establish the contrary, the learned judge found that her decision to sign the consent was arrived at after consideration, at a time when she was quite capable of understanding what she was doing, and neither on the spur of the moment nor after any pressure by officers of the Child Welfare Department. His Honour also found that when the respondent finally decided to consent she did so in the belief that what she was doing was final and irrevocable. As his Honour pointed out, there was no evidence that before January 1953 she was aware that she could change her mind. Certainly she took no steps to recall her consent until 7th January, and by that date the adoption order would have been made, according to the usual course of events, had not the Supreme Court vacation intervened. On that date, however, the respondent spoke to Miss Horn on the telephone, ascertained that no adoption order had in fact been made, and said that she might change her mind. Another week or more went by before she definitely said she would like to revoke her consent, and it was not until 23rd January 1953 that she called at the Department and signed a form of withdrawal of consent.

In the meantime, on 24th November 1952, the appellants had received the child from the hospital under an authority from the Department. On 4th December 1952 they signed a document stating that they fully understood that they had no claim on the child until the order of adoption should be signed, and that in the event of the mother claiming him before the order should be signed they would have no option but to give him up. They had been told this by a departmental officer, a Mrs. de Lucy, as they were about to leave the hospital with the child; but Mrs. de Lucy had also assured them, as the fact was, that it was very rarely that a baby was reclaimed by the mother after having been handed over in anticipation of an adoption order. The learned judge was satisfied that the applicants received the child in the expectation and belief

that an adoption order would be made in their favour, and he found also that the applicants signed the document of 4th December 1952 considering it as a mere formality. It was not until 16th January 1953 that the appellants were told of the respondent's change of mind and were asked to return the child to the Department. In the meantime they had had the child constantly in their care. They had treated him as their own and had formed a deep affection for him.

McLelland J. did not treat the respondent's conduct over this period, conduct which he described as having brought the child into the lives of the appellants, as by any means decisive of the case. The significance he attached to it was as providing a sufficient reason for entering upon an inquiry into the respondent's fitness to have the custody and control of the child, her ability to provide a home for him, and her probable opportunities of giving him a mother's attention, care and training. His Honour, in our opinion, was right in holding, as in effect he did, that such an inquiry is warranted in special circumstances only. This is not because the Act in terms places any restriction upon the range of circumstances which the court is to take into its consideration; "having regard to the circumstances" is the expression the section uses, and every consideration relevant to the question of the justice and reasonableness of dispensing with the parent's consent is thus required to be given appropriate weight. But an adjudication as to that justice and reasonableness has to be made according to the standards of fairness and humanity which are accepted in this community; and it would be the plainest denial of those standards to deprive a mother of her child against her will upon nothing more than a moral judgment as to her character and past conduct or an apprehension that she will have difficulty in providing for the child and in looking after him generally. But a problem of a peculiar kind confronts the court where a mother had made a deliberate decision irrevocably to give her baby, without even seeing him, to others who desire to take him as their own, and has allowed her decision to be known and acted upon over a period in which a virtually parental affection for the child on the part of those who have received him has become deeply rooted. In such a case it is inevitable that the refusal of an adoption order will most bitterly disappoint legitimate expectations on the part of the intending foster-parents which the mother herself has been wholly or partly responsible for creating and encouraging. But in addition to that, and of greater importance than that, is the fact that in such a case the mother-child relationship lacks features which in other cases go

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

far to make it unthinkable that the opposition of even an unworthy mother to the adoption of her child should be overruled by a court. In a case of this special nature, facts which tend to show that the mother is actually unfitted by character, or unlikely by reason of circumstances, to be in a worthwhile sense a mother to the child assume an importance which otherwise they well might not have.

The learned judges who formed the majority in the Full Court took a different view. Their Honours construed the proviso to s. 167 as meaning that the question whether the parent's consent should be dispensed with depended upon an inquiry into nothing more than the reasonableness or unreasonableness of the parent's attitude in withholding consent. The adoption of this construction led their Honours to hold, first, that where a consent has been given and withdrawn the case must be considered as if the consent had never been given at all; secondly, that the welfare of the child has no substantial bearing on the problem except in certain cases of an extreme character where the question of the child's welfare overlaps the question of the reasonableness of the parent's refusal to consent; and thirdly, that the feelings and wishes of the proposed adopting parents cannot come into question and may be disregarded. As authority for the construction they placed upon the proviso their Honours relied upon a passage in the judgment of *Jenkins* L.J. in *Re Adoption Act* 1950; *re* "*K*" (*An Infant*) (1) in which his Lordship said that the question at the hearing was whether, in the circumstances as they stood then, the parent's withholding of consent could properly be considered as unreasonable. That was undoubtedly so under the English Act with which *Jenkins* L.J. was concerned, for it was provided by that Act (the *Adoption Act* 1950, s. 3 (1) (c)), that the court might dispense with a parent's consent if satisfied that her consent was unreasonably withheld; but the position is quite different under the New South Wales Act. Whether a mother's refusal to consent to the adoption of her child should be regarded as unreasonable is not at all the same question as that which has to be answered under the New South Wales Act, namely whether a dispensation by the court with the necessity for the mother's consent should be deemed just and reasonable. Even if it be accepted that a course of events such as occurred in this case up to 16th January 1953, and the effect of those events on the emotional state of the intending adopters, have nothing to do with the reasonableness or unreasonableness of a mother's consent to her child's adoption—a proposition which we should not consider self-evident—

(1) (1953) 1 Q.B., at p. 132.

it by no means follows that they have nothing to do with the justice and reasonableness of a judicial dispensation with the mother's consent. And even if it be accepted that a mother's decision not to consent to her child's adoption may be held reasonable though arrived at in disregard of the best interests of the child himself, it does not follow that, when a court is called upon to decide whether it will be acting justly and reasonably in the circumstances if it makes an order of adoption against the opposition of a mother, it cannot in any circumstances consider her fitness to play a mother's part in the child's life.

It was submitted for the respondent on this appeal that the dominant factor is not the welfare of the child but the wishes of the mother, and that even when considering the welfare of the child the court will not act as if it were a private person dealing with his own child. It must be conceded at once that in the ordinary case the mother's moral right to insist that her child shall remain her child is too deeply grounded in human feeling to be set aside by reason only of an opinion formed by other people that a change of relationship is likely to turn out for the greater benefit of the child. It is apparent, too, that a court which is invited to make an order of adoption must appreciate that the child is another's, and that only the most weighty and convincing reasons can justify the involuntary breaking of a tie at once so delicate and so strong as the tie between parent and child. But these considerations cannot carry such overwhelming weight where the mother, with pre-meditation and full knowledge of what she is about, has excluded the child from her life from the moment of its birth. In such a case, and especially where others have taken the mother's place both materially and emotionally during the period of her renunciation of him, her proved unfitness to be a mother to the child is clearly relevant to the question whether it is just and reasonable for the court to substitute those others for her in the parental status despite a new-found desire on her part to retrace her steps.

The majority judgment of the Full Court gave an additional ground for holding that the feelings and wishes of the appellants should be disregarded. The document which the appellants signed on 4th December 1952 was construed as an undertaking to return the child to the Department if the mother's consent should be withdrawn, and the judgment then proceeded: "If they had never given that undertaking they would never have had the child in their custody and this present application would have been doomed from the outset. They cannot now seek to strengthen their claim by reference to their present possession or their own

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

feelings in the matter or to the happiness of the child of whom they obtained possession in this deceitful fashion " (1). To describe the document as an undertaking is to overstate its effect. It was an acknowledgment of a situation which, according to the view of the evidence which the learned trial judge accepted, the appellants understood well enough but genuinely believed to have no likelihood of assuming practical importance. On any construction of the document, however, the appellants must be acquitted of the charge of deceitfulness in obtaining possession of the child. True it is that when the return of the child was demanded they declined to perform the obligation to return him which they had admitted would lie upon them in the event of the mother claiming him before the adoption order should be signed. Indeed the female appellant took the child out of the jurisdiction in order to defeat a court order to give him up. But that conduct, wrongful though it undoubtedly was, cannot fairly be regarded as reflecting upon the appellants' honesty at the time when they received the child. It was quite plainly due to the highly emotional state into which Mrs. Mace had been thrown by what was for her an unexpected and tragic development. But in any case it must be remembered that *McLelland* J. had not allowed himself to be influenced by any consideration of the appellants' possession of the child after the date on which the withdrawal of the consent was made known to them. His Honour appears to us to have been clearly right in treating the growth of a *de facto* parental relation during the period before that date as a fact raising a problem for the solution of which it was proper to have regard to the fitness of the respondent for the custody and control of her child, her ability to provide a home and a mother's attention, care and training, and the welfare of the child generally.

The greater part of the hearing before his Honour was devoted to an inquiry into the matters just mentioned, and on each of them he came to a clear conclusion against the respondent. Using the language of moderation, he described the respondent's moral standards as low. His Honour very properly observed that while the incidents narrated were serious in themselves, what was more serious still was the fact that the respondent felt that there was nothing really blameworthy in her conduct. To *Street* C.J. and *Maxwell* J. it seemed worth remarking that if the respondent had a permanent home and a family life she might abandon her casual intimacies and settle down to an orderly and decorous life. " She is now only twenty-three years of age ", their Honours observed,

(1) (1954) 55 S.R. (N.S.W.), at p. 99; 71 W.N., at p. 263.

" and a marriage with the right man and a permanent position in life might induce a stability which has been lacking in the past " (1). And their Honours proceeded to mention certain respects in which she had not been as bad as she might have been, and thought that there was some ground for hoping that perhaps she might in the future lead a life more in accord with proper standards of behaviour. With all respect, we find it necessary to say that the unsavoury facts must be faced, and that they provide no ground for optimism. There is nothing to be gained by describing her character and conduct, which are made plain by the evidence. It is enough to say that she is removed from the category of ordinary parents naturally fitted for the upbringing of children. No attempt has been made before this Court, and in our judgment no attempt could reasonably be made, to challenge the conclusion of the learned primary judge that so far as moral character is concerned the respondent is unfitted to have the custody and control of the child.

The provision of a home was rightly regarded by *McLelland* J. as subordinate to the provision of a mother's attention, care and training, but the two matters are necessarily inter-related. The respondent, as was said in the Full Court, has been a wanderer in the city of Sydney, without a permanent home or abiding family ties. Suggestions which she made in her evidence as to homes to which she might be able to take the child were such as could not possibly be taken seriously. The learned judge formed the opinion that the respondent's real feeling was that there was no future for the child in her control if he were to be left in someone else's care or brought up in someone else's home, and that she had overcome the difficulty by envisaging a marriage with a husband willing to have and adopt the child. She gave evidence that a man was willing to marry her and was building a home for her; but the man went into the witness-box, and it is impossible to doubt that *McLelland* J. was right in concluding that the man was not and never had been building a home for the respondent and had no intention of marrying her or adopting the child. His Honour's opinion, for which there was solid ground in the evidence, was that there was no real probability of the respondent being able to provide a suitable home for the child and that her hope of being able to have the opportunity of giving him a mother's care and attention was illusory.

The view which *McLelland* J. took as to the welfare of the child was that moral and social considerations and considerations of

(1) (1954) 55 S.R. (N.S.W.), at p. 100; 71 W.N., at p. 264.

H. C. OF A. 1954-1955.

MACE v. MURRAY.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

welfare generally strongly suggested that the child's best interests would be served by the making of the order of adoption; and the correctness of this opinion, as distinct from its relevance, has not been challenged in this Court. The welfare of the child is, of course, one of the substantive matters as to which an applicant for an adoption order has to satisfy the court under s. 167; but his Honour held, in effect, that it may also have a relevance to the question of discretion under the proviso. Subject to what has already been said, this is clearly so.

In stating his conclusion on the whole case, *McLelland* J. expressed himself as having considered not only the specific matters to which reference has been made but also to the evidence as a whole as it presented itself to him. *Roper* C.J. in Eq., in his dissenting judgment in the Full Court, after holding, as we hold, that the specific matters were all relevant to the application, went on to make some further observations with which we find ourselves in agreement. He said: "... the appellant never has seen, nursed, fed, bathed or clothed this child; from the moment of his birth she has had no physical contact with him whatever, and this resulted from her own deliberate election ... There is ... a period of some eight or nine weeks from the date of the child's birth during which she neither saw the child nor had any physical contact with him, which must be taken into account against her. Before the child's birth she had deliberately elected not to see the child from the moment of its birth. The normal physical contacts, in the earliest days of the child's life, must be of considerable importance in the formation of the normal mother and child relationship, and this mother and her child have been deprived of the influence upon them both, arising from those contacts, by the mother's own choice. I think it may fairly be said that, over that period of eight or nine weeks from the moment of the child's birth, the appellant abandoned this child. Her mind appears to have fluctuated from time to time during that period as to whether she would prefer to have the child under her care, or not, but the physical fact is that, for that period of time, she abandoned him. This conclusion was not expressed in these terms by the Judge in the court below, and he may not have formed it. In considering, however, whether the exercise of his discretion should be interfered with by this court, it appears to me to be a consideration of weight, strengthening the conclusions which he formed, conclusions formed on matters which I consider to be relevant and leading me to the opinion that this court should not interfere with the order made" (1).

(1) (1954) 55 S.R. (N.S.W.), at p. 107; 71 W.N. 256.

After full consideration of the case, we are satisfied that the learned primary judge did not fall into any error of principle or otherwise fail properly to exercise the discretion which the Act entrusted to him. This would suffice to entitle the appellants to succeed; but because of the views expressed in the majority judgment below we think it right to add that we see no reason to doubt that his Honour's decision to dispense with the respondent's consent and make the order of adoption was entirely sound.

The appeal must be allowed and the order of adoption restored.

Appeal allowed with costs. Order of the Full Court of the Supreme Court of New South Wales discharged and in lieu thereof order that the appeal to that court from the order of McLelland J. be dismissed with costs and the order of McLelland J. restored.

Solicitors for the appellants, *Allen, Allen & Hemsley.*
Solicitor for the respondent, *P. N. Roach.*

J. B.