[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

OREGAN;

Ex parte OREGAN.

H. C. of A. 1957.

MELBOURNE, *Mar.* 4, 5, 6; SYDNEY, *April* 2.

Webb J.

High Court—Original jurisdiction—Matter between residents of different States—Habeas corpus—Husband and wife—Contest as to custody of infant child of marriage—Child living with husband in State of domicile—Application by wife living in another State for writ of habeas corpus—Jurisdiction of High Court—Whether habeas corpus available to a wife—Law applicable to custody proceedings in High Court—The Constitution (63 & 64 *Vict. c.* 12), *s.* 75 (iv.)—*Judiciary Act* 1903-1955 (*No.* 6 *of* 1903—*No.* 35 *of* 1955), *ss.* 79, 80.

Sections 79 and 80 of the *Judiciary Act* 1903-1955 apply to the High Court and have the effect of making the common law as modified by the statute law, of the State in which the High Court is sitting applicable to a custody case in the High Court irrespective of where the parties are domiciled or of where the child whose custody is in question, may be.

An application for *habeas corpus* and proceedings on the return of the writ can be a matter between residents of different States.

Reg. v. *Macdonald*; *Ex parte Macdonald* (1953) 88 C.L.R. 197, at p. 199, followed.

A writ of *habeas corpus* is not available to a wife against her husband where he has the legal custody of the child of the marriage.

A wife decided on 12th September 1956 to live apart from her husband who resided in Tasmania and to live in Melbourne and in fact did so and was still so living when she applied on 26th November 1956 to the High Court for a writ of *habeas corpus* in respect of the infant child of the marriage.

Held, that the parties were as at the date of the application residents of different States within the meaning of s. 75 (iv.) of the Constitution.

Held, further, that, in the circumstances, the wife should have custody of the infant child of the marriage.

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HABEAS CORPUS.

On 26th November 1956 Doreen Elizabeth Oregan applied to the High Court for an order nisi for a writ of *habeas corpus* directed to James Edward Oregan to produce the body of James William Oregan, an infant child before the Court. The application was heard before *Webb* J. in whose judgment hereunder the material facts appear.

J. X. O'Driscoll Q.C. and *A. Adams*, for the applicant.

R. K. Fullagar, for the respondent.

Cur. adv. vult.

April 4.

WEBB J. delivered the following written judgment:

This is an application by a wife who claims to be a resident of Victoria for an order nisi for a writ of *habeas corpus* directed to her husband who is a resident of Tasmania. She is seeking the custody of their son aged six years and eight months who is now in his father's custody in Hobart. The affidavit of the applicant in support of the application was made on 24th November 1956, and filed on 26th *idem*. When the application came before me on 27th November in Sydney I directed, pursuant to r. 2 of O. 55 of the *High Court Rules*, that the application be made by notice of motion, following the course taken by *Taylor* J. in *Reg.* v. *Langdon*: *Ex parte Langdon* (1).

The motion was duly served on the respondent in Hobart and the application was set down for hearing before a single Justice at the sittings of this Court appointed to commence at Melbourne on Tuesday 12th February 1957. The matter had not been reached when on 14th February 1957, the respondent applied on summons for an order that the trial of the matter be removed from Melbourne to Hobart. This application was dismissed by me and the hearing, which was in open court throughout, began in Melbourne on 4th March 1957 and concluded on 6th *idem*, when I reserved my decision.

Counsel for the respondent submitted that the Court had no jurisdiction to entertain the application because the applicant and the respondent were not residents of different States within the meaning of s. 75 (iv.) of the Commonwealth Constitution; and because, in any event, a writ of *habeas corpus* was not the proper remedy when the respondent, as the father of the infant, had its legal custody. Other questions raised and argued were as to the law that is to be applied if this Court has jurisdiction, i.e.

(1) (1953) 88 C.L.R. 158.

whether that law is the common law, with or without modification by the rules of equity or statute law, the statute law of Victoria, or the statute law of Tasmania. In the matter of the custody of infants the statute law of these States is not identical, at all events in the wording.

The applicant, her mother, her sister and the respondent were cross-examined on their affidavits. Other affidavits were filed, some on behalf of the applicant and others on behalf of the respondent, but the deponents were not called for cross-examination.

The applicant, then Doreen Elizabeth Hegarty, and the respondent, James Edward Oregan, were married in Melbourne on 12th December 1947, in the office of the Government Statist of Victoria. The applicant was a Catholic. The respondent was a Protestant and a divorcee. Their respective ages were twenty-six and thirty-three years. The applicant's father appears not to have expressed any views about the marriage; but her mother thought it was "a sad mistake"; although she said nothing to respondent about it. However, the applicant's sister, Mary Hegarty, and her brothers appear to have expressed to the respondent their disapproval of the marriage, if not their resentment at it, and their reasons for their attitude. The respondent does not appear to be a member of any religious congregation, although he suggests he is a Protestant. But he is somewhat hostile towards the Catholic Church, due probably to its attitude to his marriage with the applicant. It may appear remarkable that a Catholic woman who had decided to contract such a marriage would have had scruples about the form of baptism of any child of the marriage; but I am satisfied that she did tell the respondent before the marriage that any child of the marriage must be baptised in the Catholic Church, and that, although he did not give his express approval, he did not then object. The respondent admitted that the matter was discussed before the marriage, but he said that he had insisted on any child of the marriage being baptised in a Protestant Church. I accept the applicant's evidence where it differs from the respondent's. She appeared to me to be a truthful person, whereas I am unable to regard him as a reliable witness. He swore in cross-examination that the statement in his affidavit that the applicant's family prevented him from seeing the applicant was untrue, and that he did not make it; and he suggested that his solicitors had wrongly included it in the affidavit. Probably with some reluctance, he attended the baptism of the child in a Catholic Church and at times escorted the applicant and the child to Mass on Sundays and also took the child to the Catholic School.

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After the marriage the parties went to Hobart and resided there until the beginning of September 1956, when the respondent took his holidays and decided that he and the applicant should spend them in Melbourne, presumably with the applicant's people. At that stage, and for some two or three years before, the parties were on fairly good terms with each other and with the applicant's family. The applicant's mother in her evidence said that, although she regarded the marriage to the respondent as a sad mistake, she " never had any reason to object to him or his character ", and that he had been welcome in her home whenever he came. However, on 12th September 1956, the applicant made up her mind to live permanently apart from the respondent. Her reason for this was that after they arrived in Melbourne early in September 1956 she became ill and was sharing a room with her mother when her husband came into the room and abused her because she would not get out of bed and have sexual intercourse with him. She said she decided to leave him on the Monday, " the first Monday that I was sick ". Still, on the previous Sunday she had suggested to him that they should live in Melbourne ; but he was not willing to do so as he did not want to leave his home, nor his employment in Tasmania which appears to have been constant. On the following Tuesday the respondent returned to Hobart without the applicant or the child. After he returned, the child was sent to a Catholic school in Melbourne close to where the applicant's people lived and the applicant secured employment in a factory. The child was at school on 19th November 1956, when the respondent called at the school and took him away to Hobart. The applicant then commenced proceedings in the Supreme Court of Victoria to obtain the custody of the child ; but these were not carried beyond the extension of the time for service of the summons on the respondent. It so happened that the order for extension was made on the day that the respondent took the child from the school, but he disclaims any knowledge of that.

Not only was the child baptised in a Catholic Church but he had always attended Catholic Schools. However, it does not appear how much knowledge he acquired about the Catholic faith or what sacraments, if any, apart from baptism, he had received. The respondent admitted that since the child was taken by him to Hobart he has not attended any Sunday School, but added that it was because the child had not expressed a wish to go to Sunday School. The respondent said he left that to the child to decide, although he is not yet seven years of age. However, as appears

later, the respondent's attitude to religion plays no part in my conclusion as to what the interests or welfare of the child calls for.

I propose now to trace very briefly the history of the matrimonial relationship in Hobart where, as I have already stated, the parties resided from the end of October 1949 to early in September 1956. During the whole period that the parties lived in Hobart the respondent appears to have been in constant employment, mostly as an employee, but for about seven months on his own account. The applicant admitted that he gave her most of his wages or earnings throughout that period; but she said, and I believe her, that at times the amount left after paying rent, hospital and other medical expenses, and debts contracted by the husband for the purposes of his employment or in the course of his business, was not sufficient to buy necessary food and clothing for herself and the child. She says, and again I believe her, that the respondent spent more money on liquor than he could reasonably afford, that on several occasions he was drunk, and on one occasion was so drunk that he became violent and threatened to shoot his brother-in-law. But that incident occurred in September 1950. Thereafter and up to the time they left Hobart in September 1956, his behaviour was not such as to warrant her leaving him. He appears to have been fond of his wife. She said that his purpose in taking the child from Melbourne to Hobart was to force her to go back and live with him. There is no suggestion of his association with any other woman. Here one recalls that the applicant's mother said she never had any occasion to object to him or to his character and that he was always welcome in her home. He appears to be a hard-working man. He is vigorous and alert with no history of illness. Unfortunately this cannot be said of the applicant. But he is aggressive and domineering and was selfish in that he spent more on liquor than he could afford and so at times left his wife and child short of food and clothing. However, although he cannot properly be regarded as an exemplary husband, he fell far short of being a bad one.

I have come to the conclusion that she was not justified in deciding to live apart from him in September 1956. If he demanded too much of her in her then condition of health, he does not appear to have insisted unduly in the assertion of what in normal circumstances would have been his marital rights. I suspect, however, that the actual reason for her decision was that, according to the faith which she professed, she felt that she was living in sin with her husband and that by continuing to live with him the eternal salvation of herself and her child would be endangered. But I

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cannot act on suspicion, and in any event in the eyes of the law this marriage imposed the same obligations and conferred the same rights on both parties as any other marriage would. I must therefore deal with this case on the basis that the applicant has separated from the respondent without just cause or excuse. However, it does not follow that she is not entitled to have the custody of the child, if it is in his paramount interests within s. 136 of the *Marriage Act* 1928 (Vict.) or for his welfare within s. 145, that she should have his custody, as I think is the case. Section 136 is not found in the Tasmanian statutes but s. 145 corresponds with s. 10 of the *Guardianship and Custody of Infants Act* 1934 (Tas.). Whether the child is left with his father or is returned to his mother he will have a reasonably comfortable home and, so far as food and clothing and his secular education are concerned, there will be no difference between the two homes. However, the child is not yet seven years of age and is in delicate health. It is common ground that he is subject to convulsions and he has had other less serious illnesses. Clearly he is in need of constant care and attention. At present, apart from the respondent, the only person who gives the child any attention is a married woman who is a neighbour of the respondent. However it appears that her contact with the child ceases when he returns from school and the respondent then takes him to his home. But should the respondent take ill, or for any other reason become incapable of looking after the child, or should he have to work overtime at night—and he does work overtime—there is no certainty that the child will then get that close and continuous care and supervision for which his state of health calls. I emphasize that the child is subject to convulsions. On the other hand, if the child is transferred to the custody of his mother he will, except during school hours, be under the constant care and supervision of his mother or his grandmother or of one of his aunts. I am satisfied then that the applicant is fit to have the custody of the child and should have it, having regard to his welfare or paramount interests, if there be any difference between these two considerations required by ss. 136 and 145. It is true that there is no man in the mother's house; but as he is under seven years of age there is at present no real need for his supervision by a man. I am dealing with the existing situation, which as far as I can judge is likely to continue indefinitely as the respondent did not suggest the contrary. It may be that later on the respondent will be able to provide for the necessary care and supervision of the child at all times, and that his claim to have the custody will be strengthened.

However counsel for the respondent submits that because of ss. 79 and 80 of the *Judiciary Act* 1903-1955 I must apply in determining this question of custody the common law of England, without modification by the rules of equity or by statute, and that according to the common law the father has the legal right to the custody of his child. In the alternative, he submits that even if the rules of equity apply, or the statute law of Victoria or of Tasmania applies, the applicant has not proved her right to custody as against the father.

Counsel for the applicant submits that the statute law of Tasmania applies, or in the alternative the rules of equity and not the common law independently of those rules.

Counsel for the respondent relies upon the fact that the applicant has separated from the respondent without just cause or excuse, and on the decision of this Court in *Lovell* v. *Lovell* (1) and more particularly on the judgment of *Latham* C.J. In that case, however, this Court had to review the exercise of a discretion by a judge of the Supreme Court; it had not itself to exercise any discretion. It is true that the Chief Justice thought it would be wrong to approach the case upon the basis that the welfare of the infant was the only consideration, and that the conduct of the parents was immaterial, or to approach it from the point of view that the mother was entitled to custody in the case of a child of tender years. However his Honour's remarks must be taken to have been made *secundum subjectam materiam* (*The Commonwealth* v. *Bank of New South Wales* (2)) and to have related to the facts of that case in which the father not only had a suitable home for the child, but the child was under the care and supervision of its grandmother in that home. If in the father's home the child is, through lack of proper care and supervision, exposed as here to a serious risk of losing its health if not its life then in my opinion it should not be kept there because of the behaviour of its mother in relation to its father and the hardship she inflicts on its father. It is true that in this case the child is not under the necessary care and supervision in the respondent's home because the applicant wrongfully persists in living apart from its father. But her misconduct in this respect cannot justify the complete disregard of the child's paramount interests or welfare. As I said in *Lovell* v. *Lovell* (1): "To give the child's custody to the (father) 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" (3).

(1) (1950) 81 C.L.R. 513.
(2) (1950) A.C. 235, at p. 308; 79 C.L.R. 497, at p. 638.
(3) (1950) 81 C.L.R., at p. 531.

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I now proceed to consider what law is applicable here. At common law and in Victoria and Tasmania as well as in other States questions of custody of infants are determined by the supreme judicial power: they are not left to the determination of a non-judicial authority. So that whenever this Court is dealing with custody it is exercising judicial power. No State legislature can confer any judicial or other power on this Court. But the Commonwealth Parliament can and has in ss. 79 and 80 of the *Judiciary Act* 1903-1955 conferred on this Court the judicial power and duty to apply the appropriate State law in proper cases. In *Lady Carrington Steamship Co. Ltd.* v. *The Commonwealth* (1) *Higgins* J. expressed some doubt as to the applicability of s. 79 to the High Court. This was because his Honour thought that otherwise s. 15 of the *High Court Procedure Act* 1903-1915 would be unnecessary. However, s. 15 is confined to procedure relating to juries. In *Cohen* v. *Cohen* (2) *Dixon* J., as he then was, appeared to think that both ss. 79 and 80 applied to this Court. I share this view, if I may respectfully say so. Then what is the effect of ss. 79 and 80 in this case? Section 79 provides:—"The laws of each State including the laws relating to procedure, evidence, and the competency of witnesses shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable."

The laws referred to in s. 79 include, I think, substantive laws, embracing those dealing with the custody of infants. As to these, there is no exception provided by the Constitution or the laws of the Commonwealth. Then the Victorian statute law relating to the custody of infants is binding on this Court when sitting in Victoria; but only in cases in which the laws of Victoria are applicable. But I think these laws are not applicable to a person domiciled and residing in Tasmania who has the legal custody of the child in Tasmania. However s. 80 provides:—"So far as the laws of the Commonwealth are not applicable, or so far as their provisions are sufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised, is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising Federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

(1) (1921) 29 C.L.R. 596, at p. 601.

(2) (1929) 42 C.L.R. 91, at p. 99.

Again there is nothing in the Constitution or the laws of the Commonwealth dealing with custody in cases of this kind; so the common law, as modified by the statute law of Victoria, applies in custody cases in this Court while sitting in Victoria. This view is not inconsistent with that expressed above on the effect of s. 79. It is one thing to hold that the Victorian statute law is not applicable and quite another thing to hold that the common law as modified by the Victorian State law is applicable. If this is an undesirable result of s. 80 in a case where there is a difference between the law of the State where the court is sitting and the law of the domicile of the parties in another State, it can be avoided by adjourning the sitting of the court to the latter State. Indeed an application was made to me by the respondent for a hearing in Hobart to avoid this result. However, after reading the applicant's affidavits and those filed on her behalf and the respondent's affidavits in reply, and after hearing counsel for both parties I came to the conclusion that the difference between the statute law of these two States was not sufficient to warrant the transfer of the proceedings to Hobart despite other disadvantages attaching to that course, including expense and delay. After hearing all the evidence and the addresses of counsel I still see no sound reason why that transfer should have been made.

Then in this case the law applicable is the statute law of Victoria, including ss. 16 and 62 (5) of the *Supreme Court Act* 1928 applying the rules of equity and the section of the *Marriage Act* 1928 dealing with the custody of infants. Applying that law I have, as already stated, come to a conclusion in favour of the applicant. The *Marriage Act* (Vict.) by s. 136 makes the interests of the child the paramount consideration. But even if I were confined to the consideration of the welfare of the infant as provided by s. 145 (and s. 10 of the *Custody and Guardianship of Infants Act* (Tas.)) an order in favour of the applicant would still be justified. As early as 1865 in the case of *Austin* v. *Austin* (1) it was held that the welfare of an infant of tender years required that it should be in the custody of its mother. Here the child is not only of tender years but suffers from convulsions and there is no one in the respondent's home in Hobart to look after him in the home while his father is absent. The father's right to retain the child's custody must not be inconsistent with its welfare; but its welfare requires that it should be under constant supervision, and this the child does not get and, as far as the evidence discloses, is not likely to get, except with his mother in Melbourne.

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

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I will now deal with the questions of jurisdiction.

As to whether the applicant and the respondent are residents of different States within the meaning of s. 75 (iv.): In *Australasian Temperance and General Mutual Life Assurance Society Ltd.* v. *Howe* (1) *Knox* C.J. and *Gavan Duffy* J. said that s. 75 (iv.) seemed to assume that a resident of one State cannot at the same time be a resident of another State (2). They referred to the dictionary meaning of the term " resident " as being a natural person, one " who resides permanently in a place " (3). *Isaacs* J. (4) said that he was in substantial accord with the decision expressed in *Quick* and *Garran* on the *Constitution* (p. 776) that residence in a State for the purposes of s. 75 (iv.) should be interpreted as involving a question of State membership and of a character to indentify the litigant to some extent with the corporate entity of the State; that the identification by reason of residence of the litigant with one State connotes his exclusion from similar identification by reason of residence within any other State; and that if he were to express it in a word it is " status ". His Honour added that every Australian was, when all the facts were known, residentially identifiable pre-eminently with one State, and was therefore a resident of that State and of that State alone for the purposes of s. 75 (iv.) (5). His Honour said that a natural person is a resident of a State within s. 75 (iv.) where in fact the nature of his residence shows it is his real home (6). *Higgins* J. emphasised that the expression is " resident *of* a State " and not resident *in* a State, and that the language of s. 75 (iv.) " obviously implies some close connection between the resident and the State, some exclusive link with some one State which cannot at the same time be had with any other State " (7). His Honour said there was not much difficulty in defining the residence of an individual, " *It is where he sleeps and lives* " (7). *Starke* J. said the word " resident " in its primary meaning signifies a natural person who lives, dwells and has his home in some country or place (8). In this case the only real difference between their Honours was as to whether a corporation could be a resident of a State. *Isaacs* J., as he then was, and *Starke* J. thought it could be; but they were a minority.

The applicant, as already stated, said that she had decided to live apart from her husband and reside in Melbourne as from 12th September 1956, and the question then is whether, when she applied

(1) (1922) 31 C.L.R. 290.
(2) (1922) 31 C.L.R., at p. 296.
(3) (1922) 31 C.L.R., at p. 295.
(4) (1922) 31 C.L.R., at pp. 307, 308.
(5) (1922) 31 C.L.R., at p. 308.
(6) (1922) 31 C.L.R., at p. 324.
(7) (1922) 31 C.L.R., at p. 327.
(8) (1922) 31 C.L.R., at p. 337.

for the writ of *habeas corpus* on 26th November 1956, she can be said to have been a resident of Victoria. She had been living in Melbourne less than three months at that time; but although this was a brief period I conclude that she had made her permanent home in Victoria. In *Reg.* v. *Macdonald*; *Ex parte Macdonald* (1), the wife was the applicant for the writ. The parties had lived in Victoria for some years, but in April 1953, a little more than a month before the application, the husband had gone to New South Wales where he said he intended to make his permanent home. *Fullagar* J. held that this brief period of residence in New South Wales was sufficient to make the husband a resident of that State. Again in *Reg.* v. *Langdon*; *Ex parte Langdon* (2), where the applicant for the writ was the husband, and the wife the respondent, the parties had resided in Victoria for some years and in May 1953, about five months before the application, the wife went to live in King Island, which is part of Tasmania. Dealing with the question whether she was a resident of Tasmania, *Taylor* J. said, after referring to *Reg.* v. *Macdonald; Ex parte Macdonald* (1), that he should perhaps be prepared to assume that the question whether she resided in Tasmania should be resolved in favour of the applicant. However, his Honour dismissed the application.

I have come to the conclusion that the applicant and the respondent are residents of different States within s. 75 (iv.). In finding that she was residing permanently in Melbourne on 26th November 1956, I am taking into consideration the fact that she had obtained employment and had sent the child to school there. Whatever may have been her real reasons I am satisfied that she had made her home there. The inadequacy or the invalidity of her reasons could not prevent her from forming the intention to reside in Melbourne permanently and giving effect to it, although it is a consideration in determining whether she really had the intention and acted on it.

The question whether an application for *habeas corpus* and proceedings on the return of the writ can be a matter between residents of different States was not raised. That question was answered in the affirmative in *Reg.* v. *Macdonald*; *Ex parte Macdonald* (3). With that answer I respectfully agree.

As to whether a writ of *habeas corpus* is the proper remedy when the respondent is the father of the child whose custody is sought by the applicant mother: In *Reg.* v. *Macdonald*; *Ex parte Macdonald* (1) the applicant was the mother and the respondent the father of the child. There was nothing before *Fullagar* J. in that

(1) (1953) 88 C.L.R. 197.
(2) (1953) 88 C.L.R. 158.
(3) (1953) 88 C.L.R., at p. 199.

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case to suggest that at the time of the application the father had lost his legal right to custody. His Honour himself raised the question as to whether he had jurisdiction; but he directed the attention of counsel only to the points whether an application for *habeas corpus* could be a matter between residents of different States; and, if so, whether the parties were residents of different States. He did not raise the point whether a wife could get the writ against a husband who apparently had legal custody.

In *R.* v. *Wigand* (1) a wife obtained a writ of *habeas corpus* directing her husband to bring their child before the court and the court ordered the husband, who was represented by counsel, to deliver the child into her custody. Nothing in the report suggests that the husband had lost his right to the legal custody.

But in *Reg.* v. *Macdonald*; *Ex parte Macdonald* (2), and in *R.* v. *Wigand* (1), the question whether the writ of *habeas corpus* was available to a wife as against her husband does not appear to have been raised. It is true that in *Halsbury's Laws of England*, 3rd ed., vol. 11, p. 25, it is said that when, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, the claims may be inquired into on the return of a writ of *habeas corpus* and the custody awarded to the proper person. However in *Halsbury's Laws of England*, 3rd ed., vol. 11, p. 33 it is stated that a parent legally entitled to the custody may regain that custody when wrongfully deprived of it by means of a writ.

I have come to the conclusion that *habeas corpus* proceedings are not available to a wife against her husband where he has the legal custody of the child. I think the correct procedure here was by summons under s. 157 of the *Marriage Act* (Vict.). However, as both parties are before the Court, and as I have heard all the evidence and the addresses of counsel on both sides, I think that I have jurisdiction to accede to the application to dispense with the summons and that I should do so, as no miscarriage of justice has been caused by the failure to issue the summons: see s. 24 of the *High Court Procedure Act* 1903-1950.

Although the applicant succeeds in securing the custody of the child, she should bear her own costs. She has succeeded in establishing that it is in his paramount interests or for his welfare that she should have the custody; but more important for the purposes of costs is the fact that she is wholly responsible for the child not being able to get the necessary care and attention in the matrimonial home, which ordinarily is the proper place for a child.

(1) (1913) 2 K.B. 419.

(2) (1953) 88 C.L.R. 197.

It would be wrong to allow her to recover the costs of retrieving her son from a situation of her own making. It is no answer to say that in leaving that home she was actuated by religious scruples. That may prevent her conduct from being morally blameworthy. But the law which this Court is required to apply makes no allowance for the applicant's scruples, but treats this " mixed marriage " as valid and as imposing the same obligations on her as would a marriage in a Catholic Church. Moreover, if I rightly understood her attitude, she relied for an order in her favour, on her separation from the respondent being justified because of his behaviour throughout the married life, as well as on the fact that this child was of tender years and in delicate health. The point was stressed that in *McKinley* v. *McKinley* (1), the child was a boy nine years old and that this Court refused special leave to appeal from the decision of the Full Court of Victoria in that case ; but I was not asked to apply my reasoning in *Lovell* v. *Lovell* (2), because of the outstanding fact of the respondent's failure to provide for the constant care and supervision of this young and delicate child in the matrimonial home.

As already stated the hearing of this application was in court, although s. 157 of the *Marriage Act* (Vict.) which I now hold applies, requires custody applications to be heard in chambers. When the hearing began I drew the attention of counsel to s. 157 and counsel for the applicant then requested me to hear the application in chambers. Naturally counsel for the respondent remained silent on the point. However, I was at that stage inclined to take the view, submitted and adhered to throughout by counsel for the respondent and eventually adopted by counsel for the applicant, that if the statute law applied, and not the common law, it was that of Tasmania, as the law of the domicile of the parties, and so I decided to continue the hearing in court. In so doing I felt it would be the safer course, as I was of the opinion that, even if I should thereafter hold the Victorian statute law to apply, still s. 157 was directory only, and not mandatory, as it might be if it required the hearing to be in court. It appears that in England it is the practice to hear custody applications in chambers except when important questions of law are raised, as is the case here. See *Halsbury's Laws of England*, 3rd ed., vol. 11, p. 38. This suggests to me that hearings in chambers are not required for the purpose of ensuring that justice shall be done or appear to be done, and so that no miscarriage of justice arises from a hearing in open court.

(1) (1947) V.L.R. 149. (2) (1950) 81 C.L.R. 513.

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Whether this is also an irregularity which can and should be dealt with under s. 24 of the *High Court Procedure Act* is a point I have not considered.

1. *Declaring the proceedings herein valid notwithstanding the applicant's failure to proceed by summons and that the applicant is entitled to the custody of the child James William Oregan* ;

2. *That the child be handed over to her by the respondent* ; *and*

3. *That the questions of access and maintenance be reserved. Liberty to both parties to apply.*

Solicitors for the applicant, *D. G. Sullivan & O'Phelan.*

Solicitors for the respondent, *Hodgman & Valentine,* Hobart by *Moule, Hamilton & Derham.*

R. D. B.