the decision of the Supreme Court is right and I have nothing further to add.

Appeal dismissed with costs.

Solicitors for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the respondents, *Croker & Croker.*

B. L.

H. C. OF A. 1911.

MELBOURNE CORPORATION v. HOWARD SMITH CO. LTD.

[HIGH COURT OF AUSTRALIA.]

ANNIE MOULE . . . . . APPELLANT;

AND

ARTHUR MOULE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *Sept.* 28.

Griffith C.J., Barton and O'Connor JJ.

Infant, custody of—Parent and child—Child in custody of mother—Habeas corpus—Right of father—Welfare of child—Marriage Act 1890 (*Vict.*) (*No.* 1166), *secs.* 31, 33.

On a question of who should have the custody of a child the dominant matter is the welfare of the child.

A husband and wife had lived apart for over a year, and the only child of the marriage, a girl of three years of age, had always lived with her mother. There was no evidence to show that the mother was not a fit person to have the custody of the child. On a writ of *habeas corpus* issued by the father to obtain from his wife the custody of the child,

Held, that it was for the welfare of the child that she remain with her mother.

Goldsmith v. *Sands*, 4 C.L.R., 1648, applied.

Decision of the Supreme Court of Victoria (*Hodges* J.) reversed.

H. C. OF A. 1911.

MOULE v. MOULE.

APPEAL from the Supreme Court of Victoria.

On the application of Arthur Moule, a smelter, residing at Port Pirie, a writ of *habeas corpus* was issued out of the Supreme Court of Victoria commanding Annie Moule, his wife, residing at Latrobe Street, Melbourne, to produce the body of Annie Emma Moule, the only child of the marriage, before a Judge of the Supreme Court. On the return of the writ before *Hodges* J. it appeared that the parties were married in 1907 and that the child was three years of age. The other facts are sufficiently stated in the judgment of *Griffith* C.J.

Hodges J. ordered the child to be handed over to the father. In the course of his judgment the learned Judge said:—"There is no doubt, I think, that the paramount question is the interest of the child, but I do not think that the Court can deal with the child just as it pleases, apart from the consideration of who is, according to the law of nature, its natural guardian, and I think I have first to say the father is entitled to the custody of this child *primâ facie*." He then, after dealing with the evidence, said:—"So I conclude that not only is the father the natural guardian, not only has he the first right, but that he has never done anything to abdicate the right, or to show himself unfit to discharge the duties of guardian of the child."

From this decision Mrs. Moule now by special leave appealed to the High Court.

Jacobs, for the appellant. Under secs. 31 and 33 of the *Marriage Act* 1890 the Court has an absolute discretion to do what is best for the interest of the child: *In re Taylor* (1); *In re Ethel Brown* (2); *In re Holmes* (3); *Smart* v. *Smart* (4). The mother having always had the custody of the child, it would be cruel and capricious to order the child to be handed over to the father: *Goldsmith* v. *Sands* (5); *Reg.* v. *Gyngall* (6). In the case of a girl of three years old the mother is the natural guardian: *Symington* v. *Symington* (7).

The respondent appeared in person.

(1) 4 Ch. D., 157.
(2) 13 Q.B.D., 614.
(3) 21 V.L.R., 358.
(4) (1892) A.C., 425.
(5) 4 C.L.R., 1648.
(6) (1893) 2 Q.B., 232.
(7) L.R. 2 H.L. Sc., 415, at p. 423.

GRIFFITH C.J. The principles upon which a question of this kind is to be determined were laid down by this Court very clearly in *Goldsmith* v. *Sands* (1). I said in that case :—" It is also settled law that in the exercise of the paternal jurisdiction of the Court of Chancery the dominant matter for the consideration of the Court is the welfare of the child." The same doctrine was laid down by *Hood* J. in *In re Holmes* (2). The child in this case is a girl a little over three years of age who has always lived with her mother. The father and mother have been separated for more than a year. There is nothing in the evidence to suggest that the mother is not a fit person to have the custody of the child. Under these circumstances the father, who has been separated from his wife for that length of time, obtained a writ of *habeas corpus* to get the custody of the child, and *Hodges* J. made an order that the child should be handed over to the father. The learned Judge appears from the report of his judgment to have directed his attention to the old rule of the common law that the father was the person entitled to the custody of his child unless very strong reasons to the contrary were made out. But the Act commonly called Serjeant Talfound's Act (36 & 37 Vict. c. 12), which is embodied in sec. 31 of the *Marriage Act* 1890, has altered that, and the rule is now as I have stated. The question, then, for us to consider is whether it is for the interest of this little girl that she should be taken from the custody of her mother and handed over to the custody of the father. He is a smelter and lives at Port Pirie in South Australia. She lives in Melbourne, where she has been for over a year with the knowledge of her husband and, for the greater part of that time, with his consent, and where she has been earning her own living. In *Goldsmith* v. *Sands* (3) two conflicting views were put before the Full Court of Victoria. That was an appeal from *Hodges* J. from whom the present appeal is brought. *Higgins* J., who dissented from the opinion of the majority of this Court, stated the two views thus (4) :—" Mr. Justice *Hodges* asked himself—' What residence would be the better for the infant on the materials before me ?' The Full Court asked itself : ' What

(1) 4 C.L.R., 1648, at p. 1653.
(2) 21 V.L.R., 358.
(3) 4 C.L.R., 1648.
(4) 4 C.L.R., 1648, at p. 1661.

H. C. OF A. 1911.

MOULE v. MOULE.

Griffith C.J.

proof is there that to permit the father to have his child would involve any serious injury to the child?'" He thought the form of question put by the Full Court was right, but the majority of this Court thought that the question put by *Hodges* J. was right. That learned Judge, however, in the present case seems to have taken the other view. In my opinion the question for us is what on the materials before us is best for the child, and, applying my mind to the evidence, I am unable to come to any other conclusion than that it is better for the child to remain where she has always been, with her mother. I think, therefore, that the order appealed from should be discharged, and that the child should be remanded to the custody of her mother. The respondent asks that he may have access to the child, and that is a reasonable request. We think that he should have access to the child not oftener than once a week within reasonable hours after 24 hours notice has been given to the mother. If in the future events happen which render it desirable that the child should not remain with her mother the Court has ample jurisdiction to do what is necessary to protect the child. As the matter stands at present the mother is the proper custodian.

BARTON J. I concur, and have nothing to add.

O'CONNOR J. I am of the same opinion.

Appeal allowed. Order appealed from discharged. Child to be remanded to the custody of the appellant. Respondent to have access once a week at reasonable hours after 24 *hours notice. Respondents to pay the costs of the appeal.*

Solicitor, for the appellant, *P. J. Ridgway.*

B. L.