1953 *Present :* **Nagalingam A.C.J.**

I. F. ABEYAWARDENE, Petitioner, *and* C. E. JAYANAYAKE *et al.*, Respondents

S. C. 190—Application for a Writ of Habeas Corpus

Habeas corpus—*Surrender and abandonment of a child by its parents—Custodian's duty of registration—Adoption of Children Ordinance, No. 24 of 1941, ss. 19, 26.*

Where the custody of a child is transferred by its natural parent to a third party in circumstances not amounting to adoption, it is generally the duty of the third party, under section 19 of the Adoption of Children Ordinance, to have himself registered as the custodian of the child. Failure to register renders him liable to restore the child's custody to the natural parent, even if the restoration is prejudicial to the best interests of the child.

APPLICATION for a writ of *habeas corpus*.

D. S. Jayawickreme, for the petitioner.

N. E. Weerasooria, Q.C., with *J. A. P. Cherubim* and *A. W. W. Goonewardena*, for the respondents.

Cur. adv. vult.

September 11, 1953. NAGALINGAM A.C.J.—

The petitioner who is mother of a child by the name of Nirmalie applies to have its custody delivered to her after removing it from the custody of the respondents with whom it is at present.

The learned Magistrate to whom the matter was referred for inquiry has in a very careful and lucid report given reasons for the view he has taken that the child should be restored to its mother. I do not think I need traverse the same ground, for counsel for the respondents did not himself seek to question the soundness of the view expressed by the learned Magistrate on questions of fact. He, however, attempted to show that the child should not be removed from the custody of who might be termed its foster parents, and based his argument upon the English case of *Mathieson v. Napier* [1] where the right of the natural parent was not permitted to hold sway as against the claim of a third party who had received the child in circumstances amounting to what has been referred to under the English Law as surrender and abandonment of the child by its natural parents.

It is true that the English notion of surrender and abandonment of a child has been recognized in more than one case in our courts—see *Gunaratnayake v. Clayton* [2] and *Samarasinghe v. Simon* [3], but no attempt has been made to show what are the legal consequences of surrender and abandonment, excepting that in such a case a court would bestow its consideration as to what is best for the child in the circumstances.

Under the Roman Dutch Law, the natural parent has a right to the custody of his or her child and that custody can only be terminated under that law under circumstances which are well recognized and clearly defined [4]. The mere delivery of a child by its natural parent to a third party does not invest the transaction with any legal consequences. If the parent had a right to hand over the custody of a child then that parent would also have the undoubted right to resume the custody himself, as the authority of the parent must prevail in the latter instance as much as in the former. We are quite used to the principles of adoption, though it does not apply to persons who are governed by the Roman Dutch Law. Adoption results in definite legal consequences, so far as the child, the adoptive parent and the natural parent are concerned.

It is, however, unnecessary to pursue the question as to the effect of surrender and abandonment, for the legislature has now stepped in and given legal recognition to the basic idea underlying the English notion of surrender. By the Adoption of Children Ordinance, No. 24 of 1941, adoption has been made legal even among persons governed by the Roman Dutch Law. The Ordinance goes on to give legal recognition to the transference of the custody of a child in circumstances where the transaction may not amount to adoption, and defines the circumstances and the consequences of such transference of custody. It uses a term for the person who receives the child in these circumstances as the custodian

[1] *(1918) 119 L.T.R. 18.*
[2] *(1929) 31 N. L. R. 132.*
[3] *(1941) 43 N. L. R. 129.*
[4] *Lee : An Introduction to Roman Dutch Law, page 42.*

of the child. The Ordinance came into operation on 1st February, 1944 [1]. The delivery of the child in question was in 1947, at a date when the Ordinance was in operation, and section 19 of the Ordinance prohibits any person, subject to certain exceptions which have no application to the facts of the present case, from taking or receiving into his custody subsequent to the coming into operation of the Ordinance a child of which he is not a natural parent unless he has been registered as the custodian of the child. It is not suggested in this case that any certificate of registration has been obtained, and in any event no such certificate has been produced. In fact the attention of neither counsel nor Magistrate seems to have been given to the existence of the Ordinance.

The position in law, therefore, would appear to be that the respondents' custody of the child is illegal as such custody is in contravention of the provisions of the Ordinance, and furthermore they are guilty of the offence prescribed by section 26 of the Ordinance. Their custody cannot, therefore, be continued even if one were constrained to look at the problem from the point of view of what is good for and in the best interests of the child.

In view of the foregoing I grant the application of the petitioner and direct that the child Jehanara Nirmalie Abeyawardene *alias* Jayanthie Jayanayake be restored to the custody of the petitioner, and remit the record to the learned Magistrate for the order to be given effect to by him. The learned Magistrate will report to this court after the order has been executed.

Application allowed.