1947 *Present :* **Soertsz S. P. J. and Canakeretne J.**

DE SILVA, Appellant, *and* DE SILVA, Respondent.

S. C. 362—D. C. Colombo, 720 D.

Husband and wife—Divorce—Custody of child—Religious eduction of child—Husband's right of control.

A father is entitled to control the religious education of his child.

APPEAL from a judgment of the District Judge, Colombo.

F. A. Hayley, K.C., with *H. W. Jayewardene*, for the defendant, appellant.—The District Judge has found that the respondent was not influencing the child so as to be antagonistic to the appellant and that the respondent was particulalry respecting the wishes of the appellant in the matter of the religious education of the child. The judge further held that the respondent was the most suitable persons to have the custody of the child and that appellant was using the child as an instrument with which to harass the respondent. The Judge also in the course of his judgment made some statements commenting adversely on the conduct of the appellant.

Analysis of the evidence shows that neither the findings nor the strictures can be justified in any way. Every single finding on the important questions of fact can be shown to be incorrect.

The appellant never gave up his undoubted right to the legal custody of the child. The appellant obtained the divorce on the ground of malicious desertion by the respondent. The award of Mr W. H. Perera as embodied in the Order of October 13, 1943 referred only to the physical custody, *i.e.*, care and maintenance of the child. Legal custody was always with the appellant. All the relevant documents bear that out. Legal custody is a recognised term for full rights of guardianship See Walter Pereira's *Laws of Ceylon (2nd Edition) p. 173* and Vol. 3 Legislative Enactment p. 682.

The appellant is particularly anxious to have the child brought up as a Buddhist. The appellant undoubtedly has that right, and the District Judge is clearly wrong in allowing full legal custody to the respondent. See *Agar-Ellis v. Lascelles*[1]; *Hawksworth cs. Hawksworth*[2] : *In Re Scanlan*[3].

C. Thiagalingam with *J. Fernandopulle*, for the plaintiff respondent.—The findings in the judgment are correct and should not be set aside. Under the Roman-Dutch Law parental power belongs both

[1] *L. R. (1878) 10 Ch. 49.* [2] *L. R. (1871) 6 Ch. 539.*
[3] *L. R. (1888) 40 Ch. 200.*

to the father and mother. See Lee's *Introduction to Roman-Dutch Law 1915 Edition p. 32.* See also *Simleit v. Cüncliffe*[1]. The child may not always be brought up in the religion of his fether—*Condon v. Vollum*[2].

F. A. Hayley, K.C., replied.

December 11, 1947. CANEKERATNE J.—

This is an appeal from an order of the District Judge. The appellant was the husband of the respondent, and the marriage which took place on June 9, 1938 was dissolved by decree absolute on January 17, 1944, on the ground of desertion by the respondent—decree *nisi* being entered on October 13, 1943, There was one child of the marriage, Sriyan Ranjit, born on July 29, 1939. I do not find it necessary to go into the history of these matters, save in order to set out the nature of one or two orders which must be understood before the position can be appreciated. The appellant was a Buddhist, but appears to have been "eclectic in his views", the respondent was the daughter of a Wesleyan Minister and has always been a practising Christian. The parties separated about March 25, 1943. The action for the dissolution of the marriage—relief being sought by both parties—was set down for trial on October 11, 1943. The appellant's Counsel, according to the finding of the Judge, made a suggestion on this day about settling the question of alimony (to the respondent) and of custody and education of the child. The amount of alimony payable by the appellant was settled almost immediately, the question of custody including up to what point of time the respondent should have the child, and at what age the appellant should have the child was referred by agreement between the parties or their Counsel to a well known member of the Bar.

On October 13, 1943, an order was made for custody of this little child in favour of the respondent for some time with access to the appellant and similarly in favour of the appellant with access to the respondent. The order embodied the terms of the recommendations made by the Advocate in question with certain modifications. On December 28, 1943, the father having then possession of his child under the order made an application that the order giving the custody to the mother should be rescinded and that an order giving the "physical custody" of the child be made in his favour.

On April 18, 1944, the respondent filed her statement in anwser to the petition of the appellant: she also made a counter application, seeking to have the words "legal custody", appearing in the order made on October 13, 1943, deleted and to have an order relating to the care and custody of the child in her favour. On June 20, 1944, the learned Judge had before him the two applications; a good deal of evidence was led at the inquiry. The appellant gave evidence and called two medical witnesses. The respondent gave evidence and also as called witnesses the Counsel who appeared for her at the trial, the Advocate who sent the document X containing the recommendations to the Court and two other persons, all apparently disinterested witnesses. A medical witness also gave evidence on the respondent's side. The learned

[1] *S. A. L. R. (1940) T. P. D. 67.* [2] *(1887) 57 L. T. R. (N.S.) 154.*

Judge after hearing the evidence, seeing the witnesses and considering the conduct of the parties came to certain conclusions. As was inevitable he had to make up his mind on the conflicting testimony and arrive at a decision. His views on the facts were vehemently attacked, but it seems impossible for a Court of Appeal which has not seen the witnesses to reverse his findings on matters which are really pure questions of fact. His view was that there is no foundation for the allegation that the respondent has been bringing up the child so as to be antagonistic to the appellant ; the respondent has after the decree refrained from exercising any religious influence or teaching any religion to the child and has respected the present attitude of the appellant in regard to the child's religion. The learned Judge decided that the mother was the most suitable person to have the custody of the child. In the result the learned Judge varied the order made on October 13, 1943, by ordering the deletion of certain words and restoring the terms contained in the award marked X. Apart from the reasons given by the learned Judge it seems to me that the new terms incorporated in document X on October 13, are unworkable. The Order of the learned Judge will therefore stand.

The other important matter for consideration relates to the religion of the child. The appellant agreed, according to the findings of the learned Judge, that any children of the marriage should be brought up as Christians. The child, it is admitted, was baptized as a Wesleyan and though there is no finding that it was done with his consent, he became aware of it soon after. This, however, would not prevent the appellant from treating the antenuptial promise as void and insisting on his right after the birth of the child to control his religious education—he can determine that the child be brought up as a member of his faith[1]. Since the beginning of the year 1944, the child has been attending Ladies College, Colombo, as a day scholar. The child, according to the learned Judge, had, before the parents separated, learnt some lines of hymns and had seen the mother kneeling at her prayers and was at this time living in a Christian atomsphere. There is no evidence that she instructed the child in the doctrines of her Church or tried to bring him up as a Christian. The learned Judge finds that the mother has not been using her influence since November, 1943, to thwart the father's wishes and plans as to the religious learning and education of the child. That the mind of a child is capable at a very early age of receiving strong impressions upon matters of religion is not to be denied. It is probable if one considers the appellant's evidence that his mind has received some impressions upon religious subjects which are at variance with the faith which his father appears to hold. It is necessary to consider what might be the result of disturbing those impressions. It may be urged that the opinions of a child so young could not be fixed, and that the impressions which this child received might be removed by a different course of instruction. The father's evidence shows that he has been teaching him the precepts of his religion while the child was with him. One question would be whether the attempts to inculcate in him these views might not end in unsettling his impressions, and substituting

[1] *Agar-Ellis v. Lascells (1878) Law Rep. 10 Ch. 49.*

no fixed impressions in thier place. It is, however, a matter for him. If the father comes to the conclusion that it is right and proper for his child's welfare that he should take means of bringing the child in his (the father's) religion he must be left to be the proper judge of that. The respondent should realise that she is not entitled to take the child or cause or procure him to be taken to a Christian place of worship.

Subject to the direction, that the appellant has the right to control the religious education of the child, the appeal is dismissed with costs.

SOERTSZ S.P.J.—I agree.

Appeal dismissed.