

1924 .

Present : Jayewardene A. J.

JOSLIN NONA v. SILVA.

334—P. C. Balapitiya, 44,379.

Maintenance—Order to hand over the child to father—Compliance with order by wife—Appeal—Order illegal—Wife directed to apply for writ of habeas corpus.

The Magistrate in a maintenance case ordered the wife to hand over the child to the father. The mother obeyed the order and appealed.

Held, that the order was illegal; but as the child was already in the custody of the father, the mother was directed to apply for a writ of *habeas corpus*.

THE facts are set out in the judgment.

No appearance for appellant.

Amarasekera, for respondent.

June 23, 1924. JAYEWARDENE A.J.—

This is a claim under the Maintenance Ordinance. The husband had been ordered to pay maintenance to his wife and child in the year 1917. The husband now moves to have the order directing the payment of maintenance vacated, on the ground that the wife is

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living in adultery. The Magistrate has found that the wife is living in adultery, and has cancelled the order for maintenance in her favour. All these years the child, who is a boy now eight years old, had been in charge of the mother, and an application appears to have been made to the Magistrate to direct the wife to hand over the child to the father. This the Magistrate has acceded to, and has directed the child to be handed over, and I find from an entry in the record that the child was, as a matter of fact, on May 14 handed over by the mother to the father in the presence of the Magistrate. This was in compliance with the order of the Magistrate who ordered the mother to bring the child to Court on May 14 to be surrendered to the father. The mother appeals against the order directing the delivery of the child. I think the order of the Magistrate is clearly illegal. He has exercised a power which is vested in this Court, and in this Court alone, by practically issuing a writ of *habeas corpus*. The mother very properly obeyed the order of the Court, although it was illegal, and produced the child to be handed over to the father. It is unfortunate that her compliance with this order should prejudice her legal rights. However, now that the child is in his father's charge, rightly or wrongly, it is a question whether he can be surrendered to the mother except on a writ of *habeas corpus*. I think the proper procedure to adopt would be for the mother to make an application for a writ of *habeas corpus*, if she is so advised. I merely set aside the order directing the delivery of the child to the father, as I do not think it is possible for me to make any further order in the matter in the present proceedings. The appellant has succeeded on the points on which she has appealed, but as there was no appearance for her it is not necessary to make any order for costs.

Set aside.