1932 *Present :* **Jayewardene A.J.**

FERNANDO *v.* FERNANDO.

IN THE MATTER OF AN APPLICATION FOR WRIT OF *habeas corpus*

Habeas corpus—*Children in custody of mother—Application to withdraw them—Moral conduct of mother—Detrimental to interest of children—Discretion of Court.*

A mother may be deprived of the custody of her children where the Court, by reason of her conduct, thinks that it is detrimental to the interests of the children that they should remain in her charge.

THIS was an application for a writ of *habeas corpus.*

Aelian Pereira (with him *N. Gratiaen*), for the petitioner.

E. G. P. Jayetilleke (with him *F. C. W. van Geyzel*), for respondent.

September 12, 1932. JAYEWARDENE A.J.—

This is an application for a writ of *habeas corpus* by Albert Cyril Fernando, Registrar of Births and Deaths, Maradana, asking for the custody of his two children—a girl named Leila Godiva born in 1919, and a boy named Chandra Adam Bede born in 1921. The petitioner is a Sinhalese of the age of 41 years and is practising as a doctor and earning an average net income, according to himself, of about Rs. 7,000 a year. He was married in 1918 to the respondent Zuleika, whose father Mr. Adams, was the bandmaster at one time of the Police Band. He was a Muslim born in Ceylon, his ancestors, according to her, having come from Baluchistan. The respondent's mother was a Burgher lady of Dutch descent, Miss Jansz, a Christian before her marriage. The respondent says that her parents were not orthodox Muslims. Her mother was not in purdah, as Muslim ladies are in Ceylon, but was always the ordinary Burgher lady with European manners. The respondent herself has adopted the ordinary Burgher or European ways of her mother and seems to move about quite freely in all company, male and female, without any sort of restraint whatsoever. She was married to a Muhammadan Bengalee, Mr. Khan, when she was sixteen years of age. She divorced him in three years because she says that his moral behaviour was not very good and he was free with other women. The respondent had been at home, for about three years after the divorce, with her parents, at Dematagoda, when her mother fell ill and the petitioner, the doctor in that quarter, was called in to attend on her. In the result he fell in love with the petitioner, and like King Henry IV of France who thought Paris was well worth a mass, thought her *beaux yeux* were worth a change of faith. He became a Muslim and married her on July 25, 1918. They lived happily for a few years, and then quarrelled. The marriage was dissolved by *tollok* under the Muhammadan law before the priest who married them. The respondent in 1925 filed a case claiming maintenance for the children and was awarded Rs. 100, later raised to Rs. 130. In the

mean while the petitioner applied for the custody of the children, and this Court held that as regards the girl, her best interests would be served by allowing her to be in her mother's charge, provided she was sent to Bishop's College, and as regards the boy who was only 4 years old then, it directed that the boy too should be in the mother's charge till he attained the age of 8 years. Thereafter the petitioner was at liberty to make an application for the custody of the boy, if so advised. The boy was also to be educated and the father was to have access to his children at reasonable times. The petitioner made a second application in respect of the boy in 1927, on the ground of his ill-health, but it was refused.

The present application was made in December, 1931, asking for the custody of both children on the ground that it is detrimental to the interests of the children that they should continue to remain in the custody of their mother. All the questions of law and fact have been exhaustively tried and considered. I am indebted to counsel who have conducted this case with great ability and good taste and feeling.

The Muhammadans are divided into two main sects, Shiahs and Sunnis. There were four distinctive Sunni schools. Muhamed Shafei was the founder of one *circa* A.D. 800. Shafei doctrines are generally followed among the Mussulmans of the Malabar Coast and Ceylon, in Northern Africa, partially in Egypt, in Southern Arabia and the Malayan Peninsula, according to Ameer Ali. (*Muhammadan Law, p. 13, 5th ed.*) From the shores of the Red Sea the course of trade and colonization carried the Shafeite teaching to the east coast of Africa and the west coast of India and thence to the Eastern Archipelago. (*Wilson Ang. Muhammadan Law, p. 14, 6th ed.*) The Muhammadans of Ceylon belong to the Shafei sect. (*Nell's Muhammadan Law, preface ; Rabia Umma v. Saibu*[1] ; *In re Wappu Marikar*[2] ; and *Cassim v. Cassie Lebbe*[3].) In British Baluchistan, from where the respondent's ancestors are said to have come, the Muhammadan law prevails. (*Wilson, p. 80.*)

Generally the right of *hizanit* or care of young children, with respect to a male child, appertains to the mother until he becomes capable of eating, drinking, and performing the other natural functions without assistance. A boy or girl having passed the period of *hizanit* has no option but must remain in charge of the father. Shafei maintains that they have an option to remain with either parent because of a tradition of the Prophet when he gave a boy his choice, having first prayed to God to direct him therein, and the boy then chose under the influence of the Prophet's prayer. The argument of the doctor is that young persons from want of judgment would naturally wish to stay with the parent who treats them with the most indulgence and lays them under the least restraint, wherefore giving them a choice in this matter would not be tenderness but rather the reverse, as being contrary to their interest. (*Hedaya I., pp. 388-390.*) This tradition is "distinguished" on the ground that the Prophet's prayer must have directed the erring choice of a child. The Courts do not, as a rule, consider a male child to have attained the age of discretion so as "to form an intelligent preference" before he is fourteen years old, nor a female before sixteen years. (*Tyabji's Muhammadan Law, s. 262, p. 209.*) According to the Hanafis, a boy

[1] *17 N. L. R. 338.* [2] *14 N. L. R. 225.* [3] *29 N. L. R. 136.*

who elects to remain with his mother is still at his father's disposal for work and study in the daytime. (*Wilson, p. 425.*) The mother's *hizanit* of a male child ends with the completion of his seventh year. Ameer Ali quotes works of great authority as showing that the period when the male infant becomes independent of female care is seven years, as also Dionson, who says, "The mother's right lasts in the case of male children up to the age of seven, eight, or nine years ; in the case of female children until their majority or their marriage (Ottoman law), and at the age of nine a boy passes into the hands of his father, in order to receive from him a masculine education analogous to the paternal status, condition and fortune". The right of the father to take a boy above the age of seven years out of the custody of the mother was affirmed in *Idu v. Amiran*[1] ; and in *Ibrahim Natchia*[2], a Shafei case, a father was allowed custody of his son.

It was held by the Full Court in *re Segu Meera Lebbe*[3] that the father was entitled to the custody of a boy three years old as against the grandmother, Dias J. observing that the father is to be preferred even to the mother. In the present case, however, this Court has directed that the boy was to be in his mother's charge till he attained the age of eight years, and the right of the father to apply thereafter for his custody was specially reserved. The girl was, however, given over to the mother, and it was held that her best interests would be served by allowing her to be in her mother's charge. Where the parents are separated but the mother has not remarried, unless a court orders otherwise, the custody of a girl, according to Shafei law, remains with the mother until she is actually married (not merely until puberty, as with the Hanafis). (*Wilson, p. 424.*)

The petitioner bases his application for the custody of the girl on the ground that it is in her interests that she should be removed from the mother's charge. In appointing a guardian over a minor, the Court is guided by what, consistently with the law to which the minor is subject, appears to be for the welfare of the minor, and it has been said broadly that the welfare of the minor is the paramount consideration. This must be understood with the reservation that the Judges cannot set their own views above those of the legislators. The right of *hizanit* or custody, according to all schools, is lost amongst other reasons (1) by the subsequent marriage of the *hazina* (mother) with a person not related to the infant within the prohibited degrees, (2) by her misconduct, and (3) by her neglect or cruelty to the child. The *dicta* in the *Fatawa-i-Alamgiri* supply the general principle governing these cases by declaring that the misconduct which would disqualify a mother from exercising or claiming the *hizanit* of a child is "such wickedness as would prove injurious to the child". All cases of misconduct do not necessarily destroy the right of *hizanit;* what must be considered is the detriment to the child, the question being, is the woman's misconduct likely to injure the child ? The injury to be considered may be either physical or moral. Improper conduct on the part of a woman disentitles her to claim the right of custody.

[1] *8 All. 322.* [2] *39 Mad. 608.* [3] *9 S. C. C. 42.*

In *Abasi v. Dunne* [1] it was held that the plaintiff was *primâ facie* entitled to the custody of her minor sister, but her bad character and manner of life was held to disqualify her and a sufficient reason for dismissing her claim in the interest of the minor. The principle which should guide the decision of the Judge is laid down in explicit terms in a decree of the Court of Algiers. *" On doit rechercher principalement quel est le principal interest de l'enfant, et dëcider en conséquence à qui, du pére ou de la mère, il duit ètre remis".* All the cases were revieved *in re Saithra* [2] and it was held that the true principle deducible from the authorities is that the Court should judge upon the circumstances of each particular case, and that the welfare of the infant, irrespective of its age, is the main feature to be regarded. If the children be of proper age, the Court gives them the election, but if not, the Court takes care that they be delivered into the proper custody. The age of discretion is usually reckoned as sixteen in the case of females and fourteen in the case of males when they are given a free choice. In two Indian decisions it was held that a minor under fourteen had no will of his own and that his detention against his father's will was unlawful. (*9 Mad. 39 & 12 All. 213.*) In *Gooneratnayake v. Clayton*[3] it was held that the wishes of a minor who was seventeen years of age and had attained the age of discretion should be consulted. In *Queen v. Jayakodi* [4] it was held that the girl had not attained the age of sixteen and her wishes could not be taken into consideration, as she was not of an age to exercise a proper discretion. In *Mohamadu Cassim v. Cassie Lebbe* (*supra*) Lyall Grant J. thought there was no essential difference between the fundamental principles which guide the Court in dealing with the custody of children, whether Muhammadan or not. He adopted the principle laid down in *Rex v. Gyngall* [5] where Lord Esher said that the Court was placed in a position by the prerogative of the Crown to act as Supreme parent of children and had to exercise its jurisdiction as a wise, careful and affectionate parent would act for the welfare of the child. This view was adopted *in re Carroll* [6]. In a recent case *re Ran Menika* [7] it was held by Drieberg J. that the Court could not have regard only to the balance of advantages. The Court must be satisfied not only that the parent has so conducted himself or has shown himself to be a person of such a description, or if placed in such a position, as to render it not merely better for the children but essential to their safety or to their welfare, in some very serious and important respect that his rights should be superseded. According to *Mulla, p. 213, 9th ed.*, even a mother loses the right of custody if she is wicked as where she is a prostitute or a professional singer or has committed theft or other criminal offence, or is otherwise unworthy to be trusted.

It was contended that the petitioner was an apostate. Apostasy is stated in the *Fatawa-i-Alamgiri* as a ground of disqualification. The reason given is that a woman who relinquishes the Moslem faith would be kept in custody till she returned to the Muhammadan faith. But this reason cannot apply in British India, hence it would seem apostasy is no longer a disqualification. (*Baillie, p. 435*; *Wilson, p. 186*; and

[1] *I. L. R. 1 All. 598.*
[2] *16 Bom. 307.*
[3] *31 N. L. R. 132.*
[4] *9 S. C. C. 148.*
[5] *(1893) 2 Q. B. 232.*
[6] *(1931) 1 K. B. 317.*
[7] *12 C. L. Rec. 28.*

Mulla's Muhammadan Law, p. 213, 9th ed.) It was held by the High Court of Bengal in *Muchoo v. Arzoon* [1] that a Hindu father is not deprived of his right to the custody of his children by reason of his conversion to Christianity, but *in re Marim Babu* [2] it was held that a Muhammadan, who had become a convert to Judaism was disqualified by reason of his apostasy from disposing of his daughter in marriage. In *Shamsung v. Santubai* [3] it was later held, following Muchoo's case, that a Hindu convert to Muhammadanism is not disqualified from giving his son in adoption to a Hindu. Mulla thinks the decision in Muchoo's case is the correct one. (*Mulla, p. 183.*)

Three instructive cases have come before the Courts as regards the right to the custody of infants. *In re Saithra* (*supra*) the petition of a Hindu mother was dismissed, who was barely able to maintain herself and had contributed nothing to the child's expenses for eight years. *In re Joshy Assan* [4] a Chinaman, in indigent circumstances, had handed over his infant daughter to a Roman Catholic couple, also Chinese, and after a year demanded the child back. The Court refused the application, guided mainly by what it conceived was best for the welfare of the child. In *Makwood Lal Singh* [5] the child was born and bred in a Hindu family. The father was converted to Christianity and left the boy to his grandfather, and later claimed the custody of his son. This was refused as his means were small and he had abandoned the child whereas the boy's mother's Hindu relations were well off, and treated him well, and as it was for the welfare of the child. The decisions in all these cases would have been the same, if the party claiming the child had been Muhammadan instead of being a Hindu, a Chinaman or a Christian. The Court judicially administering the law cannot say that one religion is better than another. (*Wilson, p. 182.*)

A father who has apostatized, it would seem, is not disqualified from being a guardian and having the custody of his children. Muchoo's case (*supra*) was approved and followed by the Chief Court of the Punjab in *Jul Muhamad* [6] where the claim of the father, a convert from Muhammadanism to Christianity, was upheld. *Ameer Ali* (*p. 393*) thinks that enforcement of the Musulman law in its entirety regarding apostates has become impossible under existing conditions in most countries inhabited by Muslims. A husband abandoning Islam cannot be punished by death; nor a woman abjuring the faith be liable to incarceration. Apostasy has ceased to be a State offence.

Muhammadan law naturally favours the religion on which it is based, but the preference cannot hold in British India (*Makwood Lal Singh v. Nobodip* (*supra*)).

In considering what is the welfare of the child, age, sex, and religion are to be borne in mind. Muhammadan law pays special regard to each of these considerations. The rule of the English law is that the father is entitled to bring up his children in his own religion and he cannot contract himself out of it by agreements whether in consideration of marriage or otherwise. (*17 Hals. 112.*) The father cannot be deprived of the custody of his children purely on the ground of his religious principles, unless

[1] *(1866) 5 W. R. 235.*
[2] *(1874) 13 B. L. R. 160.*
[3] *25 Bom. 551.*
[4] *23 Cal. 290.*
[5] *25 Cal. 881.*
[6] *36 Punj. Rec. 191. Wilson pp. 175 and 176.*

those principles lead to vicious and immoral conduct. (*In re Carroll* (*supra*), and *in re Besant*[1].) The question is complicated in India by the fact that there is no established State religion. The fundamental principles of religion and morality underlying all creeds have of course to be accepted (*Jamsedjhi v. Soornabhai*[2]; *Tyabji, p. 208*).

The respondent admits that her parents were not orthodox Muslims. In my view she is herself not, as shown by the evidnce, an orthodox religionist—nor was the petitioner ever such. The law as to apostasy does not apply to them in its rigour. Commenting on the question of religion Tyabji asks, "If so, then in cases where an apostate or a non-Muslim is the person, that but for his change of religion would be entitled to be guardian, is it still in the discretion of the Court to appoint another person, on the strength of the Guardian and Wards Act, section 17, which requires the religion of the minor to be considered in the appointment of guardians? The Courts as a rule have not troubled themselves about these technical details, but in cases of doubt have fallen back on the principle that the paramount consideration to be regarded is that of the welfare of the child". (*Tyabji, 248, pp. 196 and 206.*) In *Skinner v. Oude*[3], the Privy Council, on an appeal from Allahabad said "In India all or almost all the great religious communities of the world exist side by side under the Imperial rule of the British Government. While Brahmans, Buddhists, Christians, Muhammadans, Parsees, and Sikhs are one nation, enjoying equal political rights and having perfect equality before tribunals, they exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution and disposition of property are all different, depending in each case on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations. From the very necessity of the case, a child in India under ordinary circumstances must be presumed to have his father's religion and his corresponding civil and social status."

The Judicial Committee acted upon the principle that the true rule is that the Courts are to judge upon the circumstances of the particular case what is best for the welfare and interest of the infant and to give their directions accordingly.

In *Witt v. Witt*[4] the Court came to the conclusion that the mother was not a fit person to have the custody of her daughter and that it was desirable that the daughter should be taken away from her, and that it was for the interest of the child that the father should have the custody. It rescinded a previous order giving the mother the child, holding that no hard and fast rule should be laid down as to the custody of the children, but that in every case the Court is bound to do what it conceives to be for the best interest of the children, following the House of Lords in *Symington v. Symington*[5].

The Supreme Court of Ceylon is guided by the Charter and the Roman-Dutch law, and the Ceylon Judges exercise a discretion much larger than the Judges in England. In the case of Kandyans, Muhammadans, and

[1] *(1879) 11 Ch. 508.*
[2] *33 Bom. 122, 394.*
[3] *L. R. 4, P. C, 60.*
[4] *(1891) P. 163.*
[5] *2 H. L. (Sc) 415, 27 Emp. Dig. 460.*

persons under the *Thesawalamai,* the Court will have regard to their laws; but though, by such laws, one relative may have preference over another, the Supreme Court does not necessarily follow that preference. (*In re Aysa Natchia; 1 Thomson 216;* and *Pereira's Laws of Ceylon, p. 116, 2nd ed.*)

I now turn to the facts of the case. The petitioner says that he received two or three anonymous letters about July, 1928, and grew suspicious. He questioned the ayah, Jane Nona, who used to accompany the girl to school, and received information that the respondent used to drink and also receive visits from gentlemen and that stones were thrown at her house at night. He obtained affidavit dated June 22, 1928, from her—P1. She gave evidence before me. She corroborates most of the statements in her affidavit. She says that gentlemen used to come at about 8 or 9 P.M. and remain till 10 or 11 P.M. They are usually received in the outer verandah, but one gentleman Rahim used to go into the room. The respondent's room adjoins the front verandah. Rahim used to come daily in the evening. She had seen her drinking gin. She says that respondent used to go out of her house at night and return late in a rickshaw. Her evidence receives some support from the letters R6, R7, R8, and R9, sent early in 1929 by Rahim to the respondent. In R6 dated February 15, he suffers at the thought that he could not see her on that day, but he will see her the next day. "Have you forgotten what I told you the day before yesterday night?"

The present notice was served on the respondent on January 15, 1932. She seems to have gone almost immediately to Mr. J. M. Pereira, Proctor, and sent the letter R10 dated January 20 to Mr. Rahim. Mr. Pereira wishes Mr. Rahim to call and see him. The respondent says that Rahim had promised to marry her and she wanted to sue him for breach of promise of marriage and therefore sent this Proctor's letter. The letter is silent on this point. If she had married, the question of the custody of the children could have been solved, as under the Muhammadan law she could not be entitled to keep the daughter, after marriage with a stranger.

The two Wijesinghes impressed me favourably. Kumarasiri says that he has seen people coming to the house practically at all hours of the day and night, and sometimes late at night, once on his return from the pictures. He has also seen the respondent smoke. A Muhammadan lady smoking made a bad impression on his young mind. Lalitha Wijesinghe is employed at Messrs. Mackinnon Mackenzie as a typist. He is old enough to form an opinion and made a good witness. He has seen people coming there very late at night, even at 12 P.M. He used to go to the pictures on Saturday nights to relieve the tedium of office work. He has seen Rahim come and leave at about midnight. He thought respondent was living a very fast life. He has seen her smoke. He would not like a young girl to be brought up in such surroundings or even in the neighbourhood, because there is room for anyone, seeing how she lived, to get corrupted. He seems to work hard in his office, about four days in the week till 10 P.M. He had opportunities of seeing the night life of the respondent and of forming an opinion. I cannot accede to the suggestion that these two witnesses have been suborned by the petitioner.

Then there is the evidence of Mr. F. H. P. Gomis, who is a journalist and lives and has the printing press of the *Searchlight* newspaper next door, the 46th lane running between the two houses. His office overlooks the living rooms of her house. He has seen gentlemen call on her at all hours, generally in the evening and somtimes at night. His impression is that she is leading an immoral life. He has not seen her drink, but he gives reasons for thinking that she does. He has seen the rickshaw man bringing bottles of liquor to the house. Mr. Gomes has seen Arti Thomas in the house at all hours of the night and day. On one occasion he saw him early in the morning leaving the room, and his impression was that he had stayed over the night. She used to go out at all hours of the night and return late. He thinks that she may have gone to the cinema. He has also seen Mr. Sabar, a Malay gentleman, coming between 8 and 9 P.M. by car about three times. This is denied by Mr. Sabar. I do not think it is quite necessary to decide between them. Mr. Gomis has six children and one grandchild. He says he was giving evidence in the interests of the two children and solely for their welfare. He says both of them are bright children. I have seen the children and questioned them myself in Court, and I agree with Mr. Gomis on this point. It was suggested that Mr. Gomis was in poor circumstances and was giving false evidence for some consideration. I cannot accept this view. I think Mr. Gomis has spoken the truth. Then as to Carolis, Sewickreme and James Singho, their evidence is grossly exaggerated and on some points untrue. I think the diary P3 was kept and entered by Carolis. It is useful up to a point and it serves to prove that the men were in and out of this house at all hours. I do not believe the evidence of Sewickreme when he says that he peeped through the window and saw Rahim and the respondent in bed. The diary gives the lie to this. The entry is "Edmund and I approached and reached the window. Heard talking very slowly in the room." In examination Sewickreme said, "Later we went up and peeped through the window of the bedroom. Then I saw Rahim and the respondent in bed". On my visit this window was examined, and it is at an inconvenient height for Sewickreme to peep through. It may be true however that Rahim was in the room though not in bed. The diary proves, however, that Artie Thomas was a frequent visitor and this is confirmed by all the evidence. It is said that he was a sort of handy man who did odd household jobs. I feel I cannot give him so subordinate a place in the *menage*. James Singho was a servant boy about thirteen years of age. His evidence must be accepted with great caution. I have grave doubts as to the truth of his statement that he saw Rahim and the lady in bed on one occasion, but I accept his evidence as to the visitors to the house and on points where he is corroborated by other reliable witnesses. He says he has seen the respondent drinking and smoking cigarettes. It would be a matter of some surprise if no liquor at all was ever served when there were so many and such frequent gentlemen visitors. There is no reliable evidence as to actual acts of intercourse, but the respondent was free and intimate with men who even visited her bedroom. The children, especially as they grow up, are bound to suffer by the evil effects of her influence, example and association. I have formed this opinion after hearing the

witnesses and closely scrutinizing their evidence. I have come to this conclusion with regret, but in the interests of the children I have to form and give expression to my opinion.

The witnesses called by the respondent do not prove very much. Their evidence, as far as I accept it, is of a negative character. They have not seen the respondent behave in an objectionable manner. Mrs. Cooke had met Rahim there, but did not know whether he had proposed to the respondent. This seems somewhat strange. She says that Arti Thomas stayed about 2 or 3 hours at a time. The de Ley boys come there at about 6 P.M. Arti Thomas seems to have been the life and soul of the Minstrel Troupe party, when practices were held at this house. H. C. Fernando, the landlord, has often seen Arti Thomas at respondent's house. He used to do odd jobs for her, carry messages and bring his rent sometimes. George Cooke says very much the same thing. According to his wife's evidence, George Cooke led a very quiet life and was hardly ever out at night. I do not think they had many opportunities for seeing or judging what was going on in the house at night. Miss Muriel de Ley and Mrs. de Ley fall under the same category. They have probably seen nothing abnormal. I do not think anything has been proved against Mr. De Jong or Mr. Sabar. As to the drinks, I do not think liquor was promiscuously served, but some of the more intimate friends must have been served with drinks, probably on the Nigger Minstrel nights. I am satisfied that the respondent smokes. although that in itself does not count for much.

The two children have been examined. They are not of an age to exercise any preference, or to know what is best for them. At this age they would enjoy this form of living. They are with the mother and would naturally feel for her. As regards Arti Thomas, he has been employed at the Cargo Boat Dispatch Co. since December, 1930, so that he was employed during a great part of the period relevant to this case. There was no reason why he should do odd jobs for this lady. She was poor enough and there was no reason why he should depend on her bounty. He has been to her house, he says, at eight o'clock in the morning. He admits he has put down some plants in her garden. As between him and Mr. Gomis, I prefer to believe the evidence of Mr. Gomis. He used to keep his bicycle on her verandah whenever he went to the house, on his own admission. There are three or four steps leading to this verandah. I cannot see why he should do this habitually. Both Arti Thomas and Rahim seem to me to have had the run of the house, and invaded even the lady's bedroom. Frank and Ralph de Ley were the stepsons of her cousin. They too were constant visitors. The house was full of young men at all hours of the evening and night. The Nigger Minstrel party used the house for their practices. I have no doubt that it must have ben very enjoyable with Arti Thomas filling the comic role, but in some instances the jokes have to be toned down from their original crudity and are not fit for the ears of young children. The house is small and the children would see and hear almost everything. The cinema seems to have been a source of great attraction to this lady and her friends. I believe that they often used to return late after these shows. The photo P2 shows to what heights in emancipation a *soi-disant* Muslim

lady can attain. It would do credit to an actress or film star but not to a lady in her position, the mother of two children. There is no saree, no head covering, no veil, but a bare suggestion of nudity or impending nothingness.

Most Muslim ladies in Ceylon are secluded from males and are subject to the *purdah* system. They have no opportunities of social intercourse with strangers. I have been told by counsel that Malays are more liberal in this respect, but this lady is not a Malay. The fact is that the respondent's mother is a Burgher lady, and the respondent has adopted some of the European conventions.

The important question is how the children, especially the girl, will be affected by this environment and upbringing.

I have considered the case with great care and almost with anxiety and have been guided by what, consistently with the law to which the minors are or may be subject, appears in all the circumstances to be for their welfare. I have borne in mind the questions of age, sex and religion. It is only in an exceptional case that an order giving the custody of a girl to her mother should be rescinded. In my opinion the evidence has proved that the interests of the children require that they should be removed from the mother. It is particularly so in the case of the girl who is thirteen years of age. In her case I venture to think that the present surroundings are detrimental to her interests and wellbeing. The mother has shown herself unworthy to be trusted with their custody. In one of the leading cases on the subject, *Barnado v. McHugh*[1] (25), Lord Herschell said in the House of Lords, "All the Courts are now governed by equitable rules and empowered to exercise equitable jurisdiction. If it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother, or of any person in whose custody she desires it to be, the Court exercising its jurisdiction as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother". The interest of the child was considered in *re Nona Sooja*[2].

Nothing has been stated against the father. He is leading a respectable life and is earning a good income. He has sent his car to take the children to school, although not required to do so. He is devoted to his children and seems a kind father. He can make the necessary arrangements for their comfort and will I have no doubt, do so. In *Makwood Lal Singh v. Nobodip* (*supra*) Maclean C.J. remarked that the Court must consider the welfare of the minor in its widest sense, and looking not only to the question of money and comfort, but to the moral and religious welfare of the child and to the ties of affection, and pointed out that the Court, judicially administering the law, cannot say that one religion is better than another. In *King v. Greenhill*[3], Lord Denman C.J. said that the proper custody is undoubtedly that of the father.

In my view, in the present case neither the father nor the mother was an orthodox Muhammadan at any time, but whether the Muhammadan or the Common law applies, the mother by her conduct has dis-entitled herself from keeping the children.

[1] *(1891) A. C. 388. 398.*

[2] *32 N. L. R. 63.*

[3] *4 A. and E. 624 (634-42).*

The mother is entitled to access to her children at all reasonable times. The petitioner expressed, at my request, his willingness to make her an allowance, but I cannot make any binding order in this respect.

I order that both children be given over to their father. The boy will go to Royal, and the girl to Bishop's College as before.

Application allowed.