1941 *Present* : Nihill J.

SAMARASINGHE *v.* SIMON *et al.*

In the Matter of an Application for a Writ of *Habeas Corpus* No. 1,087.

Habeas Corpus—*Custody of child—Surrender of custody to another—Right of parent to claim the child back—Good ground for disturbing* status quo—*Restoration of custody not detrimental to best interest of child.*

Where a parent has surrendered the custody of a child to another, the mere assertion of his natural right is not sufficient to entitle him to claim back the child. The Court will not disturb the *status quo* unless there is good ground for doing so.

A good ground is that it would not be detrimental to the best interests of the child that she should return to her home.

THIS was an application for a writ of *Habeas Corpus* asking for the custody of a child, who is ten years of age and who has been with the respondents since she was an infant. The matter was referred to the Magistrate's Court of Colombo for inquiry. The Magistrate recommended that the prayer of the applicant be granted but that the respondents should be given three months' time to hand over the custody of the child.

L. M. D. de Silva, K.C. (with him *Dodwell Gunawardana* and *A. H. C. de Silva*), for the respondents, was called upon to begin, in view of the Magistrate's recommendation in favour of the petitioner.—The child has been in the custody of the respondents from her earliest infancy. There are no circumstances now needing any change, and the only ground for the present application is the assertion of a parental right. It is, however, the welfare of the child which is the paramount consideration. The bias of the law in favour of the father disappears under the conditions which exists in the present case. If a parent surrenders his child to a foster-parent, it is necessary for the former to show strong ground for the existing relationship to be disturbed. *Mathieson v. Napier*[1] is exactly in point. See also *Rex v. Walker et al.*[2]. *Thain v. Taylor*[3] can be distinguished because in that case there had not been and surrender. The ordinary rights of a father, apart from any question of surrender, are considered in *Ran Menika v. Paynter*[4]. As to how far the wishes of the child may be consulted, see *The Queen v. Gyngall*[5] and *Gooneratnayake v. Clayton*[6]. No good ground has been shown by the petitioner why the existing state of things should be disturbed.

N. E. Weerasooria, K.C. (with him *E. F. N. Gratiaen* and *C. J. Ranatunge*), for the petitioner.—Parental rights and liabilities, whether in English law or Roman-Dutch law, cannot be irrevocably surrendered or transferred—*Vol. I. of Encyclopaedia of the Laws of England (3rd ed.), p. 166; Humphrys v. Polak*[7]; *Besant v. Narayaniah*[8]; *Lee's Introduction to Roman-Dutch law (3rd ed.), p. 42.* In fact there was no abandonment

[1] *(1918) 119 Law Times 18.*
[2] *(1912) 28 T. L. R. 342.*
[3] *(1926) 135 Law Times 99.*
[4] *(1932) 34 N. L. R. 127.*
[5] *L. R. (1893) 2 Q. B. 232 at p. 250.*
[6] *(1929) 31 N. L. R. 132.*
[7] *L. R. (1901) 2 K. B. 385.*
[8] *(1914) 30 T. L. R. 560.*

in the present case. The evidence shows that the respondents always recognized the right of the petitioner to the custody of the child. In *Mathieson v. Napier* (*supra*) there was a finding that the return of the child to its natural parent would be injurious to the child. That is not the position here. The two homes offered are equal, but ours has the additional advantage that the child would have the company of her brother and sisters. *Thain v. Taylor (supra)* is more in point. With regard to the rights and duties of a father in respect of his child, see *In re Agar-Ellis* [1]. The present aversion of the child for the petitioner can be easily overcome by the co-operation of the foster-parents.

L. M. D. de Silva, K.C., in reply.—The submission that the authority given by a parent to another to bring up the child is revocable is correct for the purpose of maintenance only and not for the purpose of custody.

To sum up the principles established in the English cases, the indigent circumstances of a parent alone constitute a sufficient cause for refusal to restore the child.—*The Queen v. Gyngall (supra)*. This is so, quite apart from surrender. Secondly, where there is a surrender of the child, the situation is altered. The onus is no longer on the respondent to establish the parent's indigence. The principles that govern them are: (*a*) Before the father can obtain the custody he must establish good ground, of a positive character, as to why the existing condition should be disturbed, (*b*) mere absence of reason why the father should not have the child back is not a sufficient ground. Even in *Ran Menika v. Paynter (supra)* there is a dictum of Drieberg J. that where there is surrender the case would be different from an ordinary one.

Cur. adv. vult.

December 11, 1941. NIHILL J.—

This is an application for a writ of *Habeas Corpus* by Robert Earnest de Silva Samarasinghe asking for the custody of his child Ranee who is ten years of age and who has been with the respondents since she was an infant. The matter was referred to the Magistrate's Court in Colombo for inquiry. The respondents contested the applicant's right to have the child and contended that such a change would be detrimental to her best interests.

A great volume of evidence was led on both sides, and the learned Magistrate at the conclusion of a lengthy report has recommended that the prayer of the applicant should be granted but that the respondents should be given three months' time to hand over the custody of the child. Although the present proceedings are in no sense an appeal from the Magistrate's inquiry I should be reluctant to disturb any findings of fact arrived at as the Magistrate who had the witnesses before him, particularly as it is evident that in the case this learned Magistrate has addressed himself with great care to the evidence.

In fact I should like to say that this Court is indebted to the way in which the learned Magistrate has fulfilled his duty in this difficult and distressing case. It is a thousand pities that all efforts to arrive at an amicable settlement have failed.

[1] *(1883) 53 L. J. Ch. 10 at p. 18.*

Whenever litigation is started which involves something in the nature of a conflict of wills there is always a danger that the voice of reason will be stilled by the heat of the contest but in this instance, I should be reluctant to conclude that either party is actuated by any other reason than what they believe will conduce to the best interests of this child, for whom both profess great love and affection. In the result however a burden has been placed upon me which I must discharge to the best of my ability and with I hope a correct appreciation of the legal principles involved.

I am conscious that my decision for better or worse must have serious repercussions on this family that have brought their troubles to Court I still think it would have been better had the parties, who are closely knit by ties of kinship, found their own solution of this very human problem but as that is impossible, then I can only hope, that they will having left the matter to this Court, not allow themselves to be estranged by my decision but will co-operate together to ensure that its consequences will be beneficient.

The facts which have resulted in the present situation can be briefly stated as follows:—The petitioner married in 1927 and lost his wife suddenly after an operation in 1932. He was left with four very young children to bring up. He was not particularly affluent and he was planting at Akuressa. I think one can well understand that under difficult circumstances he did the best thing in seeking the help of his relations. He and his wife had several brothers and sisters married and holding good positions in life and it was agreed that different members of the family should have the care of these young children suddenly left motherless. Ranee was given to the respondents—Dr. and Mrs. de Simon. Mrs. de Simon was a sister of the petitioner's wife.

There was some conflict of evidence at the inquiry as to the precise nature of the terms on which the respondents took over the charge of Ranee, but the learned Magistrate found, and I accept his finding, that she was given over on the understanding that she would not be claimed back at any time.

It is conceded that the petitioner has never contributed to her maintenance. The respondents were childless themselves and they seem to have lavished every loving care and attention upon the little infant which Fate had so unexpectedly bestowed on them. As Ranee grew out of infancy she called the respondents "Mummy" and 'Daddy" and till this day she thinks of them as such. Her own father to her is "Uncle Wolly" and she is now perplexed by his strange desire to get hold of her. It is this factor that makes this case so particularly distressing.

The petitioner has never married again and as his circumstances improved there is evidence that he has made investments on behalf of his children including Ranee. Two or three years ago he was able to give up his lonely life at Akuressa and take a house in Colombo, where he lives with his mother, a lady of about seventy years of age.

He then seems to have conceived the idea that he should gather his children together under his roof. He has been successful with his three other children and now Ranee only remains outside the family fold and ignorant of the true position of affairs.

From the correspondence produced before the Magistrate it appears that when the respondents realized that the petitioner seriously meant to have his child their resistance to the idea hardened, and entreaties soon turned to a flat refusal. In (P 9) which was written on March 24, 1941, the petitioner seems to have felt that he could then count on the co-operation from the respondents because he thanks them both for the consideration they have shown and their promise to help.

It seems to me pretty evident that at that time the respondents were not unmindful of a father's natural rights in his child. What has happened I think is that faced with the dread prospect of separation they have not been able to face the sacrifice involved.

The correspondence also shows something else, namely, that though there may have been a surrender of the infant Ranee to the respondents there never was an abandonment, an abandonment I mean in the sense that an unwanted child may be given over to adoption by complete strangers to the natural parents. This I think is evident by the contents of (P 7). This was a letter written to the petitioner by Dr. de Simon on January 24, 1938, when he was contemplating a visit to Egypt as the Ceylon Delegate to an International Leprosy Conference. He wrote then: "I am making arrangements to take Ranee with me" and adds a few lines lower down: "I fully trust that you will have no objection whatsoever". I am not suggesting that this was not a very proper attitude of Dr. de Simon's but it was not the attribute of a foster-parent who recognized no right over Ranee other than his own. The petitioner replied by his letter (P 8) of February 14, 1938: "I see no reason to object to your taking her along with you if you think she would not in any way be a burden to you when you are there".

No father who felt and knew that he had abandoned all rights and interest in his child would have written thus. I regard (P 7) and (P 8) as important because they were written some time before the letters which have led directly to the present impasse.

That in 1938 the respondents felt themselves to be more in a position of custodians or trustees for the father than as persons who had stepped completely into the shoes of the natural parents helps to differentiate this case from the *Walker Case*[1]. There three Judges of the King's Bench refused an application from the parents for delivery up of their ten year old child who had been adopted by the Walkers when a few weeks old. The child had been born out of wedlock and the parents did not marry till several years later. The foster-parents were complete strangers to the natural parents, Mrs. Walker having obtained the infant through the instrumentality of her doctor following the birth of a stillborn child to her.

There was not much to choose between the social positions and circumstances of the parties, indeed there was a suggestion that the child

[1] *(1912) 28 T. L. R. 343.*

would ultimately benefit financially by the change as the natural mother expected to come into a considerable sum of money on the death of the grandmother. Mr. de Silva relied on on this case to show that it is not enough for the natural parent to show that he can provide as good a home and that the ties of affection which naturally spring up between a child nurtured by forster-parents should not in the best interests of the child be lightly disturbed. The Judges clearly decided against the natural parents in the *Walker Case* (*supra*) because on a review of all the circumstances they could not bring themselves to find that the change would be best for the benefit of the child. Even so Mr. Justice Pickford who, although he concurred, expressed grave doubt as to whether the facts really justified the Court in overruling the rights of the mother He agreed however that the Court could overrule such rights

My study of the English cases cited to me and some others háve shown me that there is really no ambiguity as to the legal principles which the Court must bear in mind. One starts with the assumption that the natural parent has a natural right. In certain circumstances that right will be paramount, in others it will not. Where there has been a surrender or an abandonment the mere assertion of the natural right will not be sufficient. In such a case the touchstone will be what is best for the interests of the child and the Court will not lightly disturb the *status quo* unless it is satisfied that there is a good ground for doing so. Something that is likely to be conducive to the true benefit of the child would be such a ground, something that will be clearly detrimental will operate at once against the claim of the natural parent.

Keeping these principles in mind I will now address myself to the facts of the present situation. Let me consider first what the father has to offer. He offers a home and admittedly a good home in Colombo, a home which Ranee will share with her own brothers and sisters. He has an income which should be sufficient to maintain Ranee in much the same way as she has been accustomed to. Her education will not be prejudiced as she will continue to attend the same school. He wishes to be in a position to bestow on her the natural love and solicitude of a father. No doubt it will take time for Ranee to adjust herself to her new environment and the process may involve a degree of emotional shock and distress. I will consider that later. Putting it aside for the moment, there cannot otherwise be discovered anything on which I could find that the change would be calculated to injure the best interests of this child. But I will go further than that. Mr. de Silva has argued strongly that the judgment of Mr. Justice Eve in *Mathieson v Napier and wife*[1] which was upheld in appeal demonstrates that where there has been a surrender it is not enough for a father merely to show that there is no reason why he should not be given his child back so far as he personally is concerned; he has to make out some good ground why the existing state of affairs should be disturbed. Swinfen Eady L.J. in the appeal that followed in stating the law did not in terms place quite so high a burden on the natural parent, but he did not dissent from the view expressed by Mr. Justice Eve and I am content to accept it as a principle upon which the Chancery Judges in England would act.

[1] *(1918) 119 Law Times Rep. 18.*

The question then is, has the petitioner in the present case made out a good ground for a disturbance of the *status quo*? Mr. de Silva would have it that a "good ground" must mean that the natural parent must show that a continuance of the *status quo* will be detrimental to the child. I think that is putting it too high. I would put it thus. It is not sufficient for a natural parent merely to say "I am the father, nothing is known against me. No one can say that I shall not be a good father as far as I am personally concerned".

No, he must do more than that. He must place all his cards on the table, reveal all the circumstances, show that those circumstances will not be injurious to the best interests of the child. If he can do all that then no Court I think can take upon itself to overrule the rights of a father, rights which lie deep down at the very roots of human society. For it he can do all that, can it be said that it is not "*a priori*" a "good ground" that a child should know its true status and be given an opportunity of coming to its true and rightful home?

In the case before me I cannot find any evidence to show that apart from disturbance to the child's present equanimity there are factors which point to the change being likely to be detrimental. On the contrary there is one factor which should be beneficial. Ranee is one of a family of four children. She has a brother who is now fourteen. She has a sister who is twelve and another sister who is about a year her junior. At present she only knows these children as her cousions. She has met the girls at school and has no strong opinion about them. She likes Joyce "a bit" and does not like Nalini. Is it not to her interest that she should know these children as her own brothers and sisters, grow up with them, share in their games and interests, build up with them all the hundred and one associations which help to form the ties that keep families together?

Mr. de Silva has argued that all this is speculative and to disrupt the ties of affection that bind Ranee to her foster-parents for the, at least doubtful benefit that association with her brother and sisters might bring, will not be in her best interests. In this matter I think I must take a long view. It is certain that Ranee must know the truth some day, but she may know it too late to build up the kind of relationship which should keep and does keep in normal cases, brothers and sisters close to each other through life.

Where other things are at least equal should I be right by my order to deprive Ranee of her opportunity of creating ties which should persist throughout the lifetime of her generation and will be there when she no longer requires the care and solicitude of either natural or foster-parent? I cannot bring myself to think that I should. I have said enough then to indicate that so far as the circumstances of the father are concerned I am of the opinion that the return of Ranee to her proper family unit will not be injurious and is quite reasonably likely to be beneficial.

There remains however another factor to be considered. It is inevitable that any change in her present status must cause a degree of shock to Ranee and may cause her acute distress. The learned Magistrate saw the child and recorded evidence from her. She made it quite clear to

him that she did not want to leave her "Mummy" and "Daddy" and that she did not want to go to "Uncle Wolly". Of course she was produced from the custody of her foster-parents but even so there is no reason to suppose that the expression of her wishes is anything but genuine. It would be unnatural if it was otherwise. Not too much weight should be placed on this aspect of the case but I agree, that if the medical evidence showed clearly that Ranee was an abnormal child upon whose mental life such a sudden shock would work irremediable harm, I should hesitate to grant, as I believe the petitioner himself would hesistate to press, this application. In fact the medical evidence shows nothing of the sort. Ranee has had her illnesses but all the doctors agree that she is now a normal healthy child.

No less than seven eminent medical men gave evidence before the Magistrate. Four were called by the respondent and three by the petitioner. Dr. Goonewardene, who may be called the respondents' family physician, gave details of Ranee's medical history. Apparently, before her visit to Europe she was a somewhat delicate child and there was at one time a suspicion of a tubercular infection. On her return from Europe Dr. Goonewardene found her quite a healthy child.

He says "She overcame all her ailments. In March, 1941, she had a sharp illness due to some bowel trouble, probably dysentery". She ran a high temperature and it was during this illness that she showed signs of having developed what has been called a fear complex towards "Uncle Wolly". She had a dream in which "Uncle Wolly" took her away in a sack. She was terrified and upset but she has had no recrudenscene of this dream.

As the Magistrate points out in his report "It is important to note that the frightening dreams only occurred after the petitioner demanded the custody of this child".

Dr. Goonewardene when asked his opinion as to the wisdom of Ranee leaving her foster-parents thought that if she was removed at once without taking gradual steps to effect the parting her nervous condition would be aggravated and she "*might* be upset mentally". He admitted that the company of her sisters would be to her good rather than to her harm.

Dr. Seneviratne, a visiting physician to the Colombo General Hospital, has also attended Ranee from time to time. He was called in during the March illness. He thinks that because of this illness in March and the bad dreams it is inadvisable for Ranee to leave her present home. In considering this doctor's evidence I think it must be remembered that he is a friend of the parties and is a person who from the first tried to persuade the petitioner not to get any of his daughters back. He seems to have been just as anxious about Joyce and Nalini as he is now about Ranee. Although he will not say that the petitioner's experiment has so far succeeded, he admits that he has seen the other two girls since at parties when he noticed that they were well dressed and playing about happily. In passing I should say here that not a scrap of evidence has been adduced to show that the going back of Joyce and Nalini has been detrimental to either.

The next medical witness called by the respondents is an acknowledged expert in mental diseases, namely, Dr. C. O. Perera, the Superintendent of the Mental Hospital at Angoda.

At the request of the respondents he examined Ranee in June of this year. He says he found her a perfectly healthy normal girl physically and mentally, but he was told about her dream history. In his evidence-in-chief proceeding on the supposition that her hallucinations about "Uncle Wolly" were not due to any toxic condition (although they occurred during an illness) he has sketched certain dire consequences which might result to Ranee's mental development if fear and anxiety are allowed to produce certain complexes.

The learned Magistrate has been criticized by counsel for the respondents for stating in his report that he does not believe that the dire consequences envisaged by Dr. C. O. Perera are likely to occur. I must say that the learned Magistrate's belief, in view of the medical evidence called by the petitioner, appears to me to be a sensible one. Furthermore taking this expert's evidence as a whole I think it is clear, that his forecast as to what may happen to Ranee is based very largely on the supposition that there will be no co-operation from the foster-parents if Ranee leaves them. To accept that supposition would be to accept a very low view of Dr. and Mrs. de Simon, and it is one which I see no reason at all to take.

I am perfectly confident that the respondents will accept the order of this Court distressing as it will be to them, and having accepted it, will do all they can to ease the position for the child they love.

The last medical witness called for the respondents was Dr. Ratnavale, who is the holder of a certificate granted by the Royal Medico-Psychological Association. He examined Ranee on three occasions in July of this year. He examined her at the instance of the petitioner who paid him a fee. He told the petitioner that he would be no partisan in the matter and this honourable attitude subsequently permitted this witness to take a fee similar in amount from the respondents to whom he gave the Report (R 17). To one unversed in psychological terms the report may at first sight appear a little alarming.

Bereft of such terms I should translate it as being a certificate to the effect that Ranee is an essentially nice child. It is only fair however to say that Dr. Ratnavale did detect in her a sentiment of fear of being removed by Uncle Wolly—"who thus appears to her as a person from whom she should be protected". In his evidence Dr. Ratnavale gave it as his opinion that a forcible removal of the child will be detrimental because it will create a conflict in the mind of the child.

Again as I have observed when considering Dr. C. O. Perera's evidence, much will depend upon the attitude of the respondents. If their cooperation is secured there will be no forcible removal of Ranee.

I now turn to the medical evidence adduced by the petitioner. His first witness was Dr. S. C. Paul, who is a Fellow of the Royal College of Surgeons. He does not profess to be a medical expert but he is a medical man of wide experience and has, he says, treated a large number of children

in the course of his practice. He is also incidentally a father of nine children himself, all of whom he has brought up to his entire satisfaction. He examined Ranee in June, 1941, and found her a bright and intelligent child. When he examined her "Uncle Wolly" was patting her on the head and she showed no sign of being afraid of him. This witness perhaps because he is the fortunate father of nine children has strong views about the hardships endured by the only child. His opinion is that it is likely to do Ranee more good to learn the truth and to be brought up in a family association with her brothers and sisters than to remain in what he seems to think may be the "cotton wool" atmosphere of the respondents' home.

The next witness was Dr. C. C. de Silva, who has attended special courses in children's diseases both in Vienna and London and who has more or less specialized in such since his return from Europe. He also examined Ranee in July and was given her medical history. Admitting that Ranee may have a fear complex about the petitioner it is this doctor's opinion that the complex can easily be removed by intelligent handling.

He is certain that the knowledge that the petitioner is her father will help her to get rid of her fears. His general view is the same as Dr. Paul's and he concludes his evidence as follows:—"The difference between permanent parting and a temporary parting is one of degree. If the petitioner is given the custody of the child the respondents should be allowed to see the child. In my study of child psychology I have not come across a single case where it is not desirable for a child to know her blood brothers and sisters. It is absolutely essential that a child should associate with her brothers and sisters if she has them. The only child is a problem in child psychology".

Lastly we have Dr. I. A. Senanayake who is the Assistant Superintendent at the Mental Hospital, Colombo. He is well qualified in mental diseases but has not examined Ranee. He did however either hear or has read all the medical evidence given in this case. He too stated that a fear complex in a child was the simpiest and easiest complex to get over. He thinks it would be definitely harmful to Ranee to keep the truth from her and considers that she should be told "that Uncle Wolly whom she is so averse to is really her father—that he is not a malignant being but her own benign father".

I have gone into this mass of medical opinion at length in order to satisfy myself that on medical grounds no abnormal factors exist which would outweigh and overrule all other factors in this case.

On a careful review of that evidence I cannot find such a factor. Both the petitioner and the respondents are to be congratulated that Ranee is in fact a normal healthy intelligent child. No doubt since March she had gone through trying experiences. It can do no child good to be aware of whispering and antagonism in the home and her frequent examinations by medical men however eminent and however suave may well have caused a vexation of spirit to this lively child. Ranee may have one more ordeal before her but when this is over I feel I am justified in thinking that she will settle down.

I have already alluded to the fact that the Magistrate has seen Ranee and taken evidence from her. I have considered carefully whether it was my duty that I should myself see this child in my Chambers but I have come to the conclusion that it is not necessary. She has been seen by the learned Magistrate who is a gentleman belonging to the same community and it is hardly likely that she would open her mind any more to me whom she might regard as a very strange person. I do not wish to be responsible for the creation of any more fear complexes. She has told the Magistrate that she does not want to leave Dr. and Mrs. de Simon and that she is apprehensive about Uncle Wolly's intentions towards her. I might remark that she does not say she does not want to join her own father because, of course, she thinks that Dr. de Saram is her real father.

Ranee is not yet of an age when her wishes can be a conclusive factor. Her wishes are really immaterial but they are entitled to be taken into consideration when determining what is really for her welfare.

That this is a principle followed by the Chancery Judges in England will appear from the two following citations. *In re Agar-Ellis*[1] Brett M.R. at page 14 said :—

> "It is the universal law of England that if any one allege that another is under illegal control, he may apply for a writ of *Habeas Corpus,* and have the person so alleged to be in illegal custody or under illegal control brought up before the Court. But the question for the Court is, whether the person is in illegal custody without that person's consent. Now up to a certain age infant children cannot consent or withhold consent. They can object or they can submit, but they cannot consent. The law, because the Court cannot inquire into every case, has fixed on a certain age—in the case of a boy at fourteen, and in the case of a girl at sixteen—up to which the Court will not, upon an application for *Habeas Corpus* as between father and child, inquire as to whether the child does or does not consent to remain in the place where it may be."

And in the *Gyngall Case*[2] Kay L.J. after quoting the above passage said at page 251 :—

> "When one comes to consider what it is that the Court of Chancery has to determine and what the main consideration in exercising its jurisdiction was, viz., what was really for the welfare of the child, whose interests were being discussed, it is obvious that if the child were of any reasonable age, the Court would hardly desire to determine the question without seeing and speaking to the child and ascertaining its own views on the matter. So again and again in such cases, where the child was not of very tender years, the practice has been that the Judge himself saw the child, not for the purpose of obtaining the consent of the child, but for the purpose, and as one of the best modes, of determining what was really for the welfare of the child . . . . ".

Ranee is well under sixteen years but she is of a reasonable age to be

[1] *(1884) 53 Law J. . . d p. 18.*

[2] *(1893) Law Rep. Q.B. Vol. 2. p. 232.*

interviewed and this has been done. The learned Magistrate having seen her and listened to what she had to say has felt it his duty to recommend her return to her natural parent.

I feel certain that had some special factor emerged from his inspection of the child which had not appeared otherwise from the evidence the learned Magistrate would have noted it and taken it into account before reaching the conclusion that it will not be injurious to the best interests of Ranee that she should be handed over to the petitioner.

The English principle that the wishes of a female infant under sixteen will not be taken into consideration on an application for a writ of *Habeas Corpus* except in the sense that I have indicated has been followed in our Courts as the judgments delivered in *Gooneratnayaka v. Clayton* [1] illustrate. That case is also useful because one of the points argued was whether the Roman-Dutch law or English law was applicable. Fisher C.J. was of the opinion that the Court in exercising the jurisdiction given it by section 45 of the Courts Ordinance of issuing "mandates in the nature of writs of *Habeas Corpus*", the Court should apply English law when considering the question submitted to it. No doubt this Court would also have regard to the personal law applicable to the parties before it. No difficulty of that nature exists in the present case as all the parties are Christians and it has not been suggested during the course of the argument before me that I am not free to follow the general principles laid down by the Judges in England when exercising their Chancery jurisdiction. Learned Counsel on both sides have also agreed that there is no recorded case in Ceylon where the facts are near enough to those existing on this application to be of service as a guide in showing me what decisions any of my predecessors might have come to if faced with similar facts.

I have already set down the principles which I think emerge from the English decisions and I need not restate them. In the *Mathieson v. Napier Case* [2] and in the *Gyngall Case* [3] the Court refused the application of the natural parent but on the facts as recorded in the reports of those cases it is easy to see the reason for the decisions. Thus in the former case Swinfen Eady L.J. was satisfied that "it would be very detrimental and very injurious to the best interests of the child".

Likewise in the *Gyngall Case* (*supra*) the natural mother was a person "struggling with adversity" and the child who was very nearly sixteen wished to stay where she was. The Court had therefore no difficulty in finding that it would be detrimental to order any change.

There is one other case which I think I should mention because it was relied on by the learned Magistrate. This is *Thain v Taylor* [4]. Mr. de Silva has pointed out that on the learned Magistrate's finding of fact that the petitioner did surrender Ranee to the respondents this case has not the applicability which the Magistrate has seen in it. It may be that the Magistrate has overlooked this distinction but it does not I think follow that the case is of no assistance to us in the present instance. In many respects the facts are similar. There too the natural father had lost his

[1] *(1929) 31 N. L. R. 132.*
[2] *(1918) 119 Law Times Rep. 18.*
[3] *(1893) Law Rep. Q. B., Vol. 2, p. 232.*
[4] *(1926) Law Times Rep. Vol. 135, p. 99.*

wife in child-birth and had handed over his infant daughter to his wife's sister and her husband. When she was seven years old he wanted her back. A difference is that the father had regularly sent remittances for the keep of his child but it is also clear from the facts reported that the foster-parents regarded the child as theirs by adoption and thought that the father had deliberately surrendered paternal rights.

The Court came to the conclusion that it was in the true interests of the child that she should return to her father and ordered accordingly. I cannot refrain from quoting the same passage from Lord Hanworth's judgment (at page 103) as has been cited by the learned Magistrate because it is precisely what I wish to say on the present application but which I might express in less felicitous language :—

> "I appreciate the skill of Mr. Maugham and Mr. Robertson in their presentment of the case and their care of the feeling of the husband and the parties in this appeal. It is said that the child is now with her maternal aunt and that the present wife of her father has not had touch with the child. At some time the father and his daughter ought to be brought in touch together, so that the happy relationship of father and daughter may be established. Mr. Maugham has clearly stated that he does not disregard the rights of the father to the custody of the infant at some time. At what time ? Is the child to be left with the Jones' until she becomes more and more accustomed to her aunt and uncle ? Both sides are of the highest moral character but I think that the child ought to be brought into contact with her father, and in the interests of the child that should be now, at the present time, and the child be given an opportunity of coming into her rightful home. I agree with the judgment of Eve J. and see no reason to disturb it. The true interests of the child are that she should be guided to feelings of love and respect towards her father, with gratitude to the Jones'—and I hope that the parties will be careful to put no impediment in the way of this, so that the child may have, in effect, two happy homes that will be to her true advantage . . . . ".

Having reached a similar conclusion, namely, that it will not be detrimental to the best interests of Ranee that she should return to her rightful home and having found that the petitioner has shown a good ground for a disturbance of the *status quo* I am bound to support the recommendation of the learned Magistrate.

To help to meet some of the fears expressed by the medical witnesses the Magistrate has recommended that a period of three months should be given to the respondents. I accept also the recommendation but I only do so because I feel I can place reliance in Dr. and Mrs. de Simon. If I thought that they would use the period to poison the mind of Ranee against the petitioner I would in Ranee's interests order an immediate giving up to the petitioner.

I order therefore that this child Ranee de Silva Samarasinghe be given over by the respondents to the custody of the petitioner on or before March 12, 1942.

As the learned Magistrate who concluded the inquiry is no longer on the Magisterial Bench I shall not return the papers to the Magistrate's Court. If any question arises in which either party require directions, application can be made to a Judge of the Supreme Court in Chambers.

With regard to costs, no doubt, the petitioner has been put to considerable expense in order to obtain his child. At the same time he must bear in mind that he is under a deep debt of gratitude to the respondents for having maintained his daughter for so many years without expense to himself. Under these circumstances therefore I do not propose to make any order as to costs.

Rule made absolute.