1895.
July 1.

GUNAHAMI *v.* ARNOLIS HAMI.

P. C., Galle, 16,926.

Maintenance—Ordinance No. 19 of 1889—Res judicata—*Rejection of evidence—Dismissal of former applications for maintenance—Admission that applicant is the wife of respondent.*

The question of paternity once tried and determined in a prosecution under the Ordinance No. 19 of 1889 could not be litigated a second time ; but the refusal of an order for maintenance under the above Ordinance against a husband for deserting his wife, on the ground that it had not been proved that he had deserted, or that there was no proof that he had sufficient means, would not be a bar to a subsequent application in respect of a subsequent desertion, or in case the husband subsequently acquired means.

Where the Magistrate declined to receive in evidence for the defence certain cases which had the effect of *res judicata*, and which had been brought by the respondent against the appellant and been dismissed, and made an order against the appellant under section 3 of the Ordinance because the appellant admitted the respondent to be his wife—*Held*, that the appellant ought to have an opportunity of showing what was decided in the previous cases, which might or might not afford reason for refusing the present application.

THE appellant in this case was the respondent in a prosecution under the Ordinance No. 19 of 1889, wherein the applicant, who is the wife of the respondent, applied for maintenance of her child. The respondent did not deny that the applicant was his wife, but by way of defence stated that she had previous to this made three similar applications, which were dismissed, and which had the effect of *res judicata*.

The Police Magistrate refused to admit in evidence the previous cases, as the respondent admitted the applicant to be his wife, and made an order against the respondent under section 3 of the Ordinance.

The respondent appealed.

H. Jayawardena, for respondent, appellant.

1st July, 1895. BONSER, C.J.—

In this case the appellant was ordered to pay a monthly sum for the maintenance of the respondent, who alleged that she was his wife. The order was made under section 3 of Ordinance No. 19 of 1889. The appellant, by way of defence, stated that three previous applications of this kind by the respondent had been made and dismissed, but, as he appears to have admitted that the respondent was his wife, the Police Magistrate seems to have declined to receive evidence of the former cases, and made the order in appeal.

Now, it was argued to-day by the appellant's counsel that the refusal of an order of this kind was an absolute bar to any subsequent application, and he relied upon the case of *Rankiri v. Hattena* (reported in *1 C. L. R. 86*) and the case of *Wijeyasuriya Arachige Podihamy v. Wijeyasuriya Arachige Marthelis Gooneratna* (reported in *5 S. C. C. 231*) as authorities for the proposition. Those cases were cases in which it had been found that the defendant was not the father of the bastard for whose maintenance an order was sought, and it was held in both cases—and, if I may say so, rightly held—that question of paternity having once been tried and determined could not be litigated a second time. But I do not understand those cases as deciding that, if a Court refused an order against a husband for deserting his wife on the ground that it had not been proved that he had deserted, or that there was no proof that he had sufficient means, that such a refusal would be a bar to a subsequent application in respect of a subsequent desertion, or in case the husband subsequently acquired means. In the present case, if any of these prior applications were refused on the ground that the respondent was not the appellant's wife, that would be conclusive. I think that the appellant ought to have an opportunity of showing what was decided in the previous cases, which may or may not afford reason that the present application should be refused.

The case will go back in order that the appellant may have an opportunity of proving these previous orders.