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EINA *v.* ERANERIS.

P. C., Balapitiya, 20,220.

Maintenance—Scope of the Maintenance Ordinance—Position of the Defendant—Nature of order of Magistrate dismissing application for maintenance—Appeal therefrom to the Supreme Court.

The Maintenance Ordinance is not one dealing with criminal matter, but it provides a speedy and less expensive way of enforcing a civil obligation resting on the father of a child, whether born in or out of wedlock, to maintain it.

Maintenance cases, being civil in their nature, should be decided according to the balance of evidence, and not on the footing that the innocence of the "accused" is to be assumed until the contrary is proved.

Maintenance is usually given to the mother on behalf of the child, but if she is unfit to receive the allowance, the Magistrate may order it to be paid to a person more fitted to have the care of the child.

Semble, per BONSER, C.J.—A Magistrate's order dismissing the application for maintenance is an appealable order.

Selestina v. Perera (*2 C. L. R. 88* and *1 S. C. R. 224*) questioned.

THIS was a case of maintenance. The Police Magistrate, after hearing some evidence, made order as follows: "I dis- "charge the accused. The evidence does not warrant me in "making an order of maintenance."

The petitioner applied to the Supreme Court to call for the record and consider the case in revision, because (1) she was advised that no appeal lay against any order on the part of the Police Magistrate refusing to make an order in the case; and (2) there was ample evidence that the defendant was the father of the child and had failed to provide for its maintenance.

BROWNE, A.J., after calling for the record and perusing it, directed the case to be listed for revision and notice thereof to issue to the defendant. The Police Magistrate was also requested "to inform the Court why he considered the evidence did not "justify his convicting the accused."

The Police Magistrate submitted a report, in which he reviewed the evidence and concluded as follows:—

"I do not think the evidence is sufficient. Possibly the child "may be the respondent's. He certainly never maintained it, as "he is said to have deserted applicant immediately after the birth. "I think it very doubtful, too, if he maintained applicant before "the birth. The two parties live closely together and they are "relations. Doubtless respondent visited applicant's house and "had meals with the family, but to construe this as keeping the "applicant is unjustifiable.

" It is of course hard on applicant, if the respondent is the " father of her child. But I regard the Maintenance Ordinance as " especially made for those unfortunate women who have lived " with a man for years to all intents and purposes as his wife and " then been deserted, and not for those who have received visits in " their own house by a young man and have conceived a child, and " then been abandoned by their paramour. In such cases, mainte- " nance is not given. It is mere seduction, and not maintenance. " In such cases, I regard the woman as being to blame as much as " the man. It is their own incontinence that is at fault, an incon- " tinence such as I do not think the Maintenance Ordinance is " meant to encourage.

" Certain suspicions have been cast on applicant's character " sufficient at any rate to show she was open to temptation, though " not enough to show her as a loose woman.

" The respondent should have the benefit of the doubt. Not " believing the evidence, it was unnecessary for me to call upon " the defendant."

The case in revision came on before the CHIEF JUSTICE on the 15th June, 1900.

Allan Drieberg appeared for the applicant. [BONSER, C.J.— Why was there no appeal in this case?] Because the Police Magistrate was supposed to have made no order in the case. *Selestina v. Perera* (*1 S .C. R. 224* and *2 C. L. R. 88*), decided by BURNSIDE, C.J. (1892), shows that an order dismissing an application for an order of maintenance is not appealable by the applicant, as the order amounts to an acquittal. [BONSER, C.J.— Mr. Justice LAWRIE dissented, and his opinion seems to me to be clearly right. What is the ground of revision?]

After hearing applicant's counsel his lordship called upon respondent.

Jayawardena, for respondent, referred to section 17 of the Maintenance Ordinance, and section 407 of the Criminal Procedure Code, 1883, and contended that the order amounted to an acquittal, and the sanction of the Attorney-General was necessary for an appeal.

BONSER, C.J., discharged the order made by the Police Magistrate, and remitted the case for trial in the following judgment:—

This is a case which has been set down for hearing in revision by Acting Justice BROWNE. The application was one

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under Ordinance No. 19 of 1889, by the mother of an illegitimate child for an order against the alleged father for a monthly allowance for the maintenance of the child. The mother swore that the defendant was the father of her child, and she called various witnesses to corroborate her as to the fact of the intimacy between them. The Magistrate, without calling upon the defendant for his defence, made an order refusing the application. The only reason he gave was this: "The evidence does not warrant "me in making an order for maintenance. I discharge the "accused." The Magistrate was called upon to make any observations he might have to offer on the case, and after reading his observations I think he has entirely misconceived the scope of his Ordinance.

As I said before, this Ordinance is not one dealing with a criminal matter, but it provides a speedy and less expensive way of enforcing a civil obligation, which under the Common Law of the Island rests on the father of an illegitimate child. The law says that every father is bound to maintain his children, and that irrespective of the fact whether they were born in lawful wedlock or not. He is the efficient cause of these children being brought into the world, and it is his duty to see that they do not become a burden to the community. The Police Magistrate has evolved a theory of the object and scope of this Ordinance which is peculiar to himself. He says in the course of his observations: "I regard the "Maintenance Ordinance as especially made for those unfortunate "women who have lived with a man for years to all intents and "purposes as his wife and then been deserted, and not for those "who have received visits in their own house by a young man "and have conceived a child, and then been abandoned by their "paramour. In such cases maintenance is not given. It is mere "seduction, and not maintenance. In such cases, I regard the "woman as being to blame as much as the man. It is their own "incontinence that is at fault, an incontinence such as I do not "think the Maintenance Ordinance was meant to encourage." If the Police Magistrate had read the Ordinance with any care, he would have seen that the allowance is not to be made for the benefit of the woman. No doubt, in most cases, she makes the application, being the person most nearly concerned in the welfare of her child, but the Ordinance is careful not to give her any interest whatever in the monthly allowance. The maintenance is to be given for the child, and it is not necessary that it should be paid to the mother at all. If the mother is unfit to receive it, the Magistrate may order it to be paid to a person more fitted to have the care of the child. The Ordinance provides for maintenance

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to be paid to such person as the Magistrate from time to time may direct. So that the observations of the Magistrate are beside the point and are based on a complete misconception of the object of the Ordinance. Holding those views and looking at the matter as personal benefit sought by the woman, whom the Magistrate seems to regard as in some way a joint tort feasor, it is no wonder that he has arrived at the conclusion he did.

And, again, from his language, in which he speaks of the defendant as an accused, it seems to me that he approached this case in a wrong spirit. Instead of regarding this as a civil matter to be decided according to the balance of evidence, he treated it as a criminal matter, in which the innocence of the accused is to be assumed until the contrary is conclusively proved.

The proper order to make will be to discharge the order made by the Police Magistrate and to remit the case for trial. Probably it would be more satisfactory that it should go before a Magistrate who has formed no opinion on the case, and I send it back to be tried by the Police Magistrate of Galle.

I see that the complainant did not appeal. That was probably due to the report of a case contained in *2 C. L. R. 88*, where the majority of the judges of this Court were of opinion that no appeal lies from an order dismissing the application for maintenance. But that case is of no authority, for it is stated in the report that it was decided without argument, and the utmost, therefore, it can claim is to be regarded as a pious opinion. I see that Chief Justice BURNSIDE there said: "The Police Magistrate said the "application is dismissed, and I construe that to mean 'I make no "order.'" I should prefer to construe it to mean "I make an order "dismissing the application," and I should say an appeal did lie. But that is merely an *obiter dictum*, for the point has not been argued before me. At the same time I wish to place on record my opinion that the question is still open, notwithstanding that reported decision.