1899.
January 31.

SUBALIYA *v.* KANNANGARA.

P. C., Balapitiya, 17,054.

Maintenance order in Police Court case—Res judicata—*Civil liability of father to maintain his illegitimate child—Right of mother to sue the father civilly.*

A Police Magistrate having condemned the putative father of a child to maintenance, the Supreme Court quashed the order on the ground that it had not been proved that he had neglected or refused to maintain it.

Held, that this order was not *res judicata* as regards the question of paternity; and that, if the Magistrate's order was quashed because it had not been proved that the infant was the child of the appellant, it would have been a bar to any subsequent application.

But the question whether the father refuses or neglects to maintain his child is one that may be raised from time to time, according to the circumstances of the case.

Per BONSER, C.J.—The foundation of the jurisdiction of the Police Court in matters of maintenance is the civil liability of the father already existing under the Roman-Dutch Law, wherein the mother can on behalf of the child compel the performance of this duty by a civil action. The Ordinance No. 19 of 1889 provides a simpler, speedier and less costly remedy.

Rankira v. Kiri Hattena (*1 C. L. R. 86*) questioned.

IN this case of maintenance, when defendant was called upon to "show cause why he should not be convicted," he referred to an order made by the Supreme Court in case No. 16,395, whereby the order of the Police Magistrate directing the defendant to pay Rs. 3 monthly to the complainant for the maintenance of her child was discharged.

The Police Magistrate, finding that the judgment of the Supreme Court not merely discharged the order of the Police Court, but quashed it, resolved "to continue those proceedings and make an order in the case."

After the case for the applicant was closed the Magistrate recorded as follows: "The defendant makes no statement nor offers himself to be examined in defence, or calls any witnesses." The Magistrate, therefore, condemned the defendant to pay Rs. 3 per month to the applicant for the maintenance of the child.

Defendant appealed.

Van Langenberg, for appellant, cited *Rankira v. Kiri Hattena* (*1 C. L. R. 86*).

No appearance for respondent.

31st January, 1899. BONSER, C.J.—

This is an application by a young woman for a maintenance order against the appellant, whom she alleges to be the father of her illegitimate child.

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The appellant appeared at the hearing of the application, and by his proctor contended that the application was barred, and that the matter was *res judicata* and could not be re-opened. The Magistrate decided against him, and the appellant took no further part in the proceedings. The Magistrate heard the application and decided that the defendant was the father of the child, and that he did neglect and refuse to maintain it, and made the order appealed from.

The first question was whether the contention of the appellant, that the matter was *res judicata*, can be sustained or not. It appears that a previous application had been made by the mother against the appellant, which was allowed. The appellant then appealed to this Court, and the order was quashed, not on the ground that the appellant was not proved to be the father of the child, but on the ground that it had not been proved that the appellant had neglected or refused to maintain it. Now, with all respect to my learned brother who so decided, I must confess that I cannot follow the reasoning by which he arrived at this result. It would appear, according to the statement of the mother, that she being a girl of fifteen or sixteen was seduced by the appellant. Her mother apparently knew of this and did not object. When the child was born, the appellant professed himself willing to marry her, but her father and her brothers refused to allow the marriage because they disapproved of the character of the appellant. The judgment contains these words:—"It was not the appellant who "broke off the marriage. How then can it be said that he refused "or neglected to maintain the child in those circumstances?" Now it seems to me that he did refuse and neglect to maintain the child, for he was willing to maintain it only on condition that he should be allowed to marry the mother, a condition which, in my opinion, he had no right to impose. If a man of bad character seduces a girl, he surely would not escape all responsibility for the maintenance of his child because the father refuses to commit the welfare of his child into unworthy hands. However this may be, it seems to me to be quite clear that there was no decision upon the merits of this case adverse to the mother. I venture to think that the opinion of Mr. Justice CLARENCE, in the case of *Rankiri v. Kiri Hatana* (*1. C. L. R. 86*), that proceedings under this Ordinance are of a civil nature, is to be preferred to that of the other members of the Court who took part in the decision. The late Chief Justice based his judgment upon what appears to me to be an obvious misstatement of the law. He says that there is no civil liability on the father to support his illegitimate family. Now Voet (*lib. 25, tit. 3, sec. 5*) thus states the

law:—*Inter eos qui ad alimenta præstanda ex officio pietatis devincti sunt, sic ut ad id cogi possint, et ea negantes necare videantur ex primo loco occurrit pater; quippe qui liberos alere tenetur sive suos sive emancipatos; sive ligitime natos sive naturales.* He further goes on to say that the liability extends even to the father's heirs. The same law is laid down in Van Leeuwen's *Censura Forensis, bk. I., chap. X., sec. 1.* It seems to me that the mother can on behalf of the child compel the performance of this duty by a civil action. The Ordinance provides a simpler, more speedy, and less costly remedy. It seems to me that the foundation of the jurisdiction of a Police Court in these matters is the civil liability already existing—the Ordinance simply provides a speedier process. That being, so there is no principle on which it can be said that the order of the Court made on a former application is a bar to a subsequent application. There has been no decision in the present case, as I said before, adverse to the mother. If this Court had held that the order must be quashed because it had not been proved that the child was the child of the appellant, then I should have been of opinion that the order would have been a bar to any subsequent application: that would have been a determination once and for all of a fact which is the foundation of the proceedings. But the question whether the father refuses or neglects to maintain his child is one that may be raised from time to time according to the circumstances of the case, as I intimated in a recent case, *Gunahami v. Arnolishami* (*3 N. L. R. 128*).

Then the question arises, ought the Court to interfere with the proceedings of the Magistrate in this case? I am asked to send the case back in order that the appellant may litigate the matter and produce evidence as to the paternity of the child. Two Police Magistrates who heard the case have found as a fact that the appellant is the father of this child. It is true that on the second occasion the appellant took no part in the trial after his plea of *res judicata* was over-ruled.

He did not ask for a postponement in order to appeal and take the opinion of this Court as to the Magistrate's decision over-ruling his plea, but he allowed the case to proceed.

In these circumstances, I do not think that it would be right to send the case back to allow the appellant to adduce evidence which he deliberately refrained from adducing when he had the opportunity of doing so.