1902.
June 2.

TISSEHAMY *v.* SAMUEL APPU.

P. C., Matara, 7,839.

Maintenance Ordinance, No. 19 of 1889—Magistrate declining to make order for maintenance—Appeal to Supreme Court.

The order of a Magisterate who, after hearing evidence in a case of maintenance, declines to make an order for maintenance, is one that is appealable to the Supreme Court, under section 17 of the Ordinance.

THE applicant prayed for an order of maintenance in terms of section 3 of Ordinance No. 19 of 1889, alleging that she was the "kept wife" of the respondent; that she was unable to maintain the child born of him; and that he had refused to give her maintenance, though able to do so.

After hearing evidence, the Police Magistrate declined to make an order for maintenance, not being satisfied that the respondent was the father of the child.

Applicant appealed.

The case came up for argument in appeal before Middleton, J., but in view of conflicting decisions brought to the notice of the Court by the counsel for the respondent, his Lordship directed that the question should be considered and disposed of by the Collective Court. The case accordingly came on for hearing before Moncreiff, A.C.J., Wendt, J., and Middleton, J., on the 2nd June, 1902.

Walter Pereira, for respondent.—There is no appeal in a case like this. The decisions of the Supreme Court are conflicting on this point. The earliest, decided in 1892 by three Judges, is in favour of the respondent (*Fernando v. Iamperumal, 2 C. L. R. 89*). There it was held that no appeal lay against an order of the Magistrate refusing to make an order. For nine years afterwards the point does not seem to have come up or been questioned. But in 1900, in *Eina v. Eraneris (4 N. L. R. 4)*. *Bonser, C.J.*, doubted the correctness of that decision, and in 1901 Browne, J., held that such an order was appealable (*Perera v. Pody Singho, 5 N. L. R. 243*). Under section 3 of the Ordinance No. 19 of 1889, the only order that can be made by the Magistrate is an order allowing the application, and section 17 gives an appeal against the order. There is no other order possible. [WENDT, J.—If the Court is satisfied, it may make order allowing maintenance. Those words imply that, if it is not satisfied, it may make order refusing to make any order.] It is submitted that such an implied power is not to be presumed, and there can be no appeal unless the right of appeal is expressly given.

1902.
June 2.

Prins, for appellant, relied on the judgment of Bonser, C.J. in *Perera v. Pody Singho*. In Fernando's case, reported in *2 C. L. R. 88*, the order was, " the application is dismissed." Burnside, C. J., interpreted that to mean, " I make no order." Here the Magistrate declines to make the order for maintenance, which is tantamount to dismissal of the application. The order there was entirely different from the order here. Section 17 says that any person who shall be dissatisfied with any order under section 3 ..... may appeal. Burnside, C.J., thought that, while giving a Magistrate power to make an order granting the application, the section impliedly gave him power to make an order refusing to allow maintenance. The order of refusal is therefore an order under section 3, and any order under that section is appealable under section 17.

2nd June, 1902. NONCREIFF, A.C.J.—

I have no doubt that this objection is not good. The appellant in the Police Court of Matara prayed for an order of maintenance upon the defendant. The Magistrate, after inquiring into the matter and hearing evidence, said, " I decline to make an order for maintenance." The applicant appealed, and an objection was taken *in limine* to the effect that no appeal lay from what is not, strictly speaking, an order under the Maintenance Ordinance, No. 19 of 1889. That point was referred to a Court of three Judges by the presiding Judge for argument.

The sole question is whether what the Magistrate said in this case is an order under section 14 of the Ordinance. The course of the matter seems to be this. The applicant goes to the Magistrate and asks for an order of maintenance, and upon that application he first of all examines the applicant, and if he thinks there is no ground for the application, he may, in the words of section 14, make an order refusing the order of summons. Then, when the matter is inquired into, if the Magistrate thinks that the application is well-founded, he may order the defendant to make an allowance that is provided for under section 3. but in that section there are no words referring to the refusal of the Magistrate to make the order as being in itself an order. Now, section 17 provides that any person who shall be dissatisfied with any order made by a Police Magistrate under section 3 may appeal to the Supreme Court. It is to be observed that the words used in this section are not " an order made under section 3," but " any order under section 3." For the respondent. Mr. Pereira relied upon the judgment in the case of *Fernando v. Iamperumal*, reported in 2

1902. *June 2.* MONCREIFF, A.C.J.

C. L. R. 86, in which, Mr. Justice Lawrie dissenting, Burnside, C.J., and Withers, J., held that no appeal lay where in a similar case the Police Magistrate had said, " the application is dismissed," and in referring to those words the Chief Justice said, " I construe them to mean ' I make no order,' consequently no appeal lies." Mr. Justice Withers agreed with him. But, as Bonser, C.J., pointed out, the matter was not argued before Mr. Withers, and the judgment of the majority can only be regarded as a pious opinion. Since then, in a case reported in *4 N. L. R. 4*, and in another case reported in *5 N. L. R. 243*, Bonser, C.J., expressed a very clear opinion that the Ordinance does give an applicant the right of appeal, although the Magistrate may not have in precise language declared that he made an order dismissing her application.

I have no doubt at all that Bonser, C.J., was right. The mere fact that nothing is said about an order of dismissal under section 3 does not establish that a refusal does not involve an order. In my opinion, it is not necessary for the Legislature to add what was obvious without further expression in words. Moveover, as pointed out by Mr. Prins, section 17 speaks widely, not of the order or of an order, but of " any order under section 3."

The mistake in this case, I think, has been due to too implicit an obedience to words. Words are very useful servants, but they are bad masters, and Burnside, C.J., I think, was misled by the form of section 3 into holding what was inconsistent with sense. It used to be a common endorsement on a summons in the English Courts, " No order." That simply meant that the application was refused, but I have never heard it suggested that it did not amount in reality to an order of refusal. I think that this objection should not be made. The case will go back in order that the appeal may be heard before the Judge who referred this matter to the Court.

WENDT, J.—

In this matter the Magistrate, after hearing evidence, said that he declined to make an order for maintenance. He was proceeding to ascertain whether there were grounds for ordering the defendant to make an allowance to the complainant under section 3 of the Ordinance, and his order was not a refusal to exercise jurisdiction, but to exercise it in the complainant's favour, for he proceeded upon the finding that the applicant had to his mind failed to prove that the defendant cohabited with her, and that he was the father of the child. I understand it to be a final order disposing of the application as against the applicant, whether that be couched

1902.
June 2.
WENDT. J.

in the language of a form of dismissing the application or declining to make an order. The simple question is whether such an order falls within the terms of section 17, upon which the applicant must rely for the right of appeal. I am of opinion that it does.

It seems to me that in enacting in section 3 that the Magistrate upon proof of certain things might make an order for maintenance, the Legislature also impliedly enacted that, if not so satisfied by proof, the Magistrate might refuse to make the order, and that is what I understand him to have done here. And his order falls within the terms "any order under section 3." I think the reasons for this view are admirably stated by Mr. Justice Lawrie in the last paragraph of his judgment in the case of *Fernando v. Iamperumal*, and these reasons acquire additional weight from the concurrence with them of the late Chief Justice of this Court. I therefore concur in the order proposed by my Lord the Chief Justice.

MIDDLETON, J.—

The question in this case, as I understand the applicant, is whether the words used by the Magistrate on the occasion when he dealt with this case amount or not to an order, and if they do amount to an order, whether it is such an order as is appealable.

The words he used were, "I decline to make an order for maintenance." Now, I view any expression of opinion amounting to a final decision by a Magistrate as of necessity amounting to an order. To my mind there is no particular virtue in the words which he uses, but he must from his office naturally either order that a thing is to be done, or that it may not be done. In the case here, although he used words perhaps of an ambiguous character, it seems to me that what they really amounted to was, "I order that this application be dismissed"—on whatever grounds he chose to dismiss it. Now, if these words amount to an order, I have no doubt that, under section 17 of the Ordinance, it is an order which is appealable. That section says that any person who shall be dissatisfied with any order made by a Police Magistrate.....may appeal. For these reasons, and for the reasons that have been given by the late Chief Justice Bonser in paragraphs 4 and 5 of his judgment in the case of *Perera v. Pody Sinho*, reported in *5 N. L. R. 243*, I am of opinion that this is a case which should be allowed. I agree with the observations that fell from my brother Wendt and my Lord.