1907.
May 21

*Present:* Mr. Justice Wood Renton.

LUCIYA *v.* UKKU KIRA.

*P. C., Gampola,* 38,723.

*Maintenance—Child in arms—Father's liability—Ordinance No. 19 of 1889, s. 3.*

Under the provisions of Ordinance No. 19 of 1889 (Maintenance Ordinance) the father of a child is bound to pay for its maintenance even where such child is being nursed by the mother and requires no food other than that which it derives from her.

Dictum of Bonser C.J. in *Sethu v. Janis*[1] disapproved.

Judgments of the Full Court in *Lawarinahami v. Pedro Appu*[2] and *Madalena Fernando v. Juan Fernando*[3] distinguished.

APPEAL from an order of the Police Magistrate condemning the defendant to pay a sum of Rs. 2.50 monthly for the maintenance of his illegitimate child.

The facts and arguments fully appear in the judgment.

*B. F. de Silva,* for the defendant, appellant.

21st May, 1907. WOOD RENTON *J.*—

The appellant was sued in the Police Court of Gampola under section 3 of the Maintenance Ordinance, 1889 (No. 19 of 1889), for neglecting to maintain a child, of which the applicant alleged him to be the father. The Police Magistrate ordered him to pay a monthly sum of Rs. 2.50, by way of maintenance, until the child attained the age of ten years. The only ground on which the appellant challenged this order in his petition was a denial of the paternity. I see no reason to differ from the finding of the Police Magistrate on that point. It is true that the applicant seems to be a woman of loose character. But there was ample corroboration of her evidence, if the witnesses who furnished it were to be believed.

At the argument before me, however, the appellant's counsel took a fresh point. It would appear that the child in question was only about three months old at the date of the Police Magistrate's order. It was urged, therefore, on the strength of the decision of Sir John Bonser C. J. in the case of *Sethu v. Janis*[1] that, in view of its tender age, the child presumably was being nursed by the mother, and that, therefore, it needed no maintenance at the hands

[1] (1896) 2 *N. L. R.* 103. [2] (1884) 6 *S. C. C.* 75.
[3] (1884) 6 *S. C. C.* 76.

1907
*May 21.*
WOOD RENTON J.

of the father. Apart from authority, I should have said that this contention was negatived by the language of section 3 of the Maintenance Ordinance itself. It appears to me that the Ordinance imposes upon the father of every child under the age of 14 years, whether legitimate or illegitimate, the duty of maintaining it, provided that the child is "unable to maintain itself." The question whether the mother is nursing the child is no doubt an element, of which the Court should take account, in fixing the amount of the maintenance. But it has, in my opinion, nothing to do with the inception of the father's liability. By the very terms of section 3 of the Ordinance of 1889 the test of that liability is the ability of the child to maintain itself. The section clearly points to cases in which a child, although under the age of fourteen years, is earning its own livelihood, and in which therefore it would be unfair to burden the father with the expense of supporting it.

It seems to me that all that an applicant under section 3 of the Ordinance of 1889 has to prove is, (1) that the respondent is the father of the child; (2) that the child is of tender years within the meaning of the Ordinance, and is in fact unable to maintain itself; (3) that the respondent is neglecting or refusing to support it; and (4) that he has sufficient means to enable him to do so. If these facts are established, the applicant's right to an order for maintenance is made out. It then becomes the duty of the Police Magistrate to consider what amount of maintenance ought to be allowed. In dealing with that issue he has the right to take into his consideration all the circumstances of the case before him: the means of the respective parties, the age of the child, and the question of the maintenance it actually requires. It appears to me that for this purpose the term "maintenance" should be taken in its widest sense. A child has a right to shelter, to clothing, and, if necessary, to medicine as well as to food; moreover, if the mother is in fact nursing the child, she is herself entitled to additional sustenance if she needs it, and such sustenance is, within the meaning of the Ordinance, a necessary part of the maintenance of the child.

It is in this way that I should construe the Ordinance, in the absence of judicial authority imposing upon me a contrary interpretation. The only direct decision that I have been able to find under the Ordinance of 1889 is that of Sir John Bonser in the case of *Sethu v. Janis*,[1] to which I have already referred. It was there held by the learned Chief Justice that where a child needs no maintenance other than the sustenance afforded by the mother, no order should be made against the father under section 3 of the Ordinance of 1889. It would appear from the terms of the judgment in this case that Sir John Bonser considered that the word "maintenance" might well include other elements than food,

[1] (1896) 2 *N. L. R.* 103.

for he sent the case back for inquiry as to whether any maintenance except the sustenance of the child by the mother was needed. So far, therefore, he does not contradict the view that I have already expressed as to the scope of that term in the Ordinance of 1889. If he intended to go further and to hold that where a woman is nursing her child, and where the child requires no food other than that which it derives from her, she has no claim as against the father, on the child's behalf, to any allowance for the purposes of her own sustenance, I can only say, with the greatest respect, that I do not agree with him, and that I must decline to follow his decision.

The appellant's counsel urged that in the class of life to which the present parties belong the cost of clothing an infant child was so small that it would practically be disregarded. That is a circumstance of which the Police Magistrate can take account in determining the amount of an allowance. It cannot affect the construction of an enactment of general application.

The only other cases on the point now in issue are a group of decisions reported in 6 *S. C. C.* 75 and 76 (P. C., Negombo, No. 52,743; P. C., Negombo, No. 53,680; P. C., Negombo, No. 53,288), in which it was held (in two cases by the Full Court) that on a charge of maintenance brought by the mother of a child still in arms, the father could not be held criminally liable for not maintaining it, so long as it required no nourishment except that derived from the mother. If these decisions had been *in pari materia*, they would, of course, have bound me. But they were given under a provision in the Vagrants' Ordinance, 1841 (No. 4 of 1841), section 3, sub-section (2), which imposed a criminal liability upon a father whose neglect to maintain his child made it "chargeable to others." It is true that the reasoning in these cases proceeds to some extent on the same lines as that of Sir John Bonser in *Sethu v. Janis*. But the Judges who had to construe the Ordinance of 1841 had not before them the test of liability created by section 3 of the Ordinance No. 4 of 1889, namely, the question whether the child is "unable to maintain itself." I hold, therefore, that the decisions above mentioned in the three Negombo cases are not binding upon me, and I dismiss the present appeal.

*Appeal dismissed.*