Present: The Hon. Mr. J. P. Middleton, Acting Chief Justice, and Mr. Justice Pereira.

Dec. 31, 1909

JANE RANASINGHA *et al. v.* PIERIS.

D. C., Kandy, 19,627.

Action for past maintenance by wife and child against husband and father—Not maintainable.

An action for recovering past maintenance cannot be maintained by a wife against her husband, nor by a child against its father, where they have been maintaining themselves from their own earnings or property.

THE plaintiffs appellants (mother and child), sued the defendant, respondent (father of the child), for recovering from him the sum of Rs. 500 for past maintenance. They averred in the plaint that the defendant deserted them and refused to maintain them, and that they were obliged to maintain themselves from April, 1907, to November, 1908. Judgment was entered for the plaintiffs.

The defendant appealed.

H. A. Jayewardene, for the appellant.—Plaintiffs cannot sue for arrears of maintenance. The Common Law right of action has been abolished by the Maintenance Ordinance, No. 19 of 1889 (see *Menikhamy v. Loku Appu*,[1] *Anna Perera v. Emaliano Nonis* [2]). The full Court refused past maintenance to a Kandyan wife (see *Yadalagoda v. Herat* [3]).

Bartholomeusz, for the respondents.—The Maintenance Ordinance deals with future maintenance only. The Common Law right of action for past maintenance has not therefore been taken away by the Ordinance. If Bonser C.J. held in *Menikhamy v. Loku Appu* that the Common Law right of action for maintenance was abolished, he has held in a later case that the civil action may still be maintained by a child to recover maintenance from the father (*Subaliya v. Kanangara* [4]).

Jayewardene, in reply, cited *1 Nathan 110-11 and 1 Maasdorp 232.*

Cur. adv. vult.

December 31, 1909. MIDDLETON A.C.J.—

This was an appeal against an order made in an action brought by a mother and minor child against the husband and father for maintenance previous to their action, holding on an issue of law

[1] *(1898) 1 Bal. 161.*
[2] *(1909) 12 N. L. R. 257.*
[3] *(1879) 2 S. C. C. 33.*
[4] *(1899) 4 N. L. R. 121.*

Dec. 31, 1909

MIDDLETON A.C.J.

Jane Ranasinghá v. Pieris

whether the plaintiffs can maintain the action that such an action can be maintained. It was contended for the appellant that the case was governed by the decision in *Menikhamy v. Loku Appu*,[1] approved of by Wood Renton J. in *Anna Perera v. Emaliano Nonis*,[2] and we were referred to *1 Nathan 110-111*, founded on *Voet 25, 3, 15*, and *1 Maasdorp 232*.

Menikhamy v. Loku Appu was an action for past and present maintenance by a deserted wife, and the Court held there that the plaintiff's rights were governed by Ordinance No. 19 of 1889, and that no civil action lay for maintenance. On the other side we were referred to *2 S. C. C. 33* and *4 N. L. R. 121* as supporting the view adopted by the learned District Judge. In *2 S. C. C. 33* a Kandyan woman was awarded future maintenance pending desertion, but not granted past maintenance, by a judgment of the Full Court. In *4 N. L. R. 121 Bonser C.J.* appeared to think that the mother could, on behalf of the child, compel the performance of the duty of maintenance by a civil action, for which Ordinance No. 19 of 1889, founded on this civil liability, provided a simpler remedy. The dictum of the Chief Justice did not, I think, refer to past maintenance.

Under the English Law neither a child nor a wife has a Common Law right enforceable by legal proceedings to be maintained by father or husband (*Bageley v. Fordew*,[3] per Cockburn C.J.). Their rights to maintenance depend on Statute Law. Under the Roman-Dutch Law a father is liable to support his children where they have not sufficient means for their own support (*Nathan, vol. I., 107*, founded on *Voet 25, 3, 5*). If the father is too poor and the mother has means, she may be called on to do so (*Nathan, vol. I., 108; Voet 25, 3, 6*).

There is no obligation to support if the children can maintain themselves sufficiently from what they have already received from their mother or other resources (*Nathan, vol. I., 111; Voet 25, 3, 15*). But children could not proceed at law against their parents except with the leave of the Court, which was termed *venia agendi* (*Pereira, vol. II., 68*, founded on *Van der Linden 1, 4, 1*).

In none of the Roman-Dutch text books to which I have access, including Van der Linden, Grotius, Van der Keesel, Nathan based on Voet, and Van Leeuwen, can I find it distinctly laid down that the husband is liable to maintain his wife, but the doctrine of community which applies to the case even of a wife not possessing any property of her own (*Nathan, vol. I., 230; Voet 23, 2, 64, 70*) implies that the husband is bound to maintain his wife, as Mr. Walter Pereira in his book (*vol. II., 150*) opines, so long as she remains faithful to the marriage vows. A claim for maintenance, of course, implies that the claimant has no means of her own.

[1] *(1898) 1 Bal. 161.*

[2] *(1909) 12 N. L. R. 267.*

[3] *(1868) L. R. 3 Q. B. 559.*

This is the Common Law applicable to children and wives, which was supplemented by the Vagrants' Ordinance, No. 4 of 1841, and again by Ordinance No. 19 of 1889. This latter Ordinance only contemplates maintenance being granted from the date of the order, section 3.

In the present case we have a wife and child, apparently Low-country Sinhalese, suing for past maintenance, and therefore subject to Roman-Dutch Law. Their plaint does not disclose that they have been compelled to borrow money to maintain themselves, and the presumption is that either the mother herself, or she through her child, have had the means to do it.

Under these circumstances, I feel constrained to hold, though with some hesitation, that a mother and child cannot maintain a civil action against their husband and father for past maintenance, and I would set aside the judgment of the District Judge and dismiss the action in the District Court. I think each side should pay its own costs in both Courts under the circumstances of the claim.

PEREIRA A.J.—

The first plaintiff is the mother of the second plaintiff and wife of the defendant. The two plaintiffs—mother and son—aver in their plaint that the defendant deserted them and refused to maintain them, and that they were obliged to maintain themselves. They say that they estimate the cost of maintaining themselves at Rs. 25 per mensem, and claim from the defendant the sum of Rs. 500 as such cost from April, 1907, to November, 1908. The plaint certainly is open to the construction that the first plaintiff maintained herself, while the second plaintiff maintained himself. If that is so, or, what is more likely, the second plaintiff being a mere child, if the first plaintiff maintained herself, and the second plaintiff was maintained by means of his own property by somebody else, there clearly is a misjoinder of parties and causes of action. The District Judge thinks that the joinder of plaintiffs in the present action is justified by section 11 of the Civil Procedure Code, but it is only where the cause of action is the same that joinder is permitted under that section. Here the cause of action upon which the first plaintiff bases her claim is the desertion of her by the defendant and failure on his part to maintain her, and the second plaintiff declares on a similar cause of action affecting him only. Be that as it may, the main question to be decided is as to the right of each plaintiff to maintain an action for past maintenance.

It has been said that the only remedy open to a wife or child who has been left without maintenance by the husband or father, as the case may be, is to institute proceedings in the Police Court to compel him to maintain the complaining party. On the question here involved decisions and dicta of Judges of this Court have been cited, which unfortunately are not distinguished by the merit of uniformity.

Dec. 31, 1909

PEREIRA A.J.

Jane Ranasingha v. Pieris

The case of *Yadalayoda v. Herat* [1] was an action for both past and future maintenance. By the latter expression I mean maintenance since the date of action. The claim for past maintenance was disallowed because the plaintiff had been maintained by her parents, but a decree condemning the defendant to pay the plaintiff a certain sum monthly for future maintenance until he received her into his house and maintained her there was allowed. *Menikhamy v. Loku Appu* [2] was also an action for past and future maintenance. The claim was disallowed, Bonser C.J. observing: " Since the passing of Ordinance No. 19 of 1889 the proper course for a non-Christian wife who is deserted by her husband is to go to the Police Court for an order under the Ordinance." It is not clear why the observation is confined to the case of a non-Christian wife. In the same case, with reference to the case of *Yadalagoda v. Herat*, Withers J. observed as follows: " With the greatest possible deference to the learned members of this Court as then composed, I have never been able to understand the judgment relied upon by the learned District Judge." Then, in *Subaliya v. Kanangara*,[3] Bonser C.J. appears to have favoured the view that under the Roman-Dutch Law a father might by civil action be compelled to perform the duty of maintaining his child. That apparently had reference to future maintenance; and in *Justina v. Armon* [4] Mr. Justice Wood Renton thought that it had been rightly held in *Menikhamy v. Loku Appu*, that since the commencement of Ordinance No. 19 of 1889 it was no longer competent for a woman to bring a civil action to recover maintenance for herself and her children as a debt due to her and them by the father.

I would venture to observe that if such actions were competent under our Common Law, it does not to my mind appear to be quite clear how the Maintenance Ordinance, in the absence of express words to that effect, can be said to have brought about their abolition. In the cases cited above, no claim for past maintenance would appear to have been allowed, whereas in two of the cases there would appear to be some recognition of a right to maintain an action for what may be called future maintenance. It seems to me that it will be difficult to formulate, under our present rules of procedure, an effectual decree to secure to a wife or child future maintenance, except, of course, under the chapter of the Civil Procedure Code dealing with matrimonial actions. In the present case, however, we are not concerned with claims for future maintenance. The question is whether an action is permissible under our Common Law for past maintenance.

To take the case of married women first. I see it laid down in an old case (*Ukko v. Tambya* [5]) decided by Creasy C.J. and Thomson J., that the husband by the marriage contract takes upon himself the

[1] *(1879) 2 S. C. C. 33.*
[2] *(1898) 1 Bal. 161.*
[3] *(1899) 4 N. L. R. 121.*
[4] *(1909) 1 Cur. L. R. 120–123.*
[5] *(1862–1868) 1863 Ram. 70.*

duty of supporting and maintaining his wife so long as she remains faithful to her marriage vow; but I am not aware that it is definitely stated anywhere in the recognized text books that a husband is bound to maintain his wife, although what amounts to very much the same thing is to be found stated with sufficient clearness, namely, that a wife may bind herself and her husband by means of transactions in connection with the management and conduct of the domestic establishment (see *Grot. Intr. 1, 5, 23; Voet 23, 2, 44-46*). A wife may thus render her husband liable to third parties for her own maintenance. Of course, there is nothing to prevent her from maintaining herself by means of her own property, and I am not aware that if she does so there is authority to show that she might have her own loss recouped by means of an action against her husband.

The policy of modern legislation is to prevent one's wife and children becoming chargeable to others by allowing the wife and children a remedy against the husband or father, as the case may be, in the Criminal Courts, and it is for a married woman to resort to that remedy, unless she is content to maintain herself at her own expense.

With regard to children, there is more distinct authority in the text books. I need only refer to one of them. Van Leeuwen lays down in the *Censura Forensis (1, 1, 10, 1)*, and repeats later in his *Commentaries (1, 13, 1, 3, 7)*, that to the obedience and filial respect which children owe to their parents corresponds the duty of parents to their children to afford a good education and such support as is compatible with their means to those children who cannot support themselves, and this duty they may be compelled to perform *nisi ex bonis suis adventitiis aut artificio aliquo ipsi semet alere possint.* Thus, a father, he proceeds, is not bound to support a son who has learnt to support himself without assistance, or, as the saying is, " to float by his own cork." From the above it is clear that a father is not bound to support his child who is supported by means of property derived from others or by some handicraft. This does not, I take it, mean that a father may deliberately leave a minor child unsupported because it has property of its own, but it is, I think, sufficient authority for the proposition that where, without recourse to the father, the mother or some other person supports a child by means of the property of the child itself, the father's civil liability is suspended. It is further stated in the *Censura Forensis (ibid., section 3)* that when the means of one parent are insufficient, the burden of support and education passes entirely to the other.

I think that the judgment should be set aside, and the plaintiffs' claim dismissed. I agree to the order proposed by the Chief Justice as to costs.

Appeal allowed.