Present : Mr. Justice Middleton and Mr. Justice Wood Renton.

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ANNA PERERA *v.* EMALIANO NONIS.

P. C., Colombo, 24,000.

JUSTINA *v.* ARMAN.

P. C., Galle, 44,050.

Maintenance Ordinance (No. 19 of 1889)—Nature of proceedings—Civil liability—Plea of autrefois acquit—*Plea of* res judicata—*Renewal of application—Criminal Procedure Code, how far applicable—English Law—Roman-Dutch Law.*

Held, that where an application for maintenance under Ordinance No. 19 of 1889 is struck out without any inquiry into the merits, the applicant has no right of appeal under section 17 of the Ordinance, but may make a fresh application, provided the time limit prescribed by section 7 has not expired.

Held, also, that the failure to maintain a wife and children is not an offence under the law of Ceylon, and no plea of *autrefois acquit* can be set up by a defendant who has successfully resisted proceedings under Ordinance No. 19 of 1889.

Held, further, that only those sections of the Criminal Procedure Code which are expressly incorporated in Ordinance No. 19 of 1889, are applicable to proceedings under that Ordinance, and that the provisions of section 194 of the Criminal Procedure Code should not be applied to proceedings under Ordinance No. 19 of 1889.

Sabhoor Umma v. Coos Kanny[1] disapproved.

Per MIDDLETON and WOOD RENTON JJ.—The use of the terms "complainant," "accused," "discharge," and "acquittal" in maintenance proceedings is unwarranted by the Ordinance, and should be abandoned.

THESE were cases under the Maintenance Ordinance of 1889 (No. 19 of 1889).

In *Anna Perera v. Emaliano Nonis*, 402. P. C., Colombo, 24,000, the defendant appealed from an order condemning him to pay Rs. 5 a month by way of maintenance for his two illegitimate children.

Tambiah, for the defendant, appellant.

Koch, for the petitioner, respondent.

[1] *(1909) 12 N. L. R. 97.*

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In *Justina v. Arman*, 387, P. C., Galle, 44,050, the petitioner applied to revise an order of the Police Magistrate refusing to re-open the case and to re-issue summons.

Bartholomeusz, for the applicant in revision.

No appearance for the respondent.

The facts and arguments in both cases are fully stated in the judgments.

Cur. adv. vult.

August 21, 1908. MIDDLETON J.—

The above two maintenance cases were referred respectively by my brother Wood Renton and myself to a Court of two Judges, in view of the decision of my brother Wendt in *Sabhoor Umma v. Coos Kanny.*[1]

In 402, P. C., Colombo, 24,000, the Magistrate, without hearing any evidence after two adjournments, on the third occasion, the applicant being not ready, noted on the record "Respondent discharged." The Magistrate subsequently re-opened the case and made an order for maintenance. It was contended on appeal that the order of discharge operated as an acquittal.

In 387, P. C., Galle, 44,050, which I reserved, the Magistrate heard the evidence of the applicant, on the application for process, and fixed the case for March 11, 1909, on which date the applicant put in a document alleging an amicable settlement, and asked leave to withdraw the proceedings. The Magistrate allowed this, but noted on the proceedings "application dismissed, accused acquitted."

On an alleged breach of the amicable settlement the application was renewed on April 27, May 12, May 25, and June 2, and on each occasion refused, the Magistrate saying he could do nothing on the face of his order of March 11. An appeal was entered against the Magistrate's order of refusal on June 2, but being defective in some way, my brother Wood Renton allowed notice to issue to the defendant in revision.

The two cases were argued at the same time, and it is appropriate that they should be covered by one judgment I have had the advantage of reading the elaborate judgment of my brother Wood Renton, and I agree with him.

I think that Bonser C.J.'s opinion in *4 N. L. R. 123*, that the civil liability of the father to maintain his illegitimate children under the Roman-Dutch Law (*Voet 25, 3, 5*) was the foundation of the Police Court proceedings enacted by Ordinance No. 19 of 1889, and in all probability of the Vagrants Ordinance, No. 4 of 1841, making the failure to maintain his children an offence in the father.

[1] *(1909) 12 N. L. R. 97.*

I agree that the *obiter dicta* of Burnside C.J. and Dias J. in holding in *Rankiri v. Kiri Hattena*[1] that the liability created by Ordinance No. 19 of 1889 is criminal and not civil is not binding on us here.

Under the Vagrants Ordinance of 1841, the failure to support his family was made an offence in the father by sub-section (2) of section 3. This sub-section was expressly repealed by Ordinance No. 19 of 1889. From the terms of this Ordinance, as my brother says, I have always thought it is no offence under it to fail to maintain children, nor are the proceedings criminal, except in so far as they are triable by a Police Court, and subject to a few specified sections of the Criminal Procedure Code. The nomenclature of the parties also under section 12 evinces a civil rather than a criminal character.

I desire to record my emphatic agreement with my brother in his condemnation of the practice in some Police Courts of using the terms "complainant," "accused," "discharged," and "acquitted" in maintenance proceedings, which I have more than once characterized as unwarranted.

I cannot see also how it is possible, without violating the maxim *expressio unius exclusio alterius*, to introduce other sections of the Criminal Procedure Code into the Ordinance than those mentioned in section 15.

I fail to see also, then, how we can import into and apply the doctrine of *autrefois acquit* as laid down in section 330 of the Criminal Procedure Code, even by an analogy to proceedings which are not in themselves criminal, and do not involve the trial of an offence.

Orders such as those made in the cases under consideration are not orders under section 3 of the Ordinance, as they are not made "upon proof," and they are not therefore appealable orders within the ruling of the Full Court in *Tissehamy v. Samuel Appu.*[2] Section 3 also, I think, contemplates that the Magistrate may make an order for maintenance of wife and children upon an application made by a person other than one of those to be benefited by the order. This lends colour to the theory that the policy of the Ordinance is that all applications under it should be dealt with by adjudication on the merits.

If, therefore, the applicant has no appeal, and the case has not been disposed of on the merits, the applicant is in the same position as one under the English Law, and should have the right of renewal as laid down in the English cases under 7 and 8 Vict. C. 101 quoted by my brother. See also *R. v. Harrington* [3] and *Reg. v. Hall.*[4]

I therefore entirely agree with my brother Wood Renton that where an application has been dismissed, in whatever form the Magistrate may choose for indicating such dismissal without any

[1] *(1891) 1 C. L. R. 86.*
[2] *(1902) 5 N. L. R. 334.*
[3] *12 W. R. 420.*
[4] *57 L. Times 306.*

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inquiry into the case upon the merits beyond the statement of the applicant made under section 13, the same may be renewed at any time within the period limited under section 7 of the Ordinance.

I do not think that such dismissal is either *res judicata* or *autrefois acquit*, and I hold that the appeal must be dismissed in P. C., Colombo, 24,000, and that the applicant in revision in 387, P. C., Galle, 44,050, is entitled to the reception of her fresh application as from April 26, 1909, the day on which the same was presented to the Magistrate asking that the case might be re-opened.

WOOD RENTON J.—

In this case, which was argued before me sitting alone on July 12, and which I referred to a Bench of two Judges because of its difficulty and importance, the respondent charged the appellant under section 3 of Ordinance No. 19 of 1889 with having failed to maintain their two illegitimate children, and on June 17 last obtained an order against him to pay Rs. 5 a month by way of maintenance. In her application to the Police Court, which was dated June 3, 1909, the respondent alleged that the appellant had failed to maintain the children in question for the three previous months. The paternity of the children is not in issue, and Mr. Tambyah, counsel for the appellant, based his case on a plea of *autrefois acquit*, which he contended was established by the following circumstances.

On May 3, 1909, the present respondent made a similar application for a maintenance order against the appellant in regard to the same children in P. C., Colombo, No. 23,854, alleging refusal on his part to maintain them since the previous month of March. On May 4 summons was issued for the 11th, and after two intermediate adjournments the case came on for hearing on June 1. On that day both parties were present, but the appellant was not ready, and the Police Magistrate accordingly, without hearing any evidence, made an order, which is noted thus in the record: "Respondent discharged." Mr. Tambyah contended, on the strength of the decision of Mr. Justice Wendt, in the case of *Sabhoor Umma v. Coos Kanny*,[1] that that discharge operated as an acquittal, and claimed the benefit of section 330 of the Criminal Procedure Code, which provides "that a person who had once been tried by a Court of competent jurisdiction for an offence, and acquitted of such offence, shall, while such acquittal remains in force, not be liable to be tried again for the same offence." Mr. Tambyah contended, both on the construction of Ordinance No. 19 of 1889 and on the authority of local and Indian decisions, that the omission by a man to maintain his wife and children is a criminal offence, and that, therefore, an acquittal on a charge of that offence forms a good foundation for a plea of *autrefois acquit* to any subsequent proceedings

[1] *(1909) 12 N. L. R. 97.*

in regard to it. I am not prepared to assent to this argument, and I shall deal with the questions of law involved in it as briefly as possible. I think it is clear that, according to Roman-Dutch Law, a father was liable civilly for the support of his illegitimate children (see *Voet 25, 3, 5; Subaliya v. Kannangara*;[1] and *Burge, 2nd ed., Vol. II., pages 556 and 557*). It has been held—and I think that the decision is right—that since the enactment of Ordinance No. 19 of 1889 it is no longer competent for a woman to bring a civil action in this Colony to recover maintenance for herself and her children as a debt due to her and them by the father (*Menikhamy v. Loku Appu*[2]). The special rights and remedies created by the Ordinance must be held to have superseded the Common Law. But it is important, nevertheless, when we have to construe such an enactment as Ordinance No. 19 of 1889, to consider what the Common Law was, and I agree with the decision of Bonser C.J. in *Subaliya v. Kannangara* (*ubi sup.*) that the foundation of the jurisdiction of the Police Court in matters of maintenance is the civil liability, already referred to, of the father to the mother under the Roman-Dutch Law, and that Ordinance No. 19 of 1889 merely provided a simpler and less costly procedure for its enforcement. Mr. Tambyah argued that there was nothing to show that the Roman-Dutch Law on this subject was in force in Ceylon at the time of the British occupation, and he referred us to an interesting case (*Reg. v. Mendis*[3]) in which the Full Court held that the English Common Law as to attempts to bribe was in force in Ceylon, and discussed the questions of the survival of the Roman-Dutch Law and the gradual importation of the English Law in criminal matters here. I will deal later on with the question how far Mr. Tambyah's case can be supported, if the law of England were to be applied in its determination.

For the present it is sufficient to say that there is no proof that the Roman-Dutch Law as to maintenance was not in force in this Colony at the time of the British occupation, and that, in the absence of such proof we have no right to assume the contrary. In the case of *Rankiri v. Kiri Hattena*,[4] it was held by Burnside C.J. and Dias J., Clarence J. dissenting, that the liability created by Ordinance No. 19 of 1889 is criminal and not civil. If the *dicta* of these learned Judges in that case were necessary to its decision, they are, of course, binding on us. But the only question that had actually to be decided in *Rankiri v. Kiri Hattena* was, whether a decision in a previous proceeding under the Ordinance dismissing the application on the ground that paternity was not proved as against the respondent could be set up as a plea of *res judicata* to a subsequent application by the mother against the same respondent in regard to the same child. The Supreme Court held, and if

[1] (*1899*) *4 N. L. R. 121.*
[2] (*1898*) *1 Bal. 161.*
[3] (*1883*) *5 S. C. C. 186.*
[4] (*1891*) *1 C. L. R. 86.*

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I may say with great respect, properly held, that it could. It was unnecessary, for the purpose of arriving at a decision on that question, that the Court should consider whether or not the omission by a father to maintain his wife or children is or is not a criminal offence under the Ordinance of 1889, and I venture to think that the reasons assigned by Burnside C.J. and Dias J. for so holding are not entitled to command our assent as *ratio scripta*. Chief Justice Burnside expressed himself as follows :—"There is, in my opinion, nothing in this case to distinguish it from that already decided by the Full Court, reported in *5 S. C. C. 231*, which is sufficiently authoritative on that point." I would venture to point out that there is this vital distinction between the two cases, that the case reported in *5 S. C. C. 231* [*Podihamy v. Gunaratne (1883)*] was decided under section 3, sub-section (2), of Ordinance No. 4 of 1841, which expressly made the failure by a man to maintain his family a criminal offence, whereas the case of *Rankiri v. Kiri Hattena* was decided under Ordinance No. 19 of 1889, which not only contains no enactment to that effect, but expressly repeals (see section 2) the very section in the Ordinance of 1841 under which the case of *Podihamy v. Gunaratne* was decided. I think that the reasoning of Clarence J., the dissenting Judge, in the case of *Rankiri v. Kiri Hattena*, was sound, and I have the less hesitation in preferring his opinion to that of Burnside C.J. and Dias J., because I find that the same view was taken by Bonser C. J. in *Subaliya v. Kannangara*. The nature of the Ordinance itself seems to me to support strongly this conclusion. I have already referred to the express repeal by section 2 of the provision in the old Ordinance of 1841, under which neglect to maintain a wife and children was expressly made, and spoken of as, an offence. In addition to that, I would point out that section 12 directs the use of the terms "applicant" and "defendant" to describe the respective parties to the proceedings, and that sections 14 to 17 incorporate only certain specified provisions of the Criminal Procedure Code into the Ordinance.

I do not think that we ought to be guided by the decisions under section 488 of the Indian Code of Criminal Procedure, to which Mr. Tambyah referred us in the argument (*Benhow v. Benhow* ;[1] see also *In re De Castro* ;[2] *Prinsep, Crim. Procedure Code, under section 488*). In India the law of Maintenance is expressly incorporated into the Criminal Procedure Code. The proceedings are apparently instituted as criminal proceedings, and in sub-sections (7) and (9) the respondent is termed an "accused."

The law of England is clear in the same sense as that in which, in my opinion, Ordinance No. 19 of 1889 ought to be construed. In *Reg. v. Berry*,[3] a case turning on the construction of the Statute 7 and 8 Vict. c. 101, which bears a close analogy to Ordinance No. 19 of 1889, Lord Campbell C.J. said : "The proceeding

[1] *(1897) I. L. R. 24, Cal. 638.* [2] *(1891) 13 All. 348.* [3] *(1859) 8 Cox C. C. 126.*

against a putative father of a bastard child to obtain an order of maintenance is not a proceeding *in poenam* to punish for a crime, but merely to enforce a pecuniary obligation."

On the grounds that I have stated I am of opinion that failure to maintain a wife and children is not an " offence " under the law of Ceylon, and that, therefore, no plea of *autrefois acquit* can be set up by a defendant who has successfully resisted proceedings under the Ordinance of 1889. The point is of practical importance, because the right to institute proceedings under the Ordinance is not limited to the mother (see *Podina v. Sada* [1]). I would add that the practice which has grown up in many Police Courts of using the terms " complainant," " accused," " discharge," and " acquittal " in maintenance proceedings is not warranted by the Ordinance, is misleading, and should be abandoned.

There remains, however, a more difficult question as to the effect that ought to be given to such an order as has been made by the learned Police Magistrate in the case that we have now to decide. The Maintenance Ordinance follows the line of English legislation in regard to bastardy. From very early times the rule of English Law has been that, while a decision of Petty Sessions on an application for maintenance is subject, at the instance of the putative father, to an appeal to Quarter Sessions, whose judgment on the merits is final, the mother has no right of appeal. She has the power to obtain a re-hearing so long as she is not shut out by lapse of time, and may make a fresh application to Petty Sessions, even though the original decision against her was on the merits. In this state of the law there was obviously no need to frame minute regulations as to what the Justices in Petty Sessions should do in the event of the applicant being absent, or not being ready to go on with the case, on the day of trial. For if the application were dismissed, the dismissal was no bar to any number of subsequent applications of the same character, so long as they were made within the limit of time which the law allowed. (*Pridgeon's case* ; [2] *Slater's case* ; [3] *Anon* ; [4] *R. v. Tenant* ; [5] *R. v. Jenkin* ; [6] *R. v. Brisby* ; [7] *R. v. Machen* ; [8] *Reg. v. Cook and Hickling* ; [9] *Reg. v. Gaunt* ; [10] *Reg. v. Glynne* ; [11] *Anderson v. Collinson*.[12])

Ordinance No. 19 of 1889 deals with the subject of maintenance on similar lines. It provides specifically for everything that is necessary with a view to securing a trial on the merits, and to enforcing any order for maintenance that may be made as the result of such a trial. It contains, however, no express provision of its

[1] (*1900*) *4 N. L. R. 109.*
[2] (*9 Car. 1*) *3 Cro. Car. 341, 350.*
[3] (*13 Car. 1*) *3 Cro. Car. 470.*
[4] (*21 and 22 Car. 11*) *Vent. 48.*
[5] (*13 Geo. 1*) *2 L. D. Raym, 1424.*
[6] (*9 Geo. 11*) *Cas. t. Hard. 301.*
[7] (*1849*) *18 L. J. M. C. 157.*
[8] (*1849*) *14 Q. B. 74.*
[9] (*1852*) *21 L. J. M. C. 136, Erle J. at p. 137.*
[10] (*1867*) *L. R. 2 Q. B. 466.*
[11] (*1871*) *L. R. 7 Q. B. 16.*
[12] (*1901*) *2 K. B. 107.*

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own as to what is to be done in the case of the applicant not being present or ready on the day of trial, and none of the imported provisions of the Criminal Procedure Code have any bearing on the subject. Why should we not apply the English practice? The argument against its adoption may be put thus. The Ordinance differs from English legislation, it may be contended, in this, that it confers a right of appeal on the applicant as well as on the defendant, and so invests any order made by the Magistrate at the trial with a judicial character. We have, therefore, to find a rule of law applicable to cases like the present, where an order has been made in the Court of first instance, but there has been no decision on the merits. And so much of the Criminal Procedure Code has been incorporated into the Ordinance that it is reasonable enough to seek for guidance from that enactment. This view was adopted by Wendt J. in the case of *Sabhoor Umma v. Coos Kanny* (*ubi sup.*), to which I have already referred. The question at issue between the parties was as to the paternity of an illegitimate child. The trial was fixed for May 9, and the parties issued subpœnas for a number of witnesses on both sides, but on the 9th both parties were absent, and the Magistrate made the following order: "Case struck off." It was held by Mr. Justice Wendt that as, if the case had been a criminal one in the ordinary sense of the term, such an order would amount to an acquittal of the accused under section 194 of the Criminal Procedure Code, it should, in view of the clear intention of the Legislature that procedure under Ordinance No. 19 of 1889 should be regulated by that Code, be held to be a final determination of the application for maintenance, which, however, the Police Magistrate would himself be bound to set aside under the proviso of section 194, if the applicant satisfied him that his absence was due to sickness, accident, or some other cause over which he had no control.

It appears to me that, unless we are compelled to accept this solution of the difficulty, to which the present and similar cases have given rise, it ought not to be adopted. In the first place, we can only give effect to it by disregarding the maxim of statutory interpretation, *expressio unius exclusio alterius*. Sections 15, 16, and 17 of Ordinance No. 19 of 1889 expressly point out the provisions of the Criminal Procedure Code which are to be applied in maintenance proceedings. None of these provisions deal with the striking off of cases or the discharge of accused parties under the Criminal Procedure Code. Unless the Ordinance is unworkable without having recourse to that expedient, we have no right, I think, to incorporate section 194 and similar sections by way of analogy. In the second place, the adoption by way of analogy of such provisions in the Code of Criminal Procedure prevents us from giving effect to what, I think, is the policy of the Ordinance of 1889, namely, that applications for maintenance should

not be disposed of otherwise than upon an adjudication on the merits.

I think that this policy is made clear by the fact that under the Ordinance it is open to any one to bring to the notice of the Court the failure of a man to maintain his wife and children. Moreover, circumstances arise for which the Code makes no provision. In the case, for instance, that we have now to decide, where an application was dismissed because the mother was not ready with her evidence, what help can we get from the Criminal Procedure Code? Section 289 enables a Magistrate to postpone proceedings, but it throws no light on the rights of parties if he refuses a postponement, and we should have to try to find a way out of the difficulty under section 191.

I would venture to suggest that the true solution of the problem is to be found in the fact that Ordinance No. 19 of 1889 gives to a woman no right of appeal in cases where her application has been struck out, either on the ground of her failure to appear in support of it, or because she has made an unsuccessful application for a postponement on the day fixed for the hearing.

Under section 17 no right of appeal is given, except from orders made by a Police Magistrate under section 3, which deals with the original proceedings to obtain an order of maintenance, or under section 14, which enables a Magistrate to refuse to issue a summons in such proceedings or an application for a warrant to enforce an order of maintenance. If the matter had been *res integra*, I confess I should have thought that the object of section 17 of Ordinance No. 19 of 1889 was to enact in Ceylon the English Law on this subject, *i.e.*, to give a right of appeal to the putative father where an order adverse to him had been made, but to give no such right to the applicant, leaving her, however, free to renew her application, if she thought proper, before the Magistrate, so long as she could bring herself within the time limit prescribed by section 3. It has been held, however, by a Bench of three Judges, in the case of *Tissehamy v. Samuel Appú*,[1] that the order of a Magistrate 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. This decision is, of course, binding on us. But it deals with cases where the Magistrate had so far complied with the provisions of section 3 as to hear evidence, and has made an order on that evidence. I do not think that we are bound to extend, or that we should be justified in extending it, to cases like the present, where there has been no inquiry on the merits at all. In my opinion, where the Magistrate has struck out an application for maintenance on the ground of failure of either or both parties to appear on the day fixed for the hearing, or has, in whatever form of words he may choose to adopt, dismissed such

[1] *(1902) 5 N. L. R. 334.*

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an application in refusing a request for postponement, but in either case without any kind of inquiry into the merits, the applicant has no right of appeal under section 17, and is therefore, as in England, entitled to make a fresh application, provided the time limit on which she has to rely under section 7 has not expired. The argument *ab inconvenienti* against this view of the law is fully considered and disposed of in the English cases cited above, and particularly in *R. v. Jenkin.*[1]

The interpretation of the Ordinance which, I think, should be adopted gives rise in any event to far less serious difficulties than the attempt to find a solution of the problem in provisions of the Criminal Procedure Code, which are impliedly excluded by the language of the Ordinance itself, and which, as I have shown already in regard to the case now under consideration, do not directly meet, either by analogy or otherwise, the circumstances that have to be dealt with. I would hold that the "discharge" of the respondent by the Police Magistrate of Colombo in the present case on June 1 is no bar by way of *res judicata* any more than it is a bar by way of *autrefois acquit* to the application on which the order now under appeal has been made. No argument was addressed to us by Mr. Tambyah with a view to showing that that order was bad on any other ground.

In my opinion this appeal must be dismissed.

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I concur in the judgment of my brother Middleton.

Appeal in P. C., Colombo, 24,000, dismissed.

Application in revision in P. C., Galle, 44,050, allowed.

[1] *Cas. t. Hard 202, 203.*