[FULL BENCH.] 1921.

Present: Ennis A.C.J., Shaw J., and Schneider A.J.

LAMAHAMY *v.* KARUNARATNA.

130—D. C. Kalutara, 8,940.

Action for maintenance of illegitimate child against administratrix of father's estate—Was Roman-Dutch law on the point introduced into Ceylon?—Are all claims for maintenance confined to the Maintenance Ordinance?

Per ENNIS A.C.J. and SHAW J. (SCHNEIDER A.J. *dissentiente*).—Since the enactment of the Maintenance Ordinance all applications against a husband or father for maintenance of his wife or children, legitimate or illegitimate, must be made under the provisions of that Ordinance.

Per FULL COURT.—Where plaintiff brought an action in the District Court against the administratrix of the estate of G claiming maintenance for an illegitimate child of G,—

Held, that no action lay.

THE facts appear from the judgment.

E. W. Jayawardene, for defendant, appellant.—The effect of Ordinance No. 19 of 1889 was to do away with all the Roman-Dutch law regarding maintenance. In *Menikhamy v. Loku Appu*[1] Bonser C.J. held that a wife had no right to bring a civil action for maintenance when deserted by her husband. This was followed by Wood Renton J. in *Perera v. Nonis*,[2] and later by Shaw and De Sampayo JJ. in *Lebbe v. Natchie*.[3] The whole of the Roman-Dutch law was not introduced into Ceylon. See *Korosse Rubber Company v. Silva*.[4] Under the Maintenance Ordinance it has been held that the legal representative was not liable (*Dingitto v. Appuhamy*.[5]) There is nothing in the Roman-Dutch authorities to support the proposition that the administrator of the estate of a deceased person is liable for maintenance. He is a different person from the heir as known to the Roman-Dutch law. Counsel also cited *Rankiri v. Kiri Hattena*,[6] *Koch's Reports 35, 2 Halsbury 451, 14 Halsbury 305, Walter Pereira 175.*

F. de Zoysa (with him *Croos-Dabrera*), for plaintiff, respondent.—It is clear from *Voet* (*XXV., 3, 5*) that a civil action was maintainable for maintenance, and that such action could be brought

[1] (*1898*) *1 Bal. 161.*
[2] (*1908*) *12 N. L. R. 263.*
[3] (*1918*) *5 C./W. R. 145.*
[4] (*1917*) *20 N. L. R. 65.*
[5] (*1916*) *3 C. W. R. 64.*
[6] (*1891*) *1 C. L. R. 86.*

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even against the heirs. See also *Groenewegen 34, 1, 15. Rankiri v. Kiri Hattena*[1] has been questioned in *Subaliya v. Kannangara*,[2] where Bonser C.J. said that a civil action was competent, and that the Ordinance only provides a " speedier and less costly remedy." It is submitted that the Maintenance Ordinance, No. 19 of 1889, does not do away with the Common law which is still in force. The Roman-Dutch law relating to parent and child must be considered to have been introduced into the Colony, and the contrary cannot be assumed without proof. The Vagrants Ordinance, 1841, merely made it an offence not to maintain one's children. Section 22 of Ordinance No. 15 of 1876 says that a wife with separate property is liable to maintain her children as "a widow is now by law subject to for the maintenance of her children." This clearly contemplates the existence in Ceylon of a Common law right regarding maintenance. Under the Ordinance of 1889 only a sum of Rs. 50 can be ordered as maintenance. There may be cases where this is inadequate, and a civil action for a larger sum more appropriate. The passage from *Voet* shows that the heirs may be sued. The administrator of the present day steps into the shoes of the heirs. Counsel also cited *Ranasingha v. Pieris*.[3]

Cur. adv. vult.

February 16, 1921. ENNIS A.C.J.—

The defendant-appellant in this case is the widow and administratrix of one Bastian Goonetilleke. The plaintiff-respondent is the mother of a child, Omelis Nona, a girl of two years of age. It is admitted that Omelis is the illegitimate child of Bastian. The action was a civil suit to recover maintenance for the child from the estate of the deceased. The defendant raised two points of law, which were dealt with as preliminary issues. She contended that (1) the plaintiff could not maintain the action (as the only action for maintenance was the action under Ordinance No. 19 of 1889), and (2) that even if there were a civil remedy, it would not lie after the death of Bastian Goonetilleke.

The learned Judge found in favour of the plaintiff on both points, basing his findings on the observations of Bonser C.J. in *Subaliya v Kannangara*.[2] The defendant appeals, and the points of law have been reserved for the decision of a Full Court.

I am of opinion that the appellant is entitled to succeed on both points. I accept the finding of Bonser C.J. in *Subaliya v. Kannangara*[2] and of Wood Renton J. in *Justina v. Arman*[4] that in Roman-Dutch law a civil action for maintenance was available, but I doubt if the Roman-Dutch Common law in this respect was ever introduced into Ceylon. The point does not appear to have been considered in *Subaliya v. Kannangara*,[2] and in *Justina v. Arman*[4] Wood Renton J. said: ". . . . It is sufficient to say that there is

[1] *(1891) 1 C. L. R. 86.*
[2] *(1899) 4 N. L. R. 121.*
[3] *(1909) 13 N. L. R. 21.*
[4] *(1908) 12 N. L. R. 263.*

no proof that the Roman-Dutch law as to maintenance was not in force in the Colony at the time of the British occupation, and that, in the absence of such proof, we have no right to assume the contrary." He also said: "It has been held, and I think 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* [1]). The special rights and remedies created by the Ordinance must be held to have superseded the Common law."

In *Jane Ranasingha v. Pieris* [2] which was an action for past maintenance, Pereira J. said in a judgment which reviewed all the cases: "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." And he went on to say: "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."

This judgment does not concede the point that a civil remedy was competent under the Roman-Dutch law as applied to Ceylon, and in the enumeration of remedies which a married woman has, no mention is made of any civil remedy.

In 1841 the Vagrants Ordinance, No. 4 of 1841, made it an offence to leave a child without maintenance. In 1844 the Wills Ordinance (No. 21 of 1844) enacted that a person could dispose of the whole of his property by will. In effect it abolished the "legitimate portion" which children could claim in the property of their parents. In 1876 the Matrimonial Rights Ordinance (No. 15 of 1876) enacted (section 22) that married women should be responsible for the maintenance of their children; and in 1889 the Maintenance Ordinance (No. 19 of 1889) established rights and liabilities, and provided a criminal procedure for the recovery of maintenance from the father of a child.

This record of legislation does not, in my opinion, indicate that the Roman-Dutch civil remedy was available in Ceylon, and no case has been cited to us in proof that the action was competent. Assuming for the sake of argument that it may have been available, then the Wills Ordinance reduced it to a personal action, which did not extend to the heirs, and the Maintenance Ordinance with its special procedure and the creation of a statutory liability (N.B.—A liability which is personal in the absence of any express provisions

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

[2] (*1909*) *13 N. L. R. 21.*

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applicable in case of death) must be held to have superseded the remedies of the Roman-Dutch civil law.

I would accordingly allow the appeal with costs, set aside the order appealed from, and dismiss the plaintiff's action with costs.

SHAW J.—

This is an action brought against the administratrix of one Don Bastian Goonetilleke by the mother of an illegitimate child of Don Bastian claiming maintenance for the child.

The action is based on the liability on the heirs of the deceased, which is said to have existed under the Roman-Dutch law, to maintain his illegitimate children.

In view of the opinion I have come to as to the existence of this right, I need not discuss the question whether, if such an action formerly lay against the heirs, it could now be brought against the executor or administrator.

The only authority for the existence of this liability seems to be a passage in *Voet* (*lib. 25, tit. 3, s. 5*), where the jurist, after stating the obligation of the father to maintain his children, legitimate or illegitimate, goes on to say that the liability extends to the father's heirs.

The other old jurists appear to be silent as to any liability on the part of the heirs. There does not seem to be any record of such an action ever having been brought in this Colony against the heirs or personal representatives, either before or after the enactment of the Maintenance Ordinance, No. 19 of 1889.

It appears to me to be extremely doubtful whether the liability contended for ever existed, but if it did, I am of opinion that it was never introduced into Ceylon.

I still adhere to the view I expressed in *Abdul Rahiman v. Pathumma Natchia*,[1] following the decision in *Manikhamy v. Loku Appu*[2] and the opinion expressed by Wood Renton J. in *Anna Perera v. Emaliano Nonis*,[3] that since the enactment of the Maintenance Ordinance all applications against a husband or father for maintenance of his wife or children, legitimate or illegitimate, must be made under the provisions of that Ordinance.

I would allow the appeal, with costs.

SCHNEIDER A.J.—

I have had the advantage of reading the judgment of my Lord the Acting Chief Justice before writing my own. I agree with him as to the order which should be made in this appeal, but I would allow the appeal on slightly different grounds. In my opinion there is ample authority to support the proposition that that branch of the Roman-Dutch law which writers upon Roman-Dutch law treat

[1] *(1918) 5 C. W. R. 145.*
[2] *(1898) 1 Bal. 161.*
[3] *(1908) 12 N. L. R. 263.*

under the head of " Parent and Child " was recognized as the law of this Colony in so far as it was not excluded by any local custom having the force of law or by any local legislation. Thomson in his *Institutes of the Laws of Ceylon*, in his exposition of the law of Ceylon on the subject, takes over almost verbatim what Van der Linden states in his *Institutes of the Laws of Holland*. The obligation on the part of a father to maintain his minor child, whether legitimate or illegitimate, was well recognized in the Roman-Dutch law. It falls within that branch of it which is called " Parent and Child," and as that branch of it was recognized as the law of this Colony, the inference necessarily follows that the obligation of the father to maintain his child was also recognized as part of the local law. It is an accepted doctrine that the Courts of Law in a country exist for the purpose of enforcing legal rights. The liability of a father to maintain his child being recognized by the law, an action to compel him to perform that duty may be brought in any Court of civil jurisdiction, unless such Courts are precluded from exercising jurisdiction by some special provision relating to the matter. There is nothing in the Maintenance Ordinance, No. 19 of 1889, to indicate that it was intended that the special procedure therein provided was to preclude resort to any general procedure which might be available. It seems to me therefore doubtful that that Ordinance, with its limitations, restrictions, and penal provisions, was intended to do anything more than provide a speedier, less expensive, and more summary and rigorous procedure to recover maintenance. I am therefore not convinced that the Ordinance No. 19 of 1889 was intended to, or did in fact, abrogate the right of action in an ordinary Court of civil jurisdiction to enforce payment of maintenance for a child.

On this part of this case I would cite two passages from Thomson, which, if I may say so respectfully, appears to sum up the law correctly. I would here mention that the attention of the Court during the argument on appeal was not drawn to Thomson :—

(1) " Parents are legally bound to provide legitimate or illegitimate children with necessary maintenance where the children, of whatever age, are impotent and unable to work either through infancy, disease, or accident ; but not when the children can support themselves. (*1 Kerr's Bl. 473–5 ; Ordinance No. 4 of 1841, s. 3 ; 27,015, P. C. Matara, August 10, 1860 ; P. C. Ca. 144 ; 25,497, P. C. Jaffna, September 30, 1859.*) Maintenance means support, with food, clothing, and other conveniences. (*23,022, D. C. Galle, May 6, 1857 ; P. C. Ca. 107.*) This duty of maintenance is enforced against every person, in whole or in part, able to maintain his family ; and who leaves his legitimate (or illegitimate) children, whereby they become chargeable to, or require to be supported by, others, is liable as an idle and disorderly person. (No. 4 of 1841, s. 3, para. 2 and subsequent clauses.) But this is a

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mere penalty for an offence, and the Police Court cannot award maintenance (*2,716 Harrispattoo, August 15, 1861 ; P. C. Ca. 153*), nor order payment of arrears of maintenance. (*33,407, P. C. Matara, June 26, 1862 ; P. C. Ca. 169.*) Parents may, however, be liable in a civil suit for the maintenance of their children, though not at the suit of the children, who are generally minors, or, if not, " minors cannot sue unless by leave of the Court (*V. Lwn. 5, 3, s. 6, p. 523*) ; but may be sued by the children's guardians, *ad litem*, or others appointed by the Court in its equitable jurisdiction." (*Thomson's Institutes of the Laws of Ceylon," vol. 2, pages 44–45.*)

(2) " The father of an illegitimate child is not primarily in law bound to support his illegitimate child, but if the mother cannot maintain it, and the father fails to maintain it, so that it becomes chargeable to another, he is liable, as an idle and disorderly person, for not maintaining his child. (*No. 4 of 1841, s. 3, p. 2 ; 25,497, P. C Jaffna, September 30, 1859 ; P. C. C. Ca. 134.*)" (*Thomson's Institutes of the Laws of Ceylon, vol. 2, pages 47–48.*)

The gist of what he says is that parents " are liable in a civil suit for the maintenance of their children."

To my mind the plaintiff's action fails for the reason that there is no reliable authority to support the proposition that the obligation of the father to maintain his illegitimate child exists after his death or is enforceable in Ceylon against the legal representative of his estate. The present action as framed does not disclose that the administratrix has assets of the estate to pay the maintenance claimed. But I will assume she has.

As I understand the matter, it is not clear that it was generally recognized even in the Roman-Dutch law that the " heirs " of the father upon his demise were under any obligation to maintain his children. It is true that Voet gives it as his opinion that the law did recognize that extension of the father's obligation, but there is authority to the contrary. There being a conflict of opinions, and in view of the fact that there is not a single instance which can be cited to prove that such a liability had been recognized in this Colony, it seems to me that the existence of such a liability in this Colony cannot be assumed or be said to have been recognized. In 1884, by Ordinance all persons were given an unfettered right of disposition of their property by last will, with the power in the exercise of that right to exclude any persons whatsoever from the " legitimate portion." The " legitimate portion " was primarily intended for the benefit of the legitimate children. It is not conceivable that the law having granted the liberty to deprive the legitimate issue of any claim upon a man's property would not have removed any fetter which may have existed for the benefit of the illegitimate issue.

Appeal allowed.