1964 *Present :* **Basnayake, C.J., Abeyesundere, J., and Sirimane, J.**

P. H. BABY NONA, Appellant, *and* R. KAHINGALA, Respondent

S. C. 225/61—M. C. Galle, 7917

Maintenance—Illegitimate child—Application by mother for maintenance—Procedure—Commencement of inquiry—Requirement of examination of applicant on oath—Condition precedent—Effect of non-compliance—Maintenance Ordinance (Cap. 91), ss. 2, 8, 9, 13–17—Courts Ordinance, s. 81—Criminal Procedure Code, s. 425.

In an application made under section 13 of the Maintenance Ordinance by the mother of an illegitimate child for maintenance of the child—

Held, (SIRIMANE, J., dissenting), (i) that compliance with the requirement of section 14 of the Maintenance Ordinance that the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation and recording such examination is a condition precedent to an inquiry under the Ordinance. The condition cannot be waived by consent of parties.

(ii) that non-compliance with section 14 renders the subsequent proceedings null and void.

(iii) that the applicant was not barred from questioning in appeal the validity of the proceedings before the Magistrate even though no objection was taken at the inquiry.

APPEAL from a judgment of the Magistrate's Court, Galle. This appeal was referred by Sansoni, J., to a Bench of more than one Judge in the following terms :—

" This is an appeal by an applicant from an order made by the learned Magistrate on 29th October, 1960, dismissing her application for maintenance for her illegitimate child, whose father she alleged was the Defendant.

" The application was made to Court on 31st January, 1959, and on that day the Magistrate ordered summons on the Defendant, but no evidence on oath or affirmation was given by the applicant before that order was made as required by Section 14 of the Maintenance Ordinance. The objection now taken in appeal on behalf of the applicant is that the proceedings are invalid by reason of the Magistrate's failure to comply with the provisions of that section. For the Defendant, on the other hand, it has been urged that the applicant is not entitled at this stage to benefit from any such omission to comply with this statutory requirement.

" As the question is of some importance and turns on the wider issue of jurisdiction, I think I ought to indicate my views briefly. There can be no doubt that applications under the Maintenance Ordinance must be

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made to the Magistrate, and there can also be no doubt that a Magistrate's Court is the only Court that has jurisdiction to entertain such applications. Therefore, I think it is correct to say that a Magistrate's Court has inherent jurisdiction over the subject matter of an application for maintenance; but Section 14 lays down the procedure to be followed when the Magistrate is asked to exercise that jurisdiction. A case such as this is quite different from a case where there is a total want of jurisdiction in the Court to entertain the particular kind of action, but nevertheless it acts as though it had jurisdiction by reason of the fact that parties to the particular proceedings never raised the question of jurisdiction. In the former type of case, the Magistrate exercises jurisdiction and his orders will be valid and will bind the parties if they do not take prompt objection to any defects of procedure. In the latter type of case, all orders made are incurably void.

"The distinction between the two classes of cases is so well-established that it is hardly necessary to cite authority, but I think I might refer to an old decision of the Privy Council which seems to have a direct bearing on the present case. I refer to *Ledgard v. Bull* (1886) 9 Allahabad 191 (P.C.). In the course of his judgment in that case, Lord Watson said this: 'When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.' Applying that dictum to the present case, it seems to me that this was an application which the Magistrate was competent to try, and as no objection was raised at any time in the lower Court that there was an irregularity in the order directing summons to issue, the applicant cannot now dispute the Magistrate's jurisdiction on that ground.

"There is another case where the same rule was laid down—*Moore v. Gamgee* (1890) 25 Q. B. D., p. 244 where Cave J. referred to the two senses in which it may be said that there is no jurisdiction to entertain an action. The first is where under no circumstances can the Court entertain the particular kind of action, and the second is where, for instance, leave has to be obtained to bring an action in the Court. In the second type of case the Court has jurisdiction over the subject matter, but it is a contingent jurisdiction requiring a certain procedure to be followed before the jurisdiction is exercised. This type of case may be said to fall under the head of procedure rather than under the head of jurisdiction, and the objection to jurisdiction in the latter type of case may be waived by taking part in the proceedings. A Defendant by so taking part deprives himself of the power of objecting to jurisdiction.

"It is that type of case that Rose J. dealt with in *Thomas v. Bawa* (1945) 46 N. L. R. p. 215, where again the principle was followed that where there is jurisdiction over the subject matter, but non-compliance with the procedure prescribed as essential to the exercise of the jurisdiction, the defect can be waived. Such a jurisdiction, as I have said, is usually described as contingent.

"If I had to decide this appeal without reference to previous authorities, I would have held that the applicant was precluded from now objecting to the validity of the proceedings. She has waived the defect that existed when the Magistrate ordered that summons should issue, and she is barred by her acquiescence and by her taking part in the subsequent inquiry, from now raising such an objection.

"But there is the judgment of two Judges in *Rupasinghe v. Somawathie* (1959) 61 N. L. R. p. 457 which decided that a Magistrate's failure to comply with the procedure laid down in Section 14 renders his subsequent order, made after an enquiry in which both parties took part, null and void. The earlier decision in *Namasivayam v. Saraswathy* (1949) 50 N. L. R. p. 333 which was based on jurisdiction was approved.

"I do not think the two different classes of cases which I have referred to, and the bearing which waiver has in the particular class of case into which the present application falls, have been sufficiently considered in *Rupasinghe v. Somawathie*. It has been pointed out to me that there are probably several cases in which orders for the payment of maintenance have been made where, if that decision has to be followed, all proceedings may even now be attacked as invalid. For if non-compliance with Section 14 goes to the root of the Magistrate's jurisdiction and renders all subsequent proceedings invalid, such an objection may be taken whenever an order for maintenance is sought to be enforced.

"The question of the invalidity of the proceedings that has been raised by the Applicant-appellant before me is one of difficulty, and I have doubts as to the correctness of the decision in *Rupasinghe v. Somawathie*, and Weerasooriya J. in *Podinona v. Ranasinghe* (1960) 63 N. L. R. p. 210 also disagreed with it. It appears to me to require further consideration by a fuller Bench.

"Acting under Section 48 of the Courts Ordinance, I reserve that question, and also the question whether the applicant is barred or not from questioning the validity of the proceedings before the Magistrate, for the decision of more than one Judge of this Court by a Bench to be constituted by the Chief Justice under Section 48 A."

C. S. Barr Kumarakulasinghe, with *K. Ratnesar*, for Applicant-Appellant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte* and *D. S. Wijewardene*, for Defendant-Respondent.

Cur. adv. vult.

July 20, 1964. BASNAYAKE, C.J.—

This is an appeal under section 17 of the Maintenance Ordinance by the unsuccessful applicant for an order of maintenance. It came on for hearing before my brother Sansoni, who, acting under section 48 of the Courts Ordinance, has referred for the decision of more than one Judge of this Court certain questions of law which arose for adjudication before him on this appeal. Acting under section 48A, I made order constituting the present Bench.

The material facts are as follows:—On 31st January 1959 the applicant Passikku Hennedige Baby Nona made under section 13 of the Maintenance Ordinance an application in writing signed by her for maintenance for her illegitimate child in a sum of Rs. 75 per mensem. Ranasena Kahingala, the respondent to this appeal, was named therein as the father of the illegitimate child and as respondent to the application. On the reverse of the application is typed a statement signed by the applicant in the form in which evidence is usually recorded, but it is not on oath or affirmation. That statement contains a repetition of the allegations in the application. It would appear that the statement has been typed at the same time as the application and submitted along with it. Below the appellant's signature there is what purports to be another signature. It is not clear whose it is. It is not identical with the Magistrate's signature which appears under the order made by him the same day—" Issue summons for 7/4/59 ". Summons was served on the respondent by the date fixed in the order. The application was thereafter fixed for inquiry and the proceedings concluded on 29th October 1960 on which date the learned Magistrate dismissed the application of the applicant.

The questions arising for decision on the references are—

(*a*) whether compliance with section 14 of the Maintenance Ordinance is a condition precedent to an inquiry under the Maintenance Ordinance,

(*b*) whether non-compliance with section 14 renders the proceedings null and void, and

(*c*) whether the applicant in the present case is barred from questioning in appeal the validity of the proceedings before the Magistrate for the reason that no objection was taken at the inquiry.

The main submissions of counsel for the appellant are—

(*a*) that compliance with section 14 is a condition precedent to an inquiry under the Maintenance Ordinance,

(*b*) that non-compliance with section 14 renders the proceedings null and void whether objection is taken in the lower Court by either party or not, and

(*c*) that, where there has been non-compliance with section 14, the appellant is not barred from raising in appeal the question of the validity of the proceedings even though no objection was taken in the lower Court.

The main submissions of learned counsel for the respondent are—

(*a*) that the appellant did not in the lower Court raise any objection to the proceedings on the ground that there has been no compliance with section 14,

(*b*) that the appellant is therefore estopped from objecting now, and

(*c*) that non-compliance with section 14 does not render the proceedings null and void, as there is no provision in the Ordinance declaring proceedings not in conformity with section 14 null and void.

The Maintenance Ordinance is a special enactment which confers on a legitimate or illegitimate child or wife the right to maintenance. It also prescribes the procedure to be followed in obtaining an order for maintenance. The right is a civil right and not a matter within the ordinary jurisdiction of a Magistrate's Court as constituted by the Courts Ordinance. That jurisdiction is thus defined by section 81 of that Ordinance—

" Every Magistrate's Court shall have and exercise all powers and authorities and perform all duties which Magistrates' Courts are empowered and required to have, exercise, and perform by virtue of the provisions of the Penal Code or of the Criminal Procedure Code, or of any other enactment for the time being in force in any way empowering or requiring them in that behalf. "

Now the authority on whom the Maintenance Ordinance confers power to make orders for maintenance and enforce them is the Magistrate and not a Magistrate's Court. All the sections speak of a Magistrate except section 9 which empowers the making of an order as to costs. That section reads—

" When disposing of any application or appeal under this Ordinance, the Magistrate's Court or the Supreme Court may order either party to pay all or any part of the costs of such application or of the costs of application and appeal, as the case may be, and such order shall be subject to the provisions and conditions laid down in the Civil Procedure Code, relating to costs so far as they may be applicable, and the amount due under the Order shall be recoverable as if it were a fine, and in default of payment imprisonment of either description may be imposed for a period not exceeding one month :

Provided that bills of costs shall be taxed according to the lowest rates specified in the Second Schedule of the said Code under head ' Courts of Requests ' and ' Appeals from Courts of Requests '. "

Although the section speaks of a Magistrate's Court, the context shows that the legislature had in contemplation the Magistrate and not the Magistrate's Court, because it is the Magistrate and not the Magistrate's Court that is empowered to dispose of an application under the Ordinance. The expression "Magistrate" would have been in accord with the rest of the Ordinance and in keeping with its design which is to confer on a Magistrate as distinct from a Magistrate's Court the powers conferred thereby. That the Magistrate is a *persona designata* is evident from the fact that when acting under the Ordinance he may exercise only the powers expressly conferred by the enactment and not all the powers which are conferred on a Magistrate's Court under the Criminal Procedure Code. This fact is brought out in sections 15, 16 and 17. The first of those sections provides that the Magistrate may proceed in manner provided in Chapters V and VI of the Criminal Procedure Code to compel the attendance of the defendant and the witnesses of the parties. Such a provision would be unnecessary if it was the Magistrate's Court that was exercising the power granted by the Ordinance. The second of the above-mentioned sections provides for the mode of recording evidence and states that all evidence taken by the Magistrate under the Ordinance "shall be recorded in the manner prescribed for trials in the Magistrate's Court". Such a provision would also be unnecessary if it were the Magistrate's Court that was mentioned in the Ordinance. The third and the last of the provisions confers a right of appeal on the dissatisfied party from an order of the Magistrate "in like manner *as if* the order was a final order pronounced by a Magistrate's Court in a criminal case or matter". That section, especially the words "as if" therein, brings out clearly the fact that the authority authorised to make orders is not the Magistrate's Court, but the Magistrate. There is no need to equate the Magistrate's order to that of a Magistrate's Court if it is the Magistrate's Court itself that is acting.

The resulting position is that it is the Magistrate that is designated in the Ordinance. It is now well established by a series of decisions of this Court that the Magistrate when acting under the Ordinance has no more powers than those expressly conferred on him and that only those provisions of the Criminal Procedure Code, expressly declared to be applicable to proceedings under the Ordinance apply—(*Chivakanni-pillai v. Chuppramanian*[1]; *Isabel v. Pedru Pillai*[2]; *Anna Perera v. Emaliano Nonis*[3]; *Esanda v. Surata*[4]). Section 425 of the Criminal Procedure Code which is excluded by implication by the Ordinance cannot therefore be called in aid to cure any omission by the Magistrate to observe the requirements of the Ordinance—see also *Anna Perera v. Emaliano Nonis*[5]. It is common ground that the Magistrate failed to observe the provisions of section 14. That section reads—

"Upon application being made for such order or warrant as aforesaid, the Magistrate shall commence the inquiry by examining the applicant

[1] *(1896) 2 N. L. R. 60.*
[2] *(1902) 6 N. L. R. 85.*
[3] *(1908) 12 N. L. R. 263 at 265.*
[4] *(1919) 6 C. W. R. 125.*
[5] *(1908) 12 N. L. R. 263 at 270 and 272.*

on oath or affirmation, and such examination shall be duly recorded. If after such examination there is in the judgment of the Magistrate no sufficient ground for proceeding, he may make order refusing to issue a summons."

The section provides for two kinds of applications. An application for an order for maintenance and an application for a warrant to enforce an order for maintenance when the person against whom the order is made neglects to comply with the order. Provision is made in section 13 for the form in which an application for an order of maintenance is to be made, and section 8 provides for the form in which an application for a warrant is to be made. In each case a condition precedent to the commencement of the inquiry is the examination of the applicant on oath or affirmation and the recording of such examination. The material words are " The Magistrate shall commence the inquiry by examining the applicant on oath or affirmation ". The word " shall " is imperative and whenever a statute declares that a thing " shall " be done, the natural and proper meaning is that a peremptory mandate is enjoined unless the context contains clear words which indicate that the direction is not compulsory but discretionary. Here, there are no such words and the Magistrate is bound to carry out the directions in the section. If he does not take the step prescribed for commencing proceedings, then the Magistrate cannot be said to have commenced proceedings under the Ordinance. Any further steps that are taken by him are step in a proceeding not commenced under the Ordinance. The parties have no right to say that they are prepared to submit to the breach of the enactment by the Magistrate. In this connexion the following passage from Craies' Statute Law (6th Edn., p. 264) is in point—

" Statutory enactments, although expressed in affirmative language, are sometimes treated as having a negative implied, and that their provisions, ' though ', as Lord O'Hagan said in *R. v. All Saints, Wigan*, ' affirmative in words, are not necessary so, if they are absolute, explicit, and peremptory '. In Viner's Abr. the following rule is laid down : ' Every status limiting anything to be in one form, although it be spoke in the affirmative, yet includes in itself a negative ' ; and in Bacon's Abr. the rule given is that ' if an affirmative statute which is introductive of a new law direct a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way. ' "

The following passage in Maxwell on Interpretation of Statutes (11th Edn. p. 368) supports what is said in Craies—

" The same imperative effect seems, in general, presumed to be intended even where the observance of the formalities is not a condition exacted from the party seeking the benefit given by the statute, but a duty imposed on a court or public officer in the exercise of the power conferred on him when no general inconvenience or injustice calls for a different construction. "

No general inconvenience or injustice calls for a different construction in section 14. In the instant case there is a further rule of interpretation that applies. Section 14 prescribes a condition precedent to an inquiry under the Ordinance. In such a case the rule is stated as follows by Maxwell (11th Edn. p. 375) :—

> "Where, however, the act or thing required by the statute is a condition precedent *to the jurisdiction* of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent to a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction."

It was urged by learned counsel for the respondent that the maxim *cuilibet licet renuntiare juri pro se introducto* applied to the Maintenance Ordinance. We are unable to uphold that contention. As stated by Maxwell, that maxim only enables a person "to waive and to agree to waive the advantage of a law or rule made *solely* for the benefit and protection of the *individual* in his *private capacity*, which may be dispensed with, *without infringing* any public right or public policy". (Maxwell, 11th Edn. p. 376).

Section 14 does not make a rule solely for the benefit of the individual in his private capacity and the question of waiver does not arise. Here the Magistrate is required to commence proceedings under the Ordinance in a certain way. No party can absolve the Magistrate from that duty, *privatorum conventio juri publico non derogat.* It has been held in the case of *Jane Hamy v. Darlis Zoysa*[1] that the provisions of the Maintenance Ordinance for the maintenance of children by their fathers are obvisiously not intended purely for the benefit of the mother. They can be enforced by the Magistrate, even if the mother takes no steps for that purpose or if she is dead. It has also been held that where an application for maintenance has been made by the mother and has been compromised by an arrangement between her and the father, that cannot deprive the Court of the power of afterwards ordering the man to make provision for maintaining the children if he neglects to do so. A further reason why the principles governing waiver have no application to the instant case is that the claim is made by the mother on behalf of her infant child and not on her own behalf. Anything done by the mother which she is not entitled in law to do cannot bind the infant and the principles governing waiver have no application. Even in regard to a benefit that may be waived, the waiver must be a deliberate act of the party concerned. Where nothing is said or done to indicate that the party concerned is giving up a right, there is no waiver for there is no conscious act. It is correct that when a benefit can be waived and there is a conscious waiver, the party making the waiver cannot recall the concession.

[1] *(1909) 12 N. L. R. 70.*

Learned counsel also contended that the appellant was estopped from raising in appeal the objection that the requirements of section 14 had not been complied with. Estoppel in our law is a rule of evidence and does not empower parties to legal proceedings to absolve Judges from performing what the statute enjoins—(1937) A.C. 610; (1941) A.I.R. 234 at 236; (1949) 2 D.L.R. 17. Rules of equity have no place in the construction of a statute. If the requirements of a statute have in fact not been complied with, the consequence is that the act contemplated in the statute has not been done [(1944) A. I. R. Calcutta, p. 280-281], and all subsequent acts do not have the authority of the statute.

Learned counsel for the respondent relied on a passage from Voet (Bk. II Tit. 4 sec. 14) in support of his contention that non-compliance with the statute does not invalidate subsequent proceedings in which the parties have participated. The passage in question does not deal with non-compliance with a statute such as the one in the instant case, but with the service of summons and the effect of a voluntary appearance on an invalid summons. He also referred us to certain English decisions, all of which it is not necessary for the purpose of this judgment to refer to, in support of his contention that appearance of the defendant without objection in answer to a summons issued not in accordance with the statute cures the defect and is a bar to his raising objection to the defect afterwards. He relied particularly on *Fry v. Moore*[1]. The question in that case was whether the service of a writ under a wrong order for substituted service was an irregularity rather than a nullity. Lindley L.J. held that it was an irregularity rather than a nullity, and went on to say—

> ". . . I am not prepared to say that an improper mode of serving the writ is a nullity that cannot be waived. Then, was the irregular service of the writ waived in the present case? The defendant has taken two steps which are inconsistent with there having been no proper service of the writ: First, the brother, who had been served took out a summons to set aside the judgment that had been signed in default of appearance, and for delivery of a statement of claim. I think that the brother knew the facts, and had authority to act for the defendant. But further, after the defendant had been communicated with and had himself instructed a solicitor, another summons was taken out in the same terms. These two summonses appear to me to be so inconsistent with the contention that the writ had not been properly served as to amount to a waiver of the irregularity. Under these circumstances the case stands thus: The writ itself was perfectly regular; the order for substituted service of the writ was wrong; service of the writ in pursuance of that order was an irregularity, but not a nullity; and the irregularity has been waived."

[1] *61 L. T. p. 545.*

But in *Craig v. Kanseen* [1], which reviews some of the earlier English cases including *Fry v. Moore* (*supra*), it was held that failure to serve process where service of process is required is a failure which goes to the root of the English conception of the proper procedure in litigation. It was also held that where, apart from proper *ex parte* proceedings, an order had been made against a man who had no notification of any intention to apply for it, the order could not be treated as a mere irregularity, but as something which was affected by a fundamental vice. In our opinion *Craig v. Kanseen* contains the better view in regard to non-compliance with essential steps in procedure prescribed by a statute. In regard to non-compliance with a statute, even under the Roman Dutch Law, a Judge had no power to ignore the written law. The footnote at page 10 of Vol. I of Gane's translation makes this clear and is as follows :—

> "What the author sets out in this section on equity is quite in accord with the analogy between equity and law. It must be held as a general rule that the prime glory of a judge is to follow the law in accord with the oath which he has taken and not the wild and slippery whim of individuals, since judges and jurists ought to look to nothing more carefully than this, that they do not forsake the written law for some head-strong equity (for what seems fair to A seems unfair to B) : "

No case has been cited to us in which it has been held that the examination on oath or affirmation need not be done and that the evidence need not be recorded before issuing a warrant for the enforcement of an order for maintenance. If in one case the examination is imperative, it cannot be different in the other case. For the above reasons we are of opinion that—

(*a*) compliance with section 14 is a condition precedent to an inquiry under the Ordinance,

(*b*) non-compliance with section 14 renders the proceedings null and void, and

(*c*) the applicant in the present case is not barred from questioning in appeal the validity of the proceedings before the Magistrate even though no objection was taken at the inquiry.

Before we part with this judgment we wish to refer to the case of *Ledgard v. Bull* [2] which my brother Sansoni thought contained a principle which had been overlooked in the case of *Rupasinghe v. Somawathie* [3].

[1] *(1943) 1 All E. R. 108.*

[2] *Indian Decisions, New Series 602; 9 Allahabad 192.*

[3] *(1959) 61 N. L. R. 457.*

A close examination of *Ledgard's* case reveals that the principle laid down in *Somawathie's* case finds support therein. There too it was a competent court that tried the case; but the proceedings were commenced in the wrong way and not in accordance with the law. It will be of assistance if the facts are briefly noticed. The action was for infringement of a patent. It was instituted in the Court of the subordinate Judge contrary to an express prohibition in the Patent Act that no such suit should be maintained before that Court. Thereafter an application was made to the District Court which had jurisdiction to try patent cases to transfer the case from the subordinate Judge to that Court. The District Court then made order transferring the case although it had no power to do so under section 25 of the Civil Procedure Code under which the District Court purported to act. The defendant objected to the jurisdiction of the District Court. The District Judge overruled the objection, but the Privy Council upheld it and in doing so observed—

> ". . . The District Judge was perfectly competent to entertain and try the suit if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him."

The expression " jurisdiction " is used in more than one sense in law—one in a general sense and the other in a narrower sense. It may either mean what is ordinarily understood by that term when used with reference to the local jurisdiction of a Court, or pecuniary jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit; or it may mean the legal authority of a Court to do certain things. The question of jurisdiction can be said to arise in the instant case only in the last mentioned sense which is also the sense in which the question arose for decision in *Ledgard v. Bull* (*supra*).

ABEYESUNDERE, J.—I agree.

SIRIMANE, J.—

The appellant filed this action in the Magistrate's Court of Galle claiming maintenance from the respondent, who, she alleged, was the father of her illegitimate child. Her application was refused.

She appealed against that order, and when the appeal came up for hearing before my brother Sansoni he reserved two questions for decision by a Bench of more than one Judge. These questions are :—

(i) whether the failure to comply with the provisions of section 14 of the Maintenance Ordinance, (Cap. 91), renders all subsequent proceedings invalid ;

(ii) whether the applicant in this case is barred from questioning the validity of such proceedings.

Section 14 reads as follow :—" Upon an application being made for such order or warrant as aforesaid, the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation, and such examination shall be duly recorded. If after such examination there is in the judgment of the Magistrate no sufficient ground for proceeding, he may make order refusing to issue a summons."

This section was obviously designed to protect a person from the embarrassment of having to defend himself in proceedings of this nature unless there was a prima facie case against him.

In this case the appellant had presented to Court a typed application signed by her and her Proctor. On the reverse of this paper there appear the name of the appellant, her age, and her place of residence, followed by a type-written statement of facts on which the claim against the respondent was based. This statement is signed by the applicant. The Magistrate himself has signed it thereafter and made order for the issue of summons. According to the procedure which was followed in Magistrates' Courts at that time it was the practice for an applicant to get into the witness box and on oath or affirmation repeat the written statement submitted by her to Court.

On the face of the order it would appear that this statement was not made on oath or affirmation, and also that it had not been recorded in Court. There was, therefore, a non-compliance with the requirements of section 14 of Cap. 91. I have no doubt, however, that when he signed the statement the learned Magistrate brought his mind to bear on the question whether or not there was sufficient material on which to summon the respondent.

When summons was served on the respondent he appeared in Court and denied paternity. The case was then fixed for hearing, and after a lengthy trial, which lasted several days, the learned Magistrate made order dismissing the application.

In my view there can be no doubt that the learned Magistrate had jurisdiction to make the order that he did; for, it is section 2 of the Maintenance Ordinance which vests the Magistrate with jurisdiction to make or refuse an order for maintenance, and not section 14. Does the failure to comply with the provisions of section 14 then vitiate all subsequent proceedings?

I cannot assent to the proposition that whenever there has been a breach of a statutory requirement, all acts done thereafter are void and of no legal effect. A distinction must be drawn between those breaches which "have the effect of emasculating the general purpose of the statute" (as Spencer Bower puts it) and those which do not.

Referring to the latter type of irregularity Spencer Bower (The Law relating to Estoppel, page 187) says "On the other hand where it is merely a question of irregularity of procedure, or of a defect in 'contingent' jurisdiction, or non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up, such irregularity or want of 'contingent' jurisdiction or non-compliance, no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing boundaries the Estoppel will be maintained, and the affirmative answer of illegality will fail: for, the Royal prerogative not being invaded, and the State therefore not being injured, nor any of His Majesty's subjects for whom that Royal prerogative is held in trust, there is no ground of public policy, or other just cause, why the litigant, to whom alone in that case the statutory benefit belongs, should not be left free to surrender it at pleasure, or why, having so surrendered it, whether by contract, or by conduct or inaction implying consent, he should be afterwards permitted to claim it."

One has to bear in mind that in a maintenance case the liability of the respondent is a civil one, even though the case is heard by a Magistrate, and criminal procedure is adopted at the trial. The decisions which lay down the principle that in *criminal cases*, where the liberty of the subject is at stake, the procedure laid down should be strictly followed, do not, in my opinion, apply to maintenance cases.

In the old Privy Council case of *Ledgard and another v. Bull*[1] it was held that, "when a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot by their mutual consent convert the proceedings into a judicial process; although when the merits have been

[1] *(1886) IX Allahabad, page 192.*

submitted to a Court it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision. On the other hand in a suit tried by a competent Court the parties having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which if objected to at the time would have led to the dismissal of the suit".

The failure to strictly comply with the provisions of section 14 is no doubt an irregularity in the initial procedure, but, in my opinion, it does not vitiate all the subsequent proceedings. This case was referred to and the same principle followed in the case of *Alagappa Chetty v. Arumugam Chetty et al.*[1]

In that case the Court approved of the principle that where jurisdiction over the subject matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round to challenge the legality of the proceedings due to his own invitation or negligence.

I do not think it necessary to refer to all the authorities cited at the argument, in which this principle has been followed. It is sufficient to refer to the cases of *Thevagnanasekeram v. Kuppammal et al*[2], *Miss Thomas v. Bawa*[3], *Weerasooriya v. The Controller of Establishments*[4], *Ratnayake v. Amarasekera et al.*[5], and the English case of *Fry v. Moore*[6].

With great respect I am unable to share the views expressed in *Namasivayam v. Saraswathy*[7] and *Rupasinghe v. Somawathie*[8] and I find myself in respectful agreement with the decisions in *Podina v. Sada*[9] and *Sebastian Pillai v. Magdalene*[10].

I am of opinion, therefore, that :—

(i) a failure to comply with the provisions of section 14 does not render the subsequent proceedings invalid, and

(ii) that the appellant having taken part in these proceedings cannot now question their validity.

Proceedings held invalid.

[1] *(1920) 2 Ceylon Law Recorder, page 202.*
[2] *(1934) 36 N. L. R. 337.*
[3] *(1945) 46 N. L. R. 215.*
[4] *(1949) 51 N. L. R. 189.*
[5] *(1955) 58 N. L. R. 462.*
[6] *(1889) 23 Q. B. D. 395.*
[7] *(1949) 50 N. L. R. 333.*
[8] *(1959) 61 N. L. R. 457.*
[9] *(1900) 4 N. L. R. 109.*
[10] *(1949) 50 N. L. R. 494.*