1949 *Present :* **Basnayake J.**

NAMASIVAYAM, Appellant, *and* SARASWATHY, Respondent

S. C. 1,192—M. C. Mallakam, 6,080

Maintenance—Issue of summons—No examination of applicant on oath or affirmation—Jurisdiction of Magistrate—Maintenance Ordinance—Section 14.

It is a condition precedent to the issue of summons in proceedings under the Maintenance Ordinance that the applicant should be examined on oath or affirmation and that the Magistrate should be satisfied that there is sufficient ground for proceeding.

APPEAL from a judgment of the Magistrate, Mallakam.

H. W. Tambiah, with *Sharvananda*, for the defendant appellant.

No appearance for the respondent.

Cur. adv. vult.

February 11, 1949. BASNAYAKE J.—

On June 19, 1948, the applicant, one Saraswathy, (hereinafter referred to as the applicant), wife of Sinnathurai Namasivayam, the defendant-appellant, (hereinafter referred to as the defendant), made an application for maintenance, in writing, as required by section 13 of the Maintenance Ordinance (hereinafter referred to as the Ordinance), in which she complained that her husband having sufficient means failed and neglected for the last eight months to maintain her and his child Thavamany Devi aged six years and asked that the defendant be ordered to make a monthly allowance for their maintenance under section 2. On the same day without following the procedure indicated in section 14 the learned Magistrate made order that summons should issue on the defendant.

Learned counsel for the defendant submits that the failure of the learned Magistrate to follow the procedure prescribed by section 14 of the Ordinance vitiates all subsequent proceedings had on the application. I think learned counsel's submission is entitled to succeed. Section 14 is imperative in its language and it requires the Magistrate to examine the applicant on oath or affirmation and record such examination and issue summons if there is after such examination sufficient ground for proceeding. It appears therefore that the judgment of the Magistrate that there is sufficient ground for proceeding is a condition precedent to the issue of summons and to all subsequent proceedings. Although the enactment is affirmative and does not expressly prohibit the issue of summons without the examination contemplated therein, it is a rule of construction that "every statute limiting anything to be in one form, although it be spoken in the affirmative, yet it includes in itself a negative"[1]. Another rule of construction that should be noticed in this connexion is that "if an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there be no negative words, be done in any other manner"[2].

A Magistrate's jurisdiction under the Maintenance Ordinance is a special jurisdiction created by the statute and it is a rule of construction that when a statute confers jurisdiction upon a tribunal of limited authority and of statutory origin, the condition and qualifications annexed to the grant must be strictly complied with. The fact that the defendant raised no objection to the proceedings in the trial court does not in my view make legal what has not been done according to law. The legislature has in its wisdom enacted this provision as a safeguard against a person being summoned on an unsworn allegation to answer charges

[1] *Viner's Abridgement, Tit. Neg. A. pl. 2.* [2] *Dwarris on Statutes, p. 477.*

of neglect or refusal to maintain his wife or child legitimate or illegitimate. Before a summons can issue it requires the judgment of a Magistrate as to whether the allegation is one that needs inquiry, which judgment must be upon evidence on oath or affirmation. The evidence taken prior to the issue of summons is in the nature of a preliminary investigation, for section 16 provides that all evidence taken by the Magistrate under the Ordinance shall be taken in the presence of the defendant. So that when the defendant appears the applicant's evidence must be recorded *de novo*. This is not a case in which in my view the maxim *Quilibet potest renuntiare juri pro se introducto* can be applied because this is not a statute designed to benefit a particular person or class of persons. It is and has been held to contain our entire law governing maintenance of wives and children [1]. The object of the statute being one of general policy, the conditions prescribed by the statute are indispensable and when a statute directs a particular mode of proceeding or gives a particular form, that form must be observed [2].

The fact that the statute imposes a duty on the Magistrate and not on a party does not affect its imperative character [3]. In *Podina v. Sada* [4] Bonser C.J., while holding that the failure to comply with section 14 was irregular, seems to have taken the view that the irregularity did not vitiate the proceedings. With the greatest respect I find myself unable to share that view.

The other question that has been raised is that the applicant is not entitled to maintain the present claim in view of the fact that a previous application by her on December 15, 1947, in M.C., Mallakam Case No. 4,847 was dismissed. The written application made on that occasion reads :

> " I, Saraswathy, wife of Sinnathurai Namasivayam of Chulipuram do hereby complain to this court that the respondent having sufficient means did fail and neglect to maintain me—his lawful wife—and his child Thavamany Devi aged 5 years for the past one month. The respondent earns Rs. 125 per mensem.
>
> " Wherefore I pray that the respondent be ordered to pay me and to his child maintenance in terms of section 2 of 18 of 1889."

The learned Magistrate, as in the instant case, without complying with section 14 of the Ordinance issued summons on the defendant, who appeared on January 10, 1948. On that date the Magistrate's record reads :

> " 10.1.48. Applicant : Saraswathy—present.
>
> Respondent : S. Namasivayam—present.
>
> Summons served on respondent.
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> Respondent present. He denies marriage and paternity.
>
> Inquiry on 31.1.48 ."

[1] *Anna Perera v. Emaliano Nonis (1908) 12 N. L. R. 263.*
Menikhamy v. Loku Appu (1898) 1 Bal. 161.
[2] *Dwarris on Statutes, p. 611.*
[3] *Maxwell on Interpretation of Statutes, p. 378, 9th Edn.*
[4] *(1900) 4 N. L. R. 109.*

On January 31, 1948, the inquiry was postponed owing to the applicant's absence, and on February 14, 1948, owing to the defendant's absence, and on March 13, 1948, owing to the absence of the proctor for the defendant. On April 3, 1948, the applicant was again absent owing to illness. Thereafter on April 17, 1948, the case was again postponed. The reason is thus recorded : " Parties moving. Call case on 1.5.48 ". After another postponement, on May 15, 1948, the inquiry was fixed for June 5, 1948. On that day the applicant was absent and the application was dismissed.

There has been no adjudication on the merits and the dismissal of the applicant's application does not operate as a bar to a fresh application. The cases of *Anna Perera v. Emaliano Nonis* [1] and *Beebee v. Mahmood* [2] are authority for the proposition that an applicant whose application has been dismissed on the ground of her failure to appear on the day fixed for the hearing without any kind of inquiry into the merits is not precluded from making a fresh application.

In view of the opinion I have formed on the first question arising on this appeal I set aside these proceedings and send the case back so that the Magistrate may proceed *de novo* from the stage indicated in section 14 of the Ordinance.

I make no order as to costs in view of the defendant's failure at the appropriate stage of the proceedings to raise the objection that has now been taken.

Set aside.

[1] *(1908) 12 N. L. R. 263.* [2] *(1921) 23 N. L. R. 123.*