1941 *Present :* **Soertsz J.**

THANGAYAGAM *v.* CHELLIAH.

258—M. C. Batticaloa, 2,458.

Maintenance—Application on behalf of a child of seventeen years—Maintenance Ordinance (Cap. 76), s. 7.

Section 7 of the Maintenance Ordinance does not preclude the Court from making an order of maintenance in favour of a child between sixteen and eighteen years of age.

APPEAL from an order of the Magistrate of Batticaloa.

P. Thiagarajah, for the applicant, appellant.

M. M. I. Kariapper, for defendant, respondent.

Cur. adv. vult.

June 17, 1941. SOERTSZ J.—

This was an application for maintenance made by a wife against her husband, for herself, and their two sons, the elder of whom was seventeen years and two months old at the time the application was made. At that date the younger son was fifteen years of age.

The defendant opposed the application, and stated that he was not to blame for the fact that his wife and children were living apart from him, and he offered to take them back. The wife, however, refused to go back to him alleging that life with him had become insupportable by reason of his habitual cruelty. The defendant did not ask for the custody of the children, and I am dealing with the matter on the footing that he was content that the children should be with the mother.

The learned Magistrate heard the evidence led before him and came to the conclusion (*a*) that the refusal of the wife to go back to the husband was unreasonable, and that, consequently, she was not entitled to an order for maintenance for herself; (*b*) that the elder son being over sixteen years of age at the time of the application, section 7 of the Maintenance Ordinance precluded the Court from ordering maintenance

for him ; (c) that the younger son was entitled to maintenance at the rate of Rs. 5 per mensem till he attained his 18th year. The applicant appeals from the order in regard to herself and her elder son.

I am not sure that I should have reached the same conclusion as the learned Magistrate on the question whether the wife's refusal to go back to her husband was justifiable or not, but I have only the recorded evidence before me, whereas the learned Magistrate had the parties before him and heard and saw them, and that is a very great advantage in a matter of this kind. I must, therefore, refuse to interfere with that part of the order.

The next question is whether the Magistrate took a correct view of the law when he held that section 7 of the Maintenance Ordinance prevented him from making an order in favour of the elder son. After careful consideration, I am of opinion that his view is erroneous. At common law, the balance of authority favours the view that there was no age limit in regard to maintenance for children. Professor Lee in his Introduction to Roman-Dutch law states in the text at page 36 :—

> " a father must support his children, that is, must supply them with necessary food, clothing, shelter, medicine and elementary instruction. *The duty continues until the children have sufficient means to maintain themselves* ",

but, in a note, he raises the question whether this liability exists irrespective of the age of the child, and points out that Vander Keesel says, that the liability continues " *ad majorem aetatam* ". Nathan in his *Common Law of South Africa, Vol. I. (1906 ed.) p. 118,* says that that was the opinion to be inferred from the judgment in *Tait's case (4 S.C. 64)* too, but he adds " of course, an age at which a child may maintain himself need not necessarily be the age of majority ", and he refers to in *re Knoop (10 S.C. 198)* where it was said " the obligation to protect a child against want may revive even after such child reached an age at which he can maintain himself, if he is in distress or unable to work through bad health ". In the Divisional Bench case of *Lamahamy v. Karuneratne* [1], Schneider J. quoted from *Thomson's Institute of the Laws of Ceylon* a passage for which Thomson relies on considerable authority to the effect that " parents are legally bound to provide legitimate 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 ". It is, therefore, clear, that at common law it was open to a child to ask for maintenance at any age at all. But under the Maintenance Ordinance, the position is different. The effect of section 7 of the Ordinance is to preclude applications by or on behalf of children who have attained the age of eighteen. All that section 7 enacts is that where an order for maintenance has been given in favour of a child without limitation of the period of maintenance, the order will not be of force once the child has attained sixteen years of age, except so far as arrears of maintenance are concerned, unless the Magistrate makes a fresh order prolonging the

[1] *22 N. L. R. 289.*

period of maintenance for any additional period up to the eighteenth year *Ex hypothesi* the main part of the section deals with orders made on applications on behalf of children who had not attained their sixteenth year. It does not deal with applications of children who had attained that age, but, it does not say that such application may not be made if a Magistrate is empowered, in the first instance, to order maintenance until a child attains its eighteenth year, there does not appear to be any good reason why a first application for maintenance may not be made between the age of sixteen and eighteen. Cases are easily conceivable of the failure to maintain arising only at that stage, and in which an order for maintenance for that period is desirable.

The words "provided that the Magistrate may in the order or subsequently" . . . . do not bar a first order after the sixteenth year. On the contrary they suggest that such an order may be made at any time before the eighteenth year is attained.

Mr. Kariapper, Counsel for respondent, submitted the case of *Dona Rosaline v. Goonesekere*[1] for my consideration. But, that case does not deal either directly or indirectly with the point with which we are here concerned. In that case, the ruling of Garvin A.C.J. was that where an order for maintenance had expired by the lapse of the period during which maintenance could have been ordered under the Maintenance Ordinance as it stood before the year 1925, an applicant could not, by virtue of the amendment effected in that year enabling a Magistrate either "in the order or subsequently" to direct maintenance till the eighteenth year, obtain an extension of the period of maintenance. In other words, Garvin A.C.J. construed the word "subsequently" in the amended section 7 as meaning as some point of time after the original order but while that order was still in force.

The next question is whether this is a case in which maintenance should be ordered for the elder child till he attains his eighteenth year. The learned Magistrate, in view of his interpretation of section 7 did not consider that matter. To send the case back for that purpose, would be to involve the parties in additional expense which they do not appear to be able to afford, and there is sufficient material on the record to enable me to reach a conclusion on it. Although the elder son is some two years older than the younger he appears to be more or less in the same position so far as the need for maintenance goes. He is still at school, and at an age at which it is desirable that he should continue at school. It was not suggested by the defendant that he is able to maintain himself, or that he would be able to find employment if he left school. His mother, in her present position is, obviously, unable to keep him at school. The defendant has an income of nearly fifty rupees a month.

I would, therefore, allow maintenance to the elder son too at Rs. 5 a month from the date of the application till he attains his eighteenth year.

The defendant will pay Rs. 10.50 on account of the applicant's costs of appeal.

Appeal allowed.

[1] *1 C. L. W. 17.*