Present : Dalton and Akbar JJ.

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JANE NONA *v.* VAN TWEST.

903—P. C. Kalutara, 28,856.

Maintenance—Applicant residing in Kalutara—Respondent in Colombo—Jurisdiction.

Where, in an application for maintenance on behalf of an illegitimate child born to the respondent in Colombo, it appeared that the applicant (the mother) was residing at Kalutara with the consent of the respondent.

Held, that the Police Court of Kalutara had jurisdiction to entertain the application.

CASE referred by Akbar J. to a Bench of two Judges. The appellant was sued by the respondent in the Police Court of Kalutara for the maintenance of her two sons, of whom the appellant was the father. It appeared that the appellant had kept the respondent as his mistress for a period of fifteen years in Colombo. Eight months prior to the application the respondent left for Kalutara, with the permission of the appellant, as she had obtained the post of a midwife under the Urban District Council.

Objection was taken by the appellant to the jurisdiction of the Police Court of Kalutara.

N. K. Choksy, for appellant, argued the appeal on the preliminary objection to the jurisdiction of the Police Court of Kalutara.

The sum awarded as maintenance is not a " fine " or " penalty " under section 15 of the Criminal Procedure Code. It does not go to the revenue but is to be paid to the applicant.

The Maintenance Ordinance refers to the parties as " Applicant " and " Defendant " (section 12).

It is only certain specified sections of the Criminal Procedure Code that are to be applied. It has been so held in the cases cited.

No " charge " is to be framed (section 16).

The amending Ordinance, No. 13 of 1925, awards costs according to the Civil Procedure Code.

Under section 17 (as amended by Ordinance No. 13 of 1925) the party dissatisfied may appeal " as if the order was a final order pronounced by a Police Court in a criminal case or matter." This shows, by implication, that they are not in fact criminal proceedings.

The former Ordinance, No. 4 of 1841, by section 3 (2) made the failure to maintain an " offence." That section has now been repealed.

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Counsel cited the following authorities in further support: *Subaliya v. Kanangara* [1]; *Eina v. Eraneris* [2]; *Isobel v. Pedru Pillai* [3]; *Saboor Umma v. Coos Kanny* [4]; *Anna Perera v. Emaliano Nonis* [5]; *Bebi v. Tediyas Appu* [6]; *Elisa v. Jokino* [7]; *Menika v. Banda* [8]; *Podihamy v. Wickremesinghe.* [9]

The same difficulty arose in India, and special provision had to be made by the amendment of section 488 of the Criminal Procedure Code.

In India too they have been held to be of a civil nature.

Sohom's Criminal Procedure Code, pp. 1178–9; 13 P. R. 1885.

In *Benlow v. Benlow* [10] jurisdiction was conferred on the Court where the husband resided.

In re Malcolm Castro [11] jurisdiction was held to be in the Court where the wife resided. That turned upon its own facts.

Counsel contended that the Civil Procedure Code could not be invoked as the preamble stated that it only applied to Civil Courts. But in *3 Bal. Notes of Cases 55* it was decided that the Police Court did not cease to be a "Criminal Court" when trying a maintenance case.

Don Simon v. Arnolis [12] was decided under the *old* Ordinance which made it an "offence" but which had been repealed at the date of the decision in *Rankiri v. Kiri Hattana.* [13]

Counsel cited *Weerasinghe v. Perera.* [14]

May 1, 1929. DALTON J.—

This case has been set down for hearing before two Judges in view of the fact that the question that has arisen for decision had not always received the same answer in earlier decisions of this Court. We have now had the advantage of hearing a comprehensive argument on the point, in the course of which all the earlier decisions have been reviewed.

The appellant was sued in the Police Court of Kalutara by the respondent for the maintenance of her two sons, of whom appellant was the father. The evidence shows that appellant kept the respondent as his mistress for a period of fifteen years. He admits the paternity of the two boys, who are stated to be twelve and seven years of age. He states, however, that they lived together in Colombo, where he lives now, and that the Police Court

[1] *4 N. L. R. 121.*
[2] *4 N. L. R. 4.*
[3] *6 N. L. R. 85.*
[4] *12 N. L. R. 97.*
[5] *12 N. L. R. 263.*
[6] *18 N. L. R. 81.*
[7] *20 N. L. R. 157.*
[8] *25 N. L. R. 70.*
[9] *27 N. L. R. 93.*
[10] *24 Cal. 638.*
[11] *13 All. 348.*
[12] *3 S. C. C. 143.*
[13] *1 C. L. R. 86.*
[14] *4 C. L. Rec. 67.*

of Kalutara has no jurisdiction. The evidence shows that, some eight months prior to the proceedings, respondent came to Kalutara, with appellant's permission, as she had obtained the post of midwife to the Kalutara Urban District Council. That, of course, necessitated her living where her work was to be done. Four months after she went there, she says appellant took another mistress and failed to maintain his two sons, the younger of whom was living with her at Kalutara, the elder having been kept from his mother by the second wife or mistress of appellant. She accordingly sued him for maintenance in the Kalutara Court.

The question to be decided on this appeal is whether the Kalutara Court had jurisdiction to hear and decide her claim for maintenance for her children, or for the child residing with her at Kalutara, or whether the appellant's objection that the case should be heard by the Court (Colombo), within the jurisdiction of which he resided, should be upheld. The Magistrate has applied the decision in *Herft v. Herft*[1], a case of a claim by a wife for maintenance, to the question arising in this case, a claim for maintenance of an illegitimate child, but it seems to me that different considerations apply here.

As I decided *Herft v. Herft* (*supra*), I think it opportune to state here that, as now advised, a view of the law taken by me in that case, a somewhat guarded view it is true, is wrong. I there stated that "I am inclined to agree with Wendt J. in his conclusion as regards the default to maintain being an offence within section 3 of the Criminal Procedure Code." That opinion of Wendt J. is given expression to in *Fernando v. Cassim.*[2] From the numerous cases that have now been cited to us, it is clear that although there are decisions (*vide Rankiri v. Kiri Hattana*[3]; *Saboor Umma v. Coos Kanny*[4]; *Weerasinghe v. Perera*[5]) that would support Wendt J.'s conclusion, by far the larger number of cases, as set out here—*Chivakannipillai v. Chuppramaniam*[6]; *Subaliya v. Kannangara*[7]; *Eina v. Eraneris*[8]; *Isobel v. Pedru Pillai*[9]; *Anna Perera v. Emaliano Nonis*[10]; *Bebi v. Tidiyas Appu*[11]; *Sampihamy v. Carolis*[12]; *Eliza v. Jokino*[13]; *Menika v. Banda*[14]; *Podihamy v. Wickremesinghe*[15] (and I think I may properly add more authoritative decisions)—lead one to conclude that maintenance proceedings are of a civil nature. I had the advantage when hearing *Herft v.*

[1] *29 N. L. R. 324.*
[2] *(1908) 11 N. L. R. 329.*
[3] *(1891) 1 C. L. Rep. 86.*
[4] *(1909) 12 N. L. R. 97.*
[5] *(1922) 4 C. L. R. 67.*
[6] *(1896) 2 N. L. R. 60.*
[7] *(1899) 4 N. L. R. 121.*
[8] *(1900) 4 N. L. R. 4.*
[9] *(1902) 6 N. L. R. 85.*
[10] *(1908) 12 N. L. R. 263.*
[11] *(1914) 18 N. L. R. 81.*
[12] *(1914) 3 Bal. Notes 55.*
[13] *(1917) 20 N. L. R. 157.*
[14] *(1923) 25 N. L. R. 70.*
[15] *(1924) 27 N. L. R. 93.*

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Herft (*supra*) of no such argument as we have now had from Mr. Choksy, and Wendt J. seems to have been in the same position when he heard *Fernando v. Cassim* (*supra*).

In the result then, in my opinion, one is not able to apply the provisions of section 3 of the Criminal Procedure Code to a failure to maintain an illegitimate child, maintenance proceedings under Ordinance No. 19 of 1889 being of a civil and not a criminal nature.

If one is not able to go to the Criminal Procedure Code for assistance on the question of jurisdiction, whither is one to go? The Maintenance Ordinance itself is silent on the point. Here it may be noted that the equivalent law in India has been amended to remove all doubt on the question. No assistance is given by section 3 of our Ordinance. On the other hand, as has been pointed out before, the Maintenance Ordinance does not provide a new remedy previously unknown to the law but merely provides a simpler, speedier, and less costly remedy which a woman is compelled to take if she wishes to obtain maintenance for herself and her children. In *Subaliya v. Kannangara* (*supra*) Bonser C.J. points out that in his opinion "the foundation of the jurisdiction of a Police Court in these matters is the civil liability already existing; the Ordinance simply provides a speedier process." Wood Renton J. follows this exposition of the law in *Anna Perera v. Emaliano Nonis* (*supra*) at p. 267, pointing out that since the enactment of the Maintenance Ordinance in 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 them by the father, the Ordinance having superseded the Common law. But if the Ordinance is silent on the question of jurisdiction, it would appear to follow that the answer to that question would be found in the law on the point as it existed at the time of the enactment of the Ordinance. The Civil Procedure Code (No. 2 of 1889) provides, *inter alia*, by section 9, that an action shall be instituted in the Court within the local limits of whose jurisdiction the cause of action arises. Evidence has been led by the applicant (respondent) to show that she was employed and was residing in the Kalutara District with her younger son. In addition, in this case it is shown that she was doing so with the consent of the appellant. Her younger son was properly in her care, and the appellant, so the evidence shows, refused to maintain him. The cause of action therefore arises at Kalutara, where the claim has been brought, and the Police Magistrate has jurisdiction to hear the matter. This is in respect of the claim for maintenance of the younger son. What is the position in respect of the elder son is not made clear. He is apparently not in his mother's custody, but in Colombo with his father. It does not appear whether or not his father is failing to maintain him in Colombo. Normally

one would take the custody and residence of an illegitimate child to be with its mother, but on the facts as disclosed on the record at present that is not the case here in respect of the elder boy. If he is being kept from his mother by the father, but nevertheless is being maintained by him, the claim by the mother for maintenance for him is at any rate premature.

The Court having jurisdiction to hear and decide part of the claim brought, the appeal must be dismissed.

In view of what I have stated above respecting the opinion expressed by me on my earlier opinion in *Herft v. Herft* (*supra*) on the application of the provisions of section 3 of the Maintenance Ordinance, I think it well to add that it does not follow that the decision in *Herft v. Herft* (*supra*) was wrong. A wife's residence is normally with the husband, but circumstances may arise where it is otherwise: the cause of action may then presumably arise in a jurisdiction other than that of the husband's residence. See *In re Malcolm De Castro*[1]. There are other cases in Indian Courts, some of which agree and others disagree with this authority, but the matter is apparently now settled there by an amending Ordinance.

AKBAR J.—I entirely agree.

Appeal dismissed.

[1] *(1891) 13 All. 348.*