1947 *Present :* **Soertsz S.P.J. and Canekeratne J.**

JEERIS APPUHAMY, Appellant, *and* KODITUWAKKU, Respondent.

S. C. 37—D. C. Kandy, 180.

Civil Procedure Code, sections 621, 622—Action for dissolution of marriage—Decree absolute—Application to increase amount of maintenance after decree absolute—Power of Court.

Section 622 of the Civil Procedure Code extends the jurisdiction of the Divorce Court as regards the custody, maintenance and education of minor children to applications made after decree absolute. The Court can therefore vary the provisions of the decree absolute in respect of these matters from time to time as occassion arises.

APPEAL from a judgment of the Additional District Judge, Kandy.

H. W. Tambiah, for the defendant, appellant.

M. M. Kumarakulasingham, for the plaintiff, respondent.

Cur adv. vult.

November 11, 1947. CANEKERATNE J.—

This is an appeal by the defendant from an order of the Additional District Judge, Kandy, directing him to pay a sum of Rs. 65 a month for the maintenance of his son. A decree *nisi* was entered on April 19, 1945, dissolving the marriage between the plaintiff and her husband, the defendant, on the ground of malicious desertion. After entrusting the custody and education of the child of the marriage, Chandrasiri, about 13 years old, to the plaintiff it was further ordered by the decree that the defendant should pay a sum of Rs. 25 a month for the maintenance of the child and that this allowance should continue until further order and should be subject to variation as future circumstances may require. The formal parts of the decree are in accord with form. No. 97 in Schedule 2 to the Code of Civil Procedure (Cap. 86, C. L. E.),

The decree was made absolute on May 3, 1946. On June 7, 1946 the respondent made an application for having the maintenance increased to Rs. 65 a month : after inquiry the Judge made order to that effect.

It was contended by appellant's Counsel that the Court had no power under section 622 of the Civil Procedure Code to make and order varying the amount of maintenance fixed by the decree absolute, the argument being that there was a *Casus Omissus* and that a Court in entering a decree dissolving the marriage should fix the period for which maintenance at a specified rate was payable. He argued that if a child required a greater sum than that fixed by the Court for maintenance application should be made in a Magistrate's Court under the Maintenance Ordinance (Cap. 76, C. L. E.) ; to the counter argument advanced by respondent's Counsel, that the maintenance proceedings can be taken only of there was a default on the part of the father and that there would be no default so long as the sum fixed by the Matrimonial Court was paid, there was hardly any satisfactory reply given by Counsel for the appellant. The latter also felt difficulty in suggesting any sensible solution as regards

the effect of an order for custody except the unpractical one of applying for a writ of *habeas corpus ;* for this writ may no be available as a general rule after the age of sixteen years. He also referred to the provisions of the present English law, *i.e.*, those under the Act of 1925 : hard by any aid can be furnished by these provisions.

Chapter 42 of the Code contains the main statutory provisions as regards matrimonial proceedings, as dissolution of marriage, nullity of marriage, judicial separation and incidental relief. These provisions embody sustantially those contained in the Matrimonial Causes Act of 1857 as amended by the later Acts. The question at issued in this case depends on the correct interpretation of sections 621 and 622 of the Code. The language used in section 35 of the Matrimonial Causes Act of 1857 (20 and 21 Vict. C. 85) is repeated, with some alterations not material to this case, in section 621 of the Code. Section 621 gives power to the court to make such provisions as the Court deems proper with respect to the custody, maintenance, and education of the nimor children of the marriage in two cases :— (1) before making the decree of dissolution absolute, the power being exercisable from time to time: (2) in the decree absolute. It seems clear that when a Court exercises its power on making a decree absolute, the decree would determine the rights of the parties finally and it could not be varied for a Judge when he has pronounced judgment is *functus officio* and thereafter ceases to be a Judge so far as that case in concerned, and any order made by him or by his successor reversing or varying the first judgment cannot as a general rule stand. The difficult situation that would be created by an order made in the decree absolute became apparent the year after the Matrimonial Causes Act was passed. In *Curtis v. Curtis*[1] the Judge stated—" As I cannot vary a decree once made . . . . and circumstances may hereafter arise which may render expedient and just to make some fresh order, I think that the most discreet course that I can pursue is to embody in the decree an order that the children shall remain in the custody of their mother for three months "—he suggested that an application should be made to the Lord Chancellor in the meantime. Parliament removed the difficulty the next year by the amending Act, the Matrimonial Causes Act of 1859 (22 and 23 Vict. C. 61). Section 4 of this Act gave power to the Court to make orders with respect to the custody, maintenance and education of the children of the marriage. The language used in section 4 is substantially repeated in section 622 of the code. It runs thus :—The Court after a decree absolute for dissolution . . . may, upon application by summary procedure for the purpose, make from time to time all such orders and provisions, with respect to the minor children[2], . . . as might have been made by such decree absolute or . . . . . or by such interim orders as aforesaid. The jurisdiction of the Divorce Court as 'regards the custody. maintenance and education of the minor children is extended to application made after decree absolute by section 622. It is given power from time to time to do certain things : the substantial effect of these words " from time to time " is to rebut the presumption that

[1] *27 L. J. P. 55 at p. 86.*

[2] *The English Act uses the word children, not minor children.*

the power is exhausted by a single exercise of its power (see Interpretation Ordinance, Cap. 2, section 4, C. L. E). The power may be exercised from time to time as occasion requires. The Court was vested with power to make such an order or provision with respect to the maintenance of a minor child—as might have been made by "such decree absolute or by such interim orders as aforesaid"; one is thrown back on the earlier section.

The effect of the later section was to vest jurisdiction in the Court, after it had entered a decree absolute, to make such an order with respect to maintenance as it was entitled to make if the dispute had not reached the stage of finality under the earlier section, for circumstances may arise rendering it necessary to vary the order. It is thus competent to the Court after it had entered a decree absolute to make and order as regards the maintenance of a minor child. The words of the section must be construed to give a sensible meaning to them.

The facts in *Thomasset v. Thomasset*[1], the case referred to by Counsel for the respondent, show that an order for maintenance was varied in that case. An order was made on August 8, 1893, about 15 months after the decree for divorce, for payment of a specified sum of money to each of four children for their maintenance and education. On June 1, 1894, on application made by the father and order was made that the allowance given to the eldest child should cease, as the child had attained the age of sixteen : the latter order was set aside by the Court of Appeal.

The appeal must be dismissed with costs.

SOERTSZ S.P.J.—I agree.

Appeal dismissed.