PODINA *v.* SADA.

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P. C., Balapitiya, 20,239.

Maintenance—Ordinance No. 19 of 1889—Irregular commencement of suit—Evidence of paternity—Competency of wife to give such evidence.

Before summons can be served in a case of maintenance, under Ordinance No. 19 of 1889, it is necessary that there should be a written application to the Police Magistrate signed by the applicant, and an examination of the applicant on oath or affirmation.

It is not necessary that the mother should be the applicant.

The evidence of the wife to show who the true father is is not admissible till it has been established by independent evidence that the child is not the child of her husband.

THIS was a case of maintenance. It appeared that the complainant was lawfully married to one Babuwa in 1893, but that she refrained from living with her husband, as she discovered soon after the marriage that he was living with another woman and had children by her. The defendant attempted to prove that the child, which was ten months old, and in respect of which this case was instituted, was Babuwa's. The Police Magistrate found the child to be the defendant's, and ordered him to pay maintenance at the rate of Rs. 2 per month.

He appealed.

H. J. C. Pereira, for appellant.—The proceedings were irregularly commenced. Summons on the appellant was served without examining the applicant on oath or affirmation, as required by

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section 14 of Ordinance No. 19 of 1889. The basis of the proceedings is a report of a headman to the Court that complainant had made a complaint to him that the appellant failed to maintain his child by her. There was no evidence to rebut the presumption raised by section 112 of the Evidence Ordinance that the child in question was her husband's. The complainant swore that, after marriage and separation the day after, " we never saw one another." This evidence is inadmissible. Appellant has proved that the complainant was in fact conducted to her husband's house and lived with him, that the appellant is complainant's cousin, and that owing to ill-feeling this false case has been instituted.

BONSER, C.J.—

This is a case under the Maintenance Ordinance, No. 19 of 1889, in which the Police Magistrate of Balapitiya has made an order against the respondent to pay the sum of Rs. 2 a month for the maintenance of an infant child, which he finds to be the respondent's child. The mother is a cousin of the respondent. The proceedings were in the highest degree irregular, and I cannot help thinking that the Magistrate had never read the Ordinance under which he purported to act. The proceedings were commenced by a report sent to the Magistrate by the headman of the village in which the mother lived, to the effect that the woman had complained to him that the respondent had been living with her and had a child by her, and that he had recently deserted her. The report went on to state that he had made inquiries into the matter and found that the respondent and the woman had been living together as husband and wife.

Attached to the report is a list of witnesses. It will be seen that this is the ordinary form of a report of a crime which has come under a headman's cognizance. On that report the Magistrate issued a summons to the respondent to appear to answer the charge, " for that you did since last month failed (*sic*) to " maintain your child by Singappapullehena Radage Podina." Now that is not the way in which, according to the procedure prescribed by the Ordinance, proceedings for obtaining maintenance are to be commenced. The application is to be in writing and signed by the applicant, and then upon that application the Magistrate is to commence the inquiry by examining the applicant on oath or affirmation, and after that, and then only, is the summons to be issued. Now I do not say that it is necessary for the mother to be the applicant. The Ordinance does not say so; but, whoever the applicant is, the applicant must be examined on oath before summons is issued, and that was not done in the

present case. The proceedings were quite irregular. At the same time the respondent did not take any objection to the regularity of the proceedings, and I do not think that he has been in any way prejudiced by the irregularity. If I thought that he had been prejudiced, or if he had objected at the trial to the irregularity, I should have quashed the proceedings.

Now to come to the question at issue between the parties—the paternity of the child. It appears that seven years ago the mother was married to a man called Babuwa, who lives in a village 12 miles away from her village, and that marriage was apparently never dissolved. Mr. Pereira argued that there was no evidence which was sufficient in law to rebut the presumption raised by section 112 of the Evidence Ordinance that the child was the husband's. He said, and rightly said, that the evidence of the wife was not admissible to show that she had not had connection with her husband. The English Law of Evidence which governs this case is laid down in Mr. Justice Stephen's *Digest of the Law of Evidence* in this way:—" Neither the mother nor the husband " is a competent witness as to the fact of their having or not having " had sexual intercourse with each other, nor are any declarations " by them upon that subject deemed to be relevant facts when " the legitimacy of the woman's child is in question, whether the " mother or her husband can be called as a witness or not, pro- " vided that in applications for affiliation orders, when proof has " been given of the non-access of the husband at any time when " his wife's child could have been begotten, the wife may give " evidence as to the person by whom it was begotten." (Art. 98.) That is to say, after it has been established by independent evidence that the child is not the child of her husband, then the evidence of the wife is admissible to show who the true father is. Therefore, we have to see in this case what independent evidence there is that the husband was not the father of the child. There is a conflict of evidence on this point, but the Magistrate believed the evidence led on behalf of the woman. Her father states that the respondent kept his daughter in his, the father's, house for five or six years continuously up to about a month before the trial. He says, as I read his evidence, that the marriage between his daughter and the respondent was never consummated, although the ceremony was gone through at the registrar's office, for that before the woman was conducted it was found that the husband was living with another woman by whom he had a number of children; and that being so, nothing further was done. Now, anybody who is acquainted with the habits and customs of the Sinhalese knows that the conducting of the bride is an essential

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part of the marriage ceremony—in fact, with them it is the essential part. They look upon the registration a meaningless form imposed on them for some unintelligible reason by an all-powerful Government, with which they are obliged to comply. In my opinion this evidence, if believed, shows that it is in the highest degree improbable that access for the purpose of sexual intercourse could have taken place between the alleged husband and this woman. The fact that she and the respondent, her cousin, were living together as husband and wife in her father's house for five or six years, renders it improbable in the highest degree that the husband, with whom relations had been broken off, should have visited her for the purpose of sexual intercourse. I think, therefore, that the Magistrate was justified in law in coming to the conclusion he did,—that this was not the child of Babuwa, the alleged husband.

Then, the question arises whether it was proved that the child was the child of the respondent. Now we have got to the stage at which the mother's evidence as to paternity is admissible. She says that she was living with the respondent as his wife in her father's house, and that he was the father of her child.

The peace officer of the village was called. He says that the respondent admitted he was the father of the child.

Another peace officer of a neighbouring village says that he visited the house and saw them living together, that he found the respondent nursing the child in his arms. It was suggested that as he was a cousin of the mother it would be natural for him to nurse the child, but having regard to the evidence of a closer relationship between the parties, I think the act of the respondent must be ascribed to other than cousinly feeling. Therefore the appeal must be dismissed.

There is one observation which I desire to make on a portion of the judgment. The Magistrate says:—"Respondent denies paternity, but he will not commit himself as to who is the father." I think that was a very sensible proceeding on the respondent's part. I do not see how the Magistrate could expect him to commit himself as to the paternity of the child. It was not for him to establish whose child it was. It was for the applicant to establish that the child was the respondent's.