Present: Mr. Justice Wendt.

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BENNO NONA *v.* DINERIS PERERA.

P. C., Colombo (Addl.), 8,636.

Maintenance, order for—Previous application—Non-proof of maintenance within one year—Dismissal—Res judicata—*Second application.*

Where an application for the maintenance of an illegitimate child was dismissed on the ground that there was no evidence that the defendant had at any time within twelve months next after the child's birth maintained it or paid money for its maintenance, or that he ever ceased to reside in the Island, and where a second application was made by the mother in respect of the same child,—

Held, that the dismissal of the first application operated as *res judicata*, and that the second application was barred.

APPEAL from an order of the Additional Police Magistrate of Colombo (M. S. Pinto, Esq.). In April, 1908, the applicant proceeded under the provisions of Ordinance No. 19 of 1889 and obtained an order condemning the defendant to pay Rs. 7 per mensem for the maintenance of his illegitimate child, which was then five years old. The defendant appealed from this order, and the Supreme Court reversed the order of the Magistrate and dismissed the application, on the ground that there was no evidence that the defendant had at any time within twelve months next after the birth of the child maintained it or paid money for its maintenance,

[1] *(1908) 11 N. L. R. 300.*

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or that he ever ceased to reside in the Island. In 1908 the applicant made a second application. The Police Magistrate, on objection taken by the defendant, held that the judgment of the Supreme Court in appeal on the first application operated as *res judicata*, and dismissed the application.

In appeal,

Tambayah, for the applicant, appellant.

H. Jayewardene (with him *Batuwantudawe*), for the defendant, respondent.

October 15, 1908. WENDT J.—

This is an appeal by the complainant against the dismissal by the Magistrate of an application for an order for maintenance in respect of her illegitimate child aged six years.

The respondent, when he appeared in the Police Court, put in a plea of *res judicata*, alleging that his liability to maintain the child in question had been finally adjudicated upon a previous application of the complainant's in that behalf. On that previous application the Magistrate made an order in the complainant's favour, but the respondent appealed; and this Court, on June 30, 1908, allowed the appeal, and dismissed the complainant's application, on the ground that, the child being over five years old, the complainant had failed to prove, as required by section 7 of the Maintenance Ordinance of 1889, that the respondent had at any time within twelve months of the child's birth maintained it or paid money for its maintenance. The Magistrate in the present case was, I think, right in holding that that judgment made the question of respondent's liability to maintain the child *res judicata*.

Mr. Tambayah, who argued the present appeal, has endeavoured to limit the conclusive effect of a previous dismissal to cases turning upon the finding against paternity only, but I am of opinion that his argument is unsound in principle.

The result of the provisions of the 3rd and 4th sections of the Ordinance, although they are put in the form of directions regulating procedure, is to enact that not every father of an illegitimate child is liable to maintain it, but only those fathers against whom an application is made within twelve months of the child's birth, or who have within that period maintained it. Therefore, where an application for maintenance has been dismissed on the ground that the application was not made within the time limited, or on the ground that the father had not so maintained the child, those facts are finally determined between the parties, and cannot be re-opened in any subsequent application. It is different with a fact, such as a failure to maintain, or non-possession of sufficient means. If one of these be the ground of dismissal, it would be competent to a complainant in a second application to prove a subsequent failure or

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a subsequent acquisition of means, as was pointed out in the case of *Gunahami v. Arnolis Hamy*.[1]

Mr. Jayewardene has called my attention to the decision of my brother Wood Renton in 431, P. C., Kandy, No. 13,788,[2] where he held that the question of a man's adultery, which the wife alleged as a reason for refusing to go back to him, and which the Magistrate held not to have been proved, could not be agitated afresh in a second application, but is conclusively determined by the dismissal of the first application.

I entirely agree with the reasoning upon which my brother's judgment is founded, and it is in accordance with what I have myself just ventured to express. The appeal therefore is dismissed.

Appeal dismissed.