1914.

*Present:* Wood Renton C.J.

GUNAWARDENE *v.* ABEYEWICKREME.

*688—P. C. Galle, 6,524.*

*Maintenance—Married woman having income sufficient to maintain herself.*

*Obiter.*—A married woman who is living apart from her husband through no fault of her own is not debarred from claiming maintenance (under Ordinance No. 19 of 1889) by the fact that she has a personal income sufficient for her maintenance.

THIS case was reserved for argument before a Bench of two Judges by Pereira J. On the question whether the Police Court of Galle had jurisdiction, Wood Renton C.J. and Ennis J. delivered the following judgment, and sent the case for argument before a single Judge on the other points involved in the case:—

WOOD RENTON C.J.—This is a proceeding under Ordinance No. 19 of 1889, in which the applicant seeks an order for maintenance against her husband, the respondent. The question referred to a Bench of two Judges for decision is whether the Police Court of Galle had jurisdiction in respect of the application when the defendant admittedly lived at Matara, that is to say, outside the territorial limits of the jurisdiction of the Police Court of Galle. It now appears that the abstract question of jurisdiction need not be decided in this case, because it is clearly a case to which the provision of section 423 of the Criminal Procedure Code should be applied. There were two trials in this case. The defendant took no objection to the jurisdiction of the Police Court of Galle throughout the first trial, nor did he take any such objection before this Court in the course of the first appeal, but he practically acquiesced in the order for further hearing made by this Court, and then for the first time took this objection before the Police Court at the further hearing of the case. The Police Court of Galle has now made an order adverse to

the defendant. I see no reason whatever for thinking that the fact that the trial took place in a wrong local area (assuming that to be so merely for the sake of argument) has occasioned a failure of justice. I would apply to the case section 423 of the Criminal Procedure Code, and remit the case to be dealt with in due course by a single Judge of this Court.

ENNIS J.—I am of the same opinion.

*A. St. V. Jayewardene*, for the appellant.

*Bartholomeusz* (with him *Loos*), for the respondent.

September 29, 1914. WOOD RENTON C.J.—

This appeal could be disposed of upon the evidence alone. The respondent's counsel did not argue before me the point that the separation between the respondent and his wife, the appellant, was a separation by mutual consent, and I am far from being satisfied on the evidence that the appellant's personal income is sufficient for her maintenance. The fact that the respondent, having deserted his wife, or compelled her by his conduct to leave him, has contracted an adulterous connection with, and has had children by, another woman, is no reason for absolving him from the duty of maintaining his wife. But as the case involves an important point of law, which was fully argued before me, I will state my opinion upon it. The appellant is living apart from her husband through no fault of her own, but she has, *ex hypothesi*, a personal income sufficient for her maintenance. Is she debarred by this circumstance from taking proceedings against the respondent under the Maintenance Ordinance, 1889 (No. 19 of 1889)? The appellant's counsel, Mr. St. Valentine Jayewardene, strenuously argued that she is. He contended that, on the authority of the judgment of Sir John Bonser C.J. in *Subaliya v. Kannangara*,[1] the Ordinance of 1889 is founded upon, and gives effect to, the Roman-Dutch law as to maintenance, and merely provides a simpler process for the enforcement of that law; that under the Roman-Dutch law the husband was under no obligation to maintain a wife who had any property of her own, except in such circumstances as would entitle her to bind his credit; and that the view expressed by the learned Police Magistrate that the language of section 3 of the Maintenance Ordinance, 1889, shows that a wife has a right to maintenance, even where she is able to maintain herself, is contradicted by form No. 2 in the schedule to the Ordinance.

So far back as 1863, it was held by Sir Edward Creasy C.J. and Thompson J., in the case of *Ukku v. Tambaya*,[2] that, by the law of this Colony, the husband by the marriage contract takes upon himself the duty of supporting and maintaining his wife so long as

[1] *(1889) 4 N. L. R. 121.*

[2] *(1863) Ram. 1863–1878, 71.*

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she remains faithful to her marriage vow. The learned Judges who decided that case stated also that a wife in Ceylon would only have a right to sue her husband for maintenance where in England she would have a right to pledge his credit. But that expression of opinion must be looked at *secundum subjectam materiem*, and it is clear that what the Court had in view was not the question whether the wife had an allowance from her husband, sufficient to cover all necessary expenses, but the rule of English law that, even where a wife would otherwise be entitled to pledge her husband's credit, she could not take advantage of this right where she herself was no longer faithful to her marriage vow. The case was sent back to the District Court, not for inquiry as to whether the wife had means adequate for her own support, but for further hearing on the question whether she had committed adultery before or after the desertion. The principle laid down in the case of *Ukku v. Tambaya* [1] was recognized by this Court in *Ramasinghe v. Peris*,[2] and there is no decision, so far as I am aware, in conflict with it. In D. C. Negombo, No. 7,875,[3] Clarence A.C.J. and Dias J. touched upon the point whether a wife living separate from her husband, and not suing for divorce or judicial separation, can claim damages in respect of past maintenance. But it was not necessary to decide this issue, and Lawrie J. indicated that in his view the law was that a husband was bound either to maintain his wife in his own house, or, if he refused to do so, to supply her with maintenance. In P. C. Kandy, No. 12,848,[4] a maintenance case was remitted by Lawrie J. to the Police Court for further evidence as to whether or not the applicant had sufficient means to support herself. But that was a case of a marriage in *binna*, under which it might well be contended that the nature of the contract of marriage excluded any liability on the part of the husband to maintain a wife, and this view is confirmed by the opinion expressed by Lawrie J. in the case of P. C. Kandy, No. 12,848.[4]

I have carefully examined all the Roman-Dutch texts to which I have been able to get access with regard to the question under consideration. They seem to support the view expressed by Middleton A.C.J. and Pereira J. in *Ramasinghe v. Peris* [2] that, under Roman-Dutch law, the husband was bound to maintain his wife so long as she remained faithful to him. The passage from *Maasdorp (vol. I., pp 30, 31)* to which Mr. Jayewardene referred me does not seem to me to support the argument that he based upon it. It means nothing more than this—that maintenance may be withheld as a matter of judicial discretion, where a wife is provided with ample means, and the husband is not in a position to contribute to her support. In the paragraph immediately preceding this passage Maasdorp expressly says that the husband is bound to maintain the

[1] *(1863) Ram. 1863–1878, 71.*
[2] *(1909) 13 N. L. R. 21.*
[3] *(1877) Ram. 1877, 331.*
[4] *(1899) Koch's Reports 54.*

wife in a manner suitable to her rank and position, so much so that he will even be liable for necessaries supplied to her, whilst living apart from him, whenever she has been obliged to leave him on account of his misconduct. The decision of Sir John Bonser in *Subaliya v. Kannangara* [1] does not involve the conclusion that the Maintenance Ordinance, 1889, is concerned with procedure alone. It is clear that sections 3, 4, and 5, to go no further, deal with matters of substantive law. I entirely agree with the learned Police Magistrate that, in section 3, the words "unable to maintain itself" apply to children alone, and the fact that in form No. 2 in the schedule they are treated as applicable to the wife also is immaterial. "It would be," said Lord Penzance in *Dean v. Green*,[2] "quite contrary to the recognized principles upon which Courts of law have to construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for convenience' sake in a schedule."

The appeal must be dismissed with costs.

*Appeal dismissed.*