A Married Woman's Right To Maintenance

APPLICATIONS by wives for maintenance from their husbands are so frequent in our Courts that no excuse is necessary for an article on the subject. However it is only fair to warn readers who think of maintenance solely in terms of the Maintenance Ordinance not to expect an exhaustive commentary on that Ordinance. The article attempts to set out the principles which govern the wife's claim for support and to consider how our law enables her to enforce this claim.

I

Law apart, the husband's duty to support his wife is as much believed in as his right to inflict moderate chastisement on her. Although the latter consequence of marriage has recently been denounced by the Courts,[1] his liability is firmly established in law. Both the English Common Law and the Roman-Dutch Law evolved rules in recognition of his duty, and in the modern law these have been supplemented by legislation. In Ceylon this branch of the law owes as much to the English Law as to Roman-Dutch Law and it would be helpful to begin with a short account of the wife's position in English Law.

Common Law recognition of the principle that a husband must support his wife while she lives with him and in many cases while she lives apart from him, took the form of making the husband liable in contracts entered into by her for necessaries. Where living together the husband neglects to provide necessaries suitable to their station in life, the wife is able to obtain them on credit as his agent, express or implied While living apart from him, her right to enforce his duty to support her is limited to cases where the husband is at fault—he must have deserted her or turned her out or compelled her by his conduct to leave. If in addition he does not support her she has the right to pledge his credit for necessaries as an agent of "necessity." In such circumstances the husband's liability to the tradesman is well settled, but he can defend himself in an action brought by the tradesman by showing that he had made his wife a reasonable

1. *Palmer* v. *Palmer* (1955) 3 S.A. 56; Hahlo, 98. For English Law see *R.* v. *Jackson*, (1891) 1 Q.B. 671.

allowance[2] or that she had sufficient means of her own.[3] A wife who leaves her husband without good cause, or even after leaving him for good cause commits adultery, has no right to pledge his credit for necessaries.[4] At Common Law she had no authority to borrow money on his credit but Equity allowed the lender to recover from the husband on proof that the money was spent on necessaries.

Attempts by legislation to enforce the husband's duty began with the Vagrancy Act of 1824 which indirectly compelled husbands to maintain their wives by imposing penalties on husbands who left their wives destitute. From 1834 Poor Relief legislation empowered Poor Law authorities who gave relief to a destitute wife to recover the amount expended from the husband, and later to obtain an order from the justices compelling him to make regular provision for her future maintenance. When the National Assistance Board (set up under the National Assistance Act of 1948) took over the relief of the poor, similar provision was made for the recovery of expenses. The Act also recognised the reciprocal duty of the wife to maintain the husband[5] but otherwise the Act has not been interpreted as effecting radical changes in the general law relating to the husband's duty.[6] Under the Poor Relief legislation the wife had first to go on poor relief before the husband's liability could be enforced ; she had no claim on her husband until 1886[7] when she was given the right of applying direct to the justices for maintenance in specified instances e.g. aggravated assault, desertion, cruelty, wilful neglect to maintain. Subsequent statutes added new grounds and the further right to have periodical payments for her maintenance secured on her husband's property was given by the Law Reform (Miscellaneous Provisions) Act of 1949.

II

Turning to our law we will first examine the provisions of the Roman-Dutch Law, which is our Common Law, and then consider statutory provisions modelled on English Law.

2. *Read* v. *Legard* 6 Exch. 636; *Johnstone* v. *Sumner* 3 H. & N. 259.

3. *Liddlow* v. *Wilmot* (1817) 2 Stark. 86; *Biberfeld* v. *Berens* (1952) 2 Q.B. 770.

4. *Grovier* v. *Hancock* 6 T.R. 603.

5. The Common Law did not recognise such obligation and the husband could under no circumstance pledge his wife's credit. Halsbury, XIX, p. 818.

6. *National Assistance Board* v. *Wilkinson* (1952), 2 Q.B. 648.

7. Married Women (Maintenance in Case of Desertion) Act, 1886, later replaced by the Summary Jurisdiction (Married Women) Act, 1895.

Roman-Dutch Law. It is somewhat surprising to find that the Roman-Dutch text books do not distinctly lay down that the husband is liable to maintain his wife. This fact was brought out in Ceylon, in *Jane Ranesinghe* v. *Pieris*[8] but, as a South African judge has observed, " no authority need be quoted for so elementary a principle which is acted upon every day in our Courts."[9] Certainly it is common cause among the modern Roman-Dutch writers that the husband is under a duty to support his wife.[10] Support in this connexion includes not only lodging, food and clothes but also medicines, general medical attention and pin-money.[11] He discharges this obligation when he provides her with a furnished house (flat, rooms) and gives her cash for the purchase of food and other necessaries for the common household. It is not bare support that the wife is entitled to but support which is reasonable when considering the social status of the parties, means of the husband, and the customs of the country.[12] If the husband does not supply her with cash for the purchase of necessaries the wife has authority (usually in compliance with arrangements made by him, but even against his express instructions) to purchase them on his credit, and he becomes liable to the tradesman unless he can show that the commodities purchased cannot be considered reasonable because his wife was already adequately supplied with them.[13] She may,instead of pledging his credit, borrow money to buy necessaries in which case the husband is liable for the loan.[14]

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8. 13 N.L.R. 21.

9. Benjamin, J. in *Gammon* v. *McClure* (1925) C.P.D. 137, 139. Roman-Dutch authorities which have been cited to show that the husband is under a duty to maintain his wife: Voet, 25.3.8 (a needy wife shall be maintained by her husband and *vice versa*); Voet 24.2.18 (husband is not bound to provide maintenance for his wife who has left him without cause); van Leeuwen, *Cens. For.*, 1.1.15. 19 (on a judicial separation a husband is not released from the duty of providing sustenance for his wife). In *Jane Ranesinghe* v. *Pieris* reference is made to Voet, 23.2.64, 70 by Middleton, A.C.J. who thought that " the doctrine of community which applies to the case even of a wife not possessing any property of her own implies that the husband is bound to maintain his wife."

10. Hahlo, 61 ; Maasdorp, 34 ; Wille, 99 ; Wouter De Vos, 69 S.A.L.J. 178.

11. Voet, 25.3.4 ; *Gammon* v. *McClure* (1925) C.P.D. 137.

12. Voet, 23.2.46 ; Wille, 99 ; Lee, 427. *Scott* v. *Scott* (1951), 1. A.E.R. 217.

13. *Reloomel* v. *Ramsay* (1920), T.P.D. 371, 378; *Voortrekkerwinkels* v. *Pretorius* (1951) 1 S.A. 730. But see Wouter de Vos, 68 S.A.L.J. 424, and Hahlo, 117.

14. Voet, 23.2.46; The statement in *Silva* v. *Fernando* 21 N.L.R. 383, 384 that " A presumption of authority from the mere fact of cohabitation would not extend beyond the pledging by the wife of her husband's credit for necessaries; there is no presumption of authority to borrow money in his name" is, it is submitted, incorrect if it is to be taken as denying the wife a right to borrow money for necessaries.

The principles on which her right to pledge his credit are based,[15] as they have been worked out by Courts in S. Africa and Ceylon, are generally the same as in English Law (but for an important exception see footnote 47). It must also be remembered that although this right is important in principle as a means of enforcing the husband's legal obligation, in practice it may be ineffective since it is dependent on the willingness of the tradesman to accept the husband as his debtor.

What has just been stated applies when the spouses are living together. When they are living apart it would depend on the circumstances leading to the separation whether the husband's liability continues because, "The duty of a husband to support his wife does not cease merely by the fact that she does not live with him ; this is only the case where she does so against his will and in the absence of just cause."[16]

(*a*) Where the wife has been deserted by her husband without lawful cause or where she has been compelled to leave him owing to his misconduct. Desertion, actual or constructive, by the husband does not relieve him of his obligation and if he fails to support her she can pledge his credit for necessaries. So also a third party who lends her money for necessaries or maintains her at his expense can recover from the husband.[17] Her position is similar to that of the deserted wife in English Law, i.e. an agent of necessity.[18] But can the husband disclaim liability to a tradesman or third party on the ground that he has made her an allowance for her maintenance ?[19] In *Excell* v. *Douglas*[20] the husband who was paying a monthly allowance to his wife,

15. Her capacity in this respect is generally considered to form part of her capacity to pledge the husband's credit for *household necessaries*. Thus in a number of cases the husband's liability has been made to depend on whether the article or services came within the scope of household necessaries: *Mason* v. *Bernstein*, 14 S.C. 504 (services of midwife-yes); *Brudo* v. *Chamberlain*, (1912), T.P.D. 131 (dental attention—yes); but *O'Brien* v. *Keal*, (1910) T.P.D. 707 (spectacles—no. A remarkable decision seeing that the wife was suffering from a compound stigmatism which caused headaches and mistiness, and yet spectacles were not considered a necessary because her sight was not so bad that she could not see to carry on her household duties). It is submitted that it is best to distinguish the wife's capacity to pledge the husband's credit in the enforcement of his duty of support from her power as manageress of the common household. See Hahlo, 123-4.

16. Bodenstein, 34 S.A.L.J. 36.

17. *Biberfeld* v. *Berens* (1952) 2 Q.B. 770; *Menikhamy* v. *Loku Appu* 1 Bal. R. 161; *Sivapakiam* v. *Nawamani Ammal* 37 N.L.R. 386.

18. *Coetzee* v. *Higgins* 5 E.D.C. 352; *Gammon* v. *McClure* (1925) C.P.D. 137; *Oelofse* v. *Grundling* (1952) 1 S.A. 338.

19. The allowance may be voluntary or under order of Court as e.g. where the wife has obtained a maintenance order. The burden of showing that the allowance is adequate is on the husband but where maintenance has been fixed by order of Court there is a presumption that it is adequate. Hahlo, 122.

20. (1924) C.P.D. 472.

was sued by a tradesman for the price of necessaries supplied to her. The Court held he was not liable because " if the husband is fulfilling his duty by providing his wife with maintenance when they are living apart then a tradesman who supplies such wife with necessaries on credit has no quasi-contractual claim against the husband. He is in no better position on such a claim than he is when the wife has left her husband without lawful cause."[21] Van Zyl, J. compared her position with a wife living with her husband: " Where spouses live together a husband might become bound in that way even though he allowed his wife an adequate allowance[22] but he should not, in my opinion, become so bound where they live apart."[23] According to this decision the deserted wife who chooses to spend her allowance on non-necessaries has thereafter no authority to pledge her husband's credit. But in *Frame* v. *Boyce and Co. Ltd.*[24] the Court upheld the husband's liability to a tradesman in spite of the fact that he had made his wife a reasonable allowance. The correctness of this decision may be questioned because although the Court purported to follow *Reloomel* v. *Ramsay* it appears to have been overlooked that in *Reloomel's* case the spouses were not, strictly speaking, living apart since the husband was only temporarily absent,[25] whereas in the present case the evidence showed that the common household had come to an end. A husband who has deserted his wife is therefore liable to a tradesman for necessaries purchased by his wife unless he can show that " he had adequately provided her with means or that such things as had been supplied were of a quality or more expensive than would be justified by his social position or means."[26] A cautious husband would also inform tradesmen who have been accustomed to doing business with his wife that since he is making her an allowance they should not look to him for payment in future.[27] The deserted wife's right to maintenance is lost if she commits adultery.[28]

(*b*) Where the spouses are living apart owing to the fault of the wife. The husband's obligation comes to an end and he is not liable for necessaries purchased by the wife[29] (unless with his knowledge or consent ?) even if

21. At 481, per Watermeyer, J. Cf. Marshall, Judgments. p. 220.
22. See *Reloomel* v. *Ramsay* (1920) T.P.D. 371, 377.
23. At 479.
24. (1925) T.P.D. 353.
25. See Lee, *A Married Woman's Contracts in Relation to Household Necessaries*, (1938), Tydskrif, 94.
26. *Gammon* v. *McClure* (1925) C.P.D. 137, at 141.
27. See *Macnaught* v. *Caledonian Hotel* (1938) T.P.D. 577, 581.
28. *Ukko* v. *Tambya* (1863-68) Rama. 70 following English Law. Hablo, 62, submits that on principle the position ought to be the same in S.Africa.
29. Voet, 24.2.18; van Leeuwen, *Cens. For.* 1.1.15. 19; *Bing and Lauer* v. *Van den Heever* (1922) T.P.D. 279; *Voortrekkerwinkels* v. *Pretorius* (1951) 1 S.A. 730; *Excell* v. *Douglas* (1924) C.P.D. 472, 477, 481; *Janion* v. *Watson & Co.* 6 Nat. L.R. 234.

he has not made her an allowance. "Consequently a tradesman who supplies goods to a wife living apart from her husband does so at his peril because his right to recover from the husband is based on the continued existence of the husband's duty to support his wife which in turn may depend on the merits of the matrimonial dispute."[30]

(*c*) Where the spouses are living apart by mutual consent. The husband's obligation is unaffected and his position is the same as in (*a*) i.e. unless he has made her a reasonable allowance she has authority to pledge his credit for necessaries.[31] Quite often on a voluntary separation the parties enter into a notarial deed with provision for the payment of maintenance by the husband. In modern S. African law such agreements are considered valid only if there was *iusta causa* for the separation (i.e. where the circumstances would have justified a judicial separation) and if the agreement did not amount to a prohibited donation between husband and wife.[32] In *Soysa* v. *Soysa*[33] De Sampayo, J. on the authority of certain Roman-Dutch writers came to the conclusion that "an agreement for voluntary separation and a provision as to property are not only notillegal, but valid as between the parties themselves." This judgment was affirmed by the Privy Council[34] and since De Sampayo, J. made no mention of the requirement of *iusta causa* it cannot be considered essential in our law.[35] The other condition too can be ignored as the prohibition against donations between spouses no longer applies in Ceylon.[36] Our Courts not only treat an agreement for maintenance as valid but will also hold a husband to it unless there is a genuine desire on his part to resume marital cohabitation.[37] According to the view expressed in the Cape Provincial Division the obligation of the husband to pay maintenance is independent of the contract and therefore "The Court has the right, where the circumstances of the party have changed, to alter and vary the agreement of maintenance so as to make it conform to the Common Law principles upon which maintenance is granted ; namely, having regard to the social standing of the parties, any needs they may have which arise from circumstances of health and the

30. Watermeyer, J. in *Excell* v. *Douglas* (1924) C.P.D. at 481.

31. Hahlo, 62, 121; *Excell* v. *Douglas* (1924) C.P.D. at 478.

32. Hahlo, 261-62, and the judgment of Davis, J. in *Lobley* v. *Lobley* (1940) C.P.D. 420.

33. 17 N.L.R. 385.

34. 19 N.L.R. 146. And yet in *Lobley* v. *Lobley* (1940) C.P.D. 420. Davis, J. who made an exhaustive search of the old authorities thought that the preponderance of Roman-Dutch authority was against the validity of a voluntary deed of separation. See also *Davies* v. *Davies* (1944) C.P.D. 23.

35. See *Silva* v. *Silva* 18 N.L.R. 26.

36. Matrimonial Rights and Inheritance Ordinance 15 of 1876, s. 12. *Soysa* v. *Soysa* 19 N.L.R. 146; *Hulme-King* v. *De Silva* 38 N.L.R. 63.

37. *Frugtneit* v. *Frugtneit* 42 N.L.R. 547; *Silva* v. *Silva* 18 N.L.R. 26.

financial position of both the parties."[38] Adultery by the wife terminates her right to maintenance under the agreement.[39]

We may now consider whether the fact that the wife has means of her own has any bearing on the husband's duty. In cases where the wife has been deserted or the spouses have separated by mutual consent the Common Law rule appears to be that if a wife has an earning capacity or means of her own sufficient to maintain herself according to her accustomed station in life, she has no authority to pledge her husband's credit for necessaries, nor can she claim reimbursement from him for spending her own money.[40] It follows that a Court will take into account the wife's means in judging the reasonableness of the allowance made to her by the husband and in determining the extent of his liability to a tradesman for necessaries supplied to her.[41] When the spouses are living together and the husband's means are insufficient, he has a right to a contribution from his wife for necessaries supplied to her on credit and paid for by him.[42] This is a necessary consequence of the Common Law rule that husband and wife are under a reciprocal duty to maintain each other so that a husband who is incapable of earning a living may shift the entire responsibility of maintenance (even of himself) on his wife.[43] But apparently the needy husband has no implied authority to pledge her credit for necessaries.[44]

More interesting is the case where the wife has a separate income but the husband's means are sufficient for the maintenance of both. It has been repeatedly asserted that " It is the duty of husband and wife, both according to their means, to contribute towards the support of the marriage."[45] Ordinarily the wife's contribution would be in kind (assistance

38. Van Zyl, J. in *Butler* v. *Butler* (1952) 1 S.A. 88, 90. In *Soysa* v. *Soysa*, 17 N.L.R. at 387 it was indicated that in subsequent divorce proceedings the Court has jurisdiction to vary the amount.

39. *Cook* v. *Cook* (1911) C.P.D. 810; *Peck* v. *Peck* (1888) Nat. L.R. 195.

40. *Oberholzer* v. *Oberholzer* (1947) 3 S.A. 294; *Jane Ranesinghe* v. *Peiris* 13 N.L.R. 21. But she is not called upon to maintain herself out of her savings. Hahlo, 63 n. 52.

41. *Biberfeld* v. *Berens* (1952) 2 Q.B. 770 (noted in 70 S.A.L.J. 93).

42. Hahlo, 61 Prof. Hahlo, does not think that a wife with an earning capacity is obliged to go out to work and make things easier for the husband.

43. Voet, 25.3.8; *Lyons* v. *Lyons* (1923) T.P.D. 345; Hahlo, 63; Maasdorp, 35. This received statutory recognition in the Married Women's Property Ordinance No. 18 of 1923, s. 26. *Fernando* v. *Fernando* 31 N.L.R. 113. Jurisdiction to hear applications for maintenance by husbands is conferred on the Magistrate's Court and the Magistrate's powers in the making and enforcing of an order for maintenance are expressly stated to be such as he possesses under the Maintenance Ordinance in regard to applications for maintenance by wives.

44. *Wiebel* v. *Wecke and Voigts* (1933) S.W.A. 123, 135.

45. Bale, C.J. in *Shanahan* v. *Shanahan* (1907) Nat. L.R. 15. See also *Union Government* v. *Warneke* (1911) A.D. 657; *Gildenhuys* v. *Transvaal Hindu Educational Council* (1938) W.L.D. 260; *Davis* v. *Davis* (1939) W.L.D. 108.

in the supervision, maintenance and education of the children) but there may be situations where a pecuniary contribution would be more to the point. Where such is the case it may be asked, how can the husband enforce this duty of the wife ? We can best consider this problem by taking the case of Mr. Silva, a Government servant with a monthly salary of Rs. 1,000, and his wife who has a private income of Rs. 500 a month.

(1) Silva agrees to meet all the expenses involved in running the joint household but wants his wife to pay him Rs. 250 per month being a reasonable estimate of the cost of her maintenance. If Mrs. Silva refuses, it is hardly conceivable that Silva would have an action for contribution against her.

(2) Silva agrees to support his wife at his expense but insists that she pay for her own clothes. He therefore gives her no money for clothes and expressly forbids her to pledge his credit. Mrs. Silva who has little desire for spending her own money nevertheless buys sarees on credit. The shopkeeper sues Silva. The extent of Silva's liability in the present state of the law depends on whether Mrs. Silva contracted in her own name and pledged her own credit or whether she acted as her husband's agent. In the latter case (and there is a presumption that she acted as his agent)[46] Silva is liable for the full amount of debt (*in solidum*). The fact that he expressly forbade her to buy on credit is not material in considering his liability because it is accepted both in S. Africa and Ceylon[47] that the wife's authority to act as her husband's agent in the purchase of necessaries in one of the consequences of marriage which can only be determined by judicial decree and publication.[48] Even where the contract is hers and she has pledged her own credit, under the *pro semisse* rule the shopkeeper can sue Silva for half the

46. *Hern & Co.* v. *De Beer* (1913) T.P.D. 721, 725; Lee, (1938), Tydskrif, 96; Hahlo, 118. Cf. *Clarkson* v. *van Rensburg* (1951) 1 S. A. 595, 598, per Price, J. " When a wife opens an account with the butcher, the baker or the candlestick-maker it is taken as a matter of course that the husband is the one who is to be charged with the price of the goods."

47. *Reloomel* v. *Ramsay* (1920) T.P.D. 371; *Clarkson* v. *van Rensburg* (1951) 1 S.A. at 598; *Lalchand* v. *Saravanamuttu* 36 N.L.R. 273; Hahlo, 112; Lee, 426. In this respect our law differs materially from English Law where a husband may by expressly prohibiting his wife from pledging his credit render himself immune to a tradesman's action. *Debenham* v. *Mellon* (1880) 6 App. Cas. 24.

48. Although there have been dicta to the effect that in the present day a husband may by mere public notice hold himself not liable for necessaries bought by his wife on credit (*Reloomel* v. *Ramsay* (1920) T.P.D. at 376; *Lalchand* v. *Saravanamuttu* 36 N.L.R. at 276) it must be considered settled law that the wife's authority to pledge his credit when they are living together can only be taken away by judicial decree. *Bing and Lauer* v. *van den Heever* (1922) T.P.D. 279, 281; *Chenille Industries* v. *Forster* (1953) 2 S.A. 691, 699; *Traub* v. *Traub* (1955) 2 S.A. 671; Hahlo, 122-3; Lee, 426.

debt. According to this rule, as explained by Lee,[49] "Whichever of the two spouses is the contracting party, the other party is at all events, liable to creditors for half the debt validly contracted for household purposes independently of any private agreement." Applying these principles to the case in hand, we find that the shopkeeper can recover if not the full amount, at least half the debt, from Silva. It does not appear to be the law that Silva can avoid responsibility to the shopkeeper on the ground that the wife has means of her own. He would learn, no doubt to his astonishment, that he would have been better off had he deserted his wife.[50]

The duty of the rich wife to make a pecuniary contribution to the expenses turns out to be one which is unenforceable at law. If at all it is a moral duty which becomes legal only if the husband takes the unlikely, but necessary, step of entering into a valid agreement with his wife for financial assistance. But then her duty arises under the contract and not by virtue of any obligation at Common Law. This raises the question whether it is not time that the husband's burden was lightened in keeping with the conditions prevailing today when working wives have become an essential feature of many households and a husband cannot always expect domestic assistance from his wife. The matter has not received attention in Ceylon, but at least one English Judge has favoured a new approach in keeping with the changed circumstances. In *Biberfeld* v. *Berens*, Denning, L. J. referring to the statement of McCardie, J. in *Callot* v. *Nash*

49. (1938) Tydskrif, 91. The *pro semisse* rule was adopted in S.Africa (see *van Rensburg* v. *Swersky Bros.* (1923) T.P.D. 255; *Clarkson* v. *van Rensburg* (1951) 1 S.A. 59. Contra *Wiebel* v. *Wecke and Voights* (1933) S.W.A. 133; Wouter de Vos, 69 S.A.L.J. 170 and 73 S.A.L.J. 70), but the Matrimonial Affairs Act of 1953 now makes husband and wife jointly and severally liable for debts incurred by either spouse in respect of household necessaries, with a right of recourse against the husband for the full amount paid by the wife (section 3). (For a criticism of this section see Scholtens, *The Liability of a Married Woman for Household Necessaries*, (1954) Butterworth's South African Law Review, 183).

The application of the *pro semisse* rule has not been considered in a Ceylon case. The decision in *Lalchand* v. *Saravanamuttu* 36 N.L.R. 273 (where, although it would appear from the facts that the contract was the wife's and the tradesman looked to her for payment, the husband was found liable for the full amount, in an action brought against both husband and wife) is against it, but see the judgment of Soertsz A.J. in *Molyneux Modes* v. *Muttucumaraswami* 14 C.L.Rec. 213, where, it is submitted, the rule is implied. Assuming that the *pro semisse* rule is part of our law, the question whether it can apply after the Married Women's Property Ordinance No. 18 of 1923 (the effect of which was not discussed in either of these cases) is one of difficulty. Section 5(3) of the Ordinance which enacts that a contract entered into by a married woman otherwise than as agent is deemed to be entered into with respect to and to bind her separate property, does not exclude the possibility of the husband being liable (on a contract for necessaries) because it does not state that the contract of a wife shall bind her separate property alone. If this is not so we are left with the unsatisfactory conclusion that the *pro semisse* rule is now applicable only *against* the wife. As an added ground against this it may be pointed out that s. 5(2) after declaring that a wife may be sued in contract or tort proceeds to state that the husband shall not be liable "merely on the ground that he is her husband, in respect of any tort committed by her.' There is no express exclusion of his liability in respect of a contract entered into by her.

50. See above p. 181. English Law would appear to be the same. *Seymour* v. *Kingscotte* (1922) 38 T.L.R. 586.

(39 T.L.R. 292) that " The wife may accumulate all her income and throw the whole burden of her keep on her husband," said " I do not think that is right. At the present day, when a wife is in nearly all respects equal to her husband, she has to bear the responsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool just as his do. When they are living together, she can of course, pledge his credit for the household necessaries, but I doubt whether she can pledge his credit for her own private necessaries, like dresses and hats, when she has ample means with which to buy them."[51]

The Vagrants Ordinance, No. 4 of 1841. Between 1841 and 1889 the husband's duty was enforced largely by means of the criminal law. The Vagrants Ordinance which was modelled on the English Vagrancy Act of 1824 punished a husband who left his wife without maintenance or support with imprisonment upto fourteen days and a fine of twenty shillings. The husband was also deemed to be an " idle and disorderly person " under which happy description also came beggars, common prostitutes behaving in a riotous and indecent manner, persons defacing buildings by indecent drawings. On a second conviction he was deemed to be a " rogue and vagabond " and the punishment doubled, and if he was convicted for the third time he became an " incorrigible rogue " who was liable to imprisonment for six months and twenty-five lashes. How did all this help the wife ? Well, apart from the fact that the natural dislike of a husband to be dealt with as a criminal and called insulting names would act as a deterrent there is ample evidence to suggest that the fine, which was usually imposed in preference to a sentence of imprisonment, was in part or whole awarded to the wife.[52] In enforcing this Ordinance it was only to be expected that English decisions would be followed. Thus if a husband could show that his wife was physically capable of doing work and supporting herself with her earnings he could not be convicted.[53] It was also a defence to show that the wife refused to live with him or had deserted him without good reason.[54] Again following an English decision it was held that a husband cannot be convicted for not supporting a wife who was living in adultery.[55]

51. (1952) 2 Q.B. 770, 782-3. Cf. Allan Milner, " The increased stature of the married women in the world of today has not only brought an appreciation that the law should protect her by removing cumbersome disabilities but also a recognition, based on her modern earning capacity and status as a property holder, that she should take her due share of the responsibilities of running the house and family." A Homestead Act for England ? 22 M.L.R. 458, 477.

52. *Fernando* v. *Fernando* 6 S.C.C. 99; 2 Bel. & Vand. 75. It was even possible for the husband to compromise the action by offering to pay a monthly sum as maintenance. Vand. R. 158.

53. *Cadera Umma* v. *Calendan* (1863-68) Rama. 141.

54. *Nona* v. *Siman* (1863-68) Rama. 64 ; 2 Bel. & Vand. 92 and 106: 2 Lor. 136.

55. Gren. (1872) P.C. 2; *Lokuhamy* v. *de Silva* (1872-75) Rama. 257.

The Maintenance Ordinance, No. 19 *of* 1889. This Ordinance repealed the provisions in the Vagrants Ordinance relating to the maintenance of wives and children and the award of maintenance to a wife or in respect of a child is governed even to the present day by the terms of this Ordinance. It gave a wife the right to apply to the Magistrate for an order against the husband for a monthly allowance as maintenance. Until 1925 the maximum monthly rate was fixed at Rs. 50 ; after that year a wife could obtain upto Rs. 100. Although it is a criminal Court which entertains applications for maintenance " this Ordinance is not one dealing with a criminal matter but it provides a speedy and less expensive way of enforcing a civil obligation."[56] Applications for maintenance are granted on proof that the husband has neglected or refused to maintain his wife.[57]

Defences open to a husband in a maintenance suit :

(1) Offer by the husband to maintain wife.[58] Maintenance is awarded as a remedial and not punitive measure. If therefore the husband is repentant and offers to maintain his wife in future if she lives with him there is no occasion to invoke the powers of the Court. But the Court must be satisfied that the offer is made *bona fide* and that the husband intends to maintain her " with the dignity and consideration which befits a wife."[59] Failure on his part to provide a suitable abode will negative the *bona fides* of his offer.[60] No award for maintenance will be made if the wife refuses the offer unless her refusal is based on one of the two following grounds :

56. Drieberg, J. in *Letchimi Pillai* v. *Kandiah* 9 C.L.Rec. 181. See also *Eina* v. *Eraneris* 4 N.L.R. 4; *Subaliya* v. *Kannangara* 4 N.L.R. 121; *Justina* v. *Arman* 12 N.L.R. 263. In particular matters of proof are determined on a balance of evidence. *Carlina Nona* v. *De Silva* 49 N.L.R. 163. The distinguishing features of a maintenance action are discussed in Kantawala, 311-13.

57. S. 2. " Neglect to maintain must mean something more than a difference of opinion regarding the manner or the adequacy of the maintenance; it must mean such inadequate maintenance as to be in reality no maintenance at all." De Kretser, J. in *Annapillai* v. *Saravanamuttu* 40 N.L.R. 1, 7. In England by S. 4 of the Summary Jurisdiction (Married Women) Act, 1895, "wilful neglect" to provide maintenance by the husband is one ground on which a maintenance order could be obtained. The additional requirement imposed by the word "wilful" continues to trouble the Courts. (For two recent cases see *Jone* v. *Jones* (1958) 3 A.E.R. 410; *Lilley* v. *Lilley* (1958) 3 A.E.R. 528). We are fortunate in that our Ordinance does not require proof of a mental element and makes a husband liable for his wife's support unless she forfeits her right by her own misconduct. Even proof of desertion by the husband is not required although in the majority of cases there would be at least constructive desertion.

58. S. 3. *Punchi Nonahamy* v. *Perera Appuhamy* Leem. 81; *Anohamy* v. *Anthony Annavirala* 3 A.C.R. 19.

59. Wendt, J. in *Mammadu* v. *Mammat Kassim* 11 N.L.R. 297. See also *Manomani* v. *Vijiyeratnam* 33 C.L.W. 72 and *Gimarahamy* v. *Don Dines* 5 Times L.R. 71.

60. *Diwurnehamy* v. *Wirasinghe* 1 Curr. L.R. 98; *Arnolinahamy* v. *James Appu* 1 Wije. 19; *Gimarahamy* v. *Don Dines* 5 Times L.R. 71; *Valliammai* v. *Eliyatamby* 1 C.L.W. 372.

(*a*) Husband living in adultery.[61] The husband should be living in adultery at the time of the application,[62] but it does not follow that where he is shown to have lived in adultery at an earlier date, the wife's refusal to go back to him must be considered unreasonable.[63] Direct proof of adultery is not required.[64]

(*b*) Husband has habitually treated his wife with cruelty.[65]

(2) Wife "living in adultery."[66] To succeed in this defence the husband must establish that she is leading a life of continuous adulterous conduct. A wife who commits an isolated act or acts of adultery is not debarred from claiming maintenance.[67] It is not sufficient to show that the wife had been living in adultery at some time previous to the application. The husband must prove that she was living in adultery or leading the life of a prostitute at the time of the application.[68] A maintenance order is liable to be cancelled on proof that the wife is living in adultery.[69]

(3) If wife without sufficient reason refuses to live with husband.[70] This in effect is a plea that the wife is guilty of desertion and has therefore lost her right to maintenance. A false allegation of adultery against her by the husband would be a sufficient excuse for her refusal,[71] but not the bare fact that the husband's parents were living with him.[72]

61. S. 3. For an exception in the case of Muslims (before exclusive jurisdiction over maintenance applications was given to the Quazi Court) see *Mammadu* v. *Mammat Kassim* 11 N.L.R. 297.

62. *Manomani* v. *Vijiyeratnam* 33 C.L.W. at 73.

63. *Marihamy* v. *Weerakodie* 2 Lead. L.R. 39. In *Ebert v. Ebert* 26 N.L.R. 438 it was held that an order for maintenance cannot be cancelled under s. 5 on the ground that the husband had ceased to live in adultery.

64. *Ebert* v. *Ebert* 22 N.L.R. 310.

65. S. 3. *Ponnamah* v. *Renganathan* 1 C.A.R. 15 ; Koch, 9.

66. S. 4.

67. *Arumugam* v. *Athai* 50 N.L.R. 310 ; *Kiree* v. *Naide* 5 Weer. 28. Cf. English Law where an order will not be made in favour of a wife who has been guilty of adultery unless the husband had connived at her adultery or condoned it. The Act of 1895, s. 6.

68. *Reginahamy* v. *Johna* 17 N.L.R. 376 ; *Simo Nona* v. *Melias Singho* 26 N.L.R. 61 ; *Arumugam* v. *Athai* 50 N.L.R. 310. But cf. Koch, J. in *Samaratunga* v. *Samaratunga* 15 C.L.Rec. 198. It is submitted that where the husband alleges that the wife is living in adultery the burden is on him to prove that fact. *Selliah* v. *Sinnammah* 48 N.L.R. 261; contra *Vidane* v. *Ukkumenika* 48 N.L.R. 256.

69. S. 5. *Isabelahamy* v. *Perera* 3 C.W.R. 294. *Wijeyesinghe* v. *Josi Nona* 38 N.L.R. 375; Kantawala, 314 n. 7.

70. S. 4. *Dingiri Menika* v. *Udadeniyagedera Mudianse* 3 Bal. R. 253. As explained by Schneider, J. in *Rosa* v. *Adonisa* 6 C.L.Rec. 17, "The policy of the law is not to encourage wives to live apart from their husbands by allowing them maintenance, unless their refusal to live with their husbands is reasonable."

71. *Edwin Perera* v. *Bisso Menika* 46 N.L.R. 186.

72. *Rosa* v. *Adonisa* 6 C.L.Rec. 17. *Fernando* v. *Milly Nona* 56 N.L.R. 549.

(4) Spouses living separately by mutual consent.[73] The scope of this defence is not clear. In *Micho Hamine* v. *Girigoris Appu*,[74] Wood Renton, J. held that once husband and wife have separated by mutual consent, the wife could not thereafter compel the husband either to take her back or pay maintenance. Later cases have however pronounced in favour of the wife's right to terminate the agreement and to claim maintenance if the husband refuses a *bona fide* offer by her to return.[75] In *Fernando* v. *Fernando*[76] husband and wife entered into a deed under which she received Rs. 250, agreed to live separately and waived all her rights to maintenance. When this sum of money was exhausted and she was without means of support, she applied for maintenance. The matter was fully argued before Hearne, J. who held that so long as the spouses are living separately by mutual consent no order for maintenance can be made, but " if, notwithstanding the agreement to maintain, the wife when she comes into Court is not being maintained by her husband, she is disqualified from asking the assistance of the Court only if she is living in adultery, or without sufficient reason refuses to live with her husband or is living separately from him by the continuing consent of both parties. If she is prepared to live with him mutuality ceases to exist, her disqualification to obtain relief disappears and the law imposes on the husband, as his paramount duty, the duty of maintaining his wife."[77] If the agreement for separation provides for periodical payments by the husband and this is honoured by him no application for maintenance under the Ordinance can be made.[78] Where the parties come to a settlement after a maintenance order is made, e.g. the husband agrees to pay a lump sum and the wife waives future claims for maintenance against him, the husband's liability under the order is at an end and the wife can no longer enforce that order.[79] She is not debarred however, from making a fresh application for maintenance.[80]

(5) Husband has no means. An award for maintenance will be made only against a husband " having sufficient means."[81] If he pleads that he

73. S. 4.

74. 15 N.L.R. 191.

75. *Goonewardene* v. *Abeywickreme* 18 N.L.R. 69 ; *Malleappa* v. *Malleappa* 8 C.L.Rec. 201.

76. 40 N.L.R. 241.

77. Where on separation the husband agrees by deed to pay her maintenance she is entitled to sue him on the agreement. See above, p. 180 and *Frugtneit* v. *Frugtneit* 42 N.L.R. 547.

78. *Fernando* v. *Fernando* 40 N.L.R. 241, at 244. But it has been asserted that the Magistrate can consider whether the amount specified is reasonable and adequate. *Simon Appu* v. *Somawathie* 56 N.L.R. 275, 279.

79. *Simon Appu* v. *Somawathie* 56 N.L.R. 275. Contra, *Parupathipillai* v. *Kandiah Arumugam* 46 N.L.R. 35.

80. *Simon Appu* v. *Somawathie* 56 N.L.R. at 276 ; *Hinnihamy* v. *Gunawardene* 3 C.L.Rec.. 161.

81. S. 2.

has no means the burden is on the wife to show that he has a source of income or, at least, that he is capable of earning and has wilfully abstained from so doing.[82]

(6) Pending divorce suit by the husband. It was held by Jayawardene, J. in *De Silva* v. *Seneviratne*[83] that a Magistrate should stay maintenance proceedings till the decision in the divorce case. In a later case Basnayake, J. (as he then was) dissented from this view.[84]

The question whether a wife was disentitled to maintenance if she had means of her own was the subject of conflicting decisions until a Divisional Bench decided in favour of the wife.[85]

III

We have reserved to the last a question which no doubt will surprise most practitioners who are accustomed to view it as long settled, that is, can a wife bring a civil action for maintenance ? This question is of some importance where a wife does not seek a divorce or judicial separation and does not think that Rs. 100 monthly (which is the maximum she is entitled to under the Maintenance Ordinance) is adequate maintenance in relation either to her needs or her husband's means. The question can really be split into three parts, namely, did the wife have a right of action under Roman-Dutch Law, have our Courts recognised this right of hers, and finally, did the civil action, if it existed, survive the Maintenance Ordinance? As to the first part of the question we have already adverted to the fact that the old writers made only passing reference to the wife's right of support and we cannot expect illumination on this point from them, but if we turn to the modern writers we find authority for the view that the wife could sue the husband for support.[86] The second part of the question was taken

82. *Sivapakiam* v. *Sivapakiam* 36 N.L.R. 195. See also *Rasamany* v. *Subramaniam* 50 N.L.R. 84.

83. 7 C.L.Rec. 58. See also *Fernando* v. *Fernando* 6 S.C.C. 99.

84. *Wimalawathie Kumarihamy* v. *Imbuldeniya*, 39 C.L.W. 75.

85. *Sivasamy* v. *Rasiah* 44 N.L.R. 241 overruling *Silva* v. *Senaratne* 33 N.L.R. 90. The reasons advanced for this interpretation of section 2 of the Maintenance Ordinance are, with respect, not altogether satisfactory. " The contrary view " says Soertsz, S.P.J. in his judgment (Wijeyewardene and Jayetilleke, JJ. agreeing) "would lead to the appalling result that a fickle husband, having enjoyed the consortium of a wife possessed of means so long as it pleased him, may, on wearying of it, turn his wife adrift and free himself of all his obligations to her " It would appear from this that maintenance is payable by the husband not so much in the enforcement of his duty to support her but by way of a penalty. This is contrary to the principles governing orders for alimony on a divorce or judicial separation (see Civil Procedure Code s. 615 ; Halsbury Vol. 12 ss. 963, 966 ; *Davis* v. *Davis* (1939) W.L.D. 108 ; *Frichol* v. *Frichol* (1945) T P.D. 276). It is also inconsistent with the rule that a deserted wife who has means may not pledge her husband's credit for necessaries (above, pp. 178, 181).

86. Hahlo, 62, 63. Such actions have been recognised in S.Africa : *Stern* v. *Stern* (1928) W.L.D. 148.

up in *Menikhamy* v. *Loku Appu*[87] which was a civil action by a Kandyan wife for past and future maintenance. Bonser, C.J. finding the Kandyan Law silent thought the matter was governed by the Roman-Dutch Law and gave Counsel time to find " any authority for the proposition that a wife who is deserted by her husband can sue her husband for maintenance." Counsel having failed it was held that the wife's only right to obtain maintenance was under the Maintenance Ordinance. The importance of this decision is that it was approved in later cases and ultimately led to the view that the special rights and remedies created by the Maintenance Ordinance have superseded the Common Law.[88] In the circumstances it is unfortunate that Counsel in *Menikhamy's* case was not a little more assiduous in his search for authority or he would have found at least four earlier cases where the wife's right to bring an action for maintenance appears not to have been questioned:

(i) In a case decided in 1834[89] it was held that where the husband refused or neglected to support his wife, on complaint of the wife, the District Court would award her a reasonable proportion of the husband's property.

(ii) In *Muttu Menicka* v. *Punchi Rala*[90] an award of a monthly sum as maintenance was made by the District Court in favour of the wife.

(iii) A more direct authority is *Ukko* v. *Tambya*,[91] where, in an action between Kandyan spouses, it was held (by Creasy, C.J. and Thomson, J.) that "even in the Maritime Provinces, the wife can sue her husband for maintenance, if she has acquired a legal right to the maintenance by the act of her husband."

(iv) In *Justinahamy* v. *Don Elias de Silva*[92] a wife instituted an action in the District Court against her husband for past and future maintenance. Her action was dismissed but the judgment makes it clear that her claim for future maintenance was disallowed only because she had instituted divorce proceedings.

87. 1 Bal. R. 161.

88. *Justina* v. *Arman* 12 N.L.R. 263 ; *Jane Ranesinghe* v. *Pieris* 13 N.L.R. 21 ; *Lamahamy* v. *Karunaratna* 22 N.L.R. 289 ; *Saraswathy* v. *Kandiah* 50 N.L.R. 22.

89. Marshall, Judgments, p. 221.

90. (1858) 3 Lor. 90.

91. (1863) Rama. (1863-68) 70.

92. 6 S.C.C. 136.

Having shown that our Courts have in the past recognised a civil action for maintenance we can now consider whether the Maintenance Ordinance in any way abolished the civil action. This was not the view taken in *Menikhamy's* case for all that it decided was that there being no evidence that a civil action was available the wife's only remedy was under the Maintenance Ordinance. Had the four cases noted above been cited to Court, it is difficult to maintain that the decision would have been the same for, as was admitted by Pereira, A.J. in *Jane Ranesinghe* v. *Pieris* " if such actions were competent under our Common Law, it does not to my mind appear to be quite clear how the Maintenance Ordinance, in the absence of express words to that effect, can be said to have brought about their abolition."[93] In this case a deserted wife and her son sued for the recovery of expenses incurred in maintaining themselves. It was therefore an action for past maintenance which clearly could not succeed for the reason that a deserted wife, who does not bring an action for maintenance, has only rights as agent of necessity, and if she has been able to support herself she does not belong to this category.[94] It was on this ground that Middleton, A.C.J. dismissed her action albeit without much conviction. Pereira, A.J. also agreed that it being an action for past maintenance there was no authority for holding that a wife who maintained herself by her own property can have her loss recouped by means of an action against her husband. The latter Judge went further to consider whether a civil action for past or future maintenance is available at all and arrived at the conclusion that " The policy of modern legislation is to prevent one's wife and children becoming chargeable to others by allowing the wife and children a remedy against the husband or father, as the case may be, in the Criminal Courts, and it is for a married woman to resort to that remedy, unless she is content to maintain herself at her own expense."[95] Quite apart from being *dicta*, these remarks were based on the doubtful authority of *Menikhamy's* case and the statement of Wood Renton, J. in *Justina* v. *Arman* that the Maintenance Ordinance has abolished the Common Law remedy.[96] But Pereira, J. had another reason for doubting the existence of the civil action and that was the difficulty of enforcing a decree for maintenance owing to our rules of civil procedure. Whatever this might means its validity as a ground can be judged by the fact that these same rules of procedure (or

93. 13 N.L.R. 21, 24.

94. See above, pp. 178, 181.

95. 13 N.L.R. at 25.

96. 12 N.L.R. 263, 267. The only authority for this statement was *Menikhamy* v. *Lokku Appu*.

the absence of appropriate rules) did not deter Sansoni, J. in a recent case[97] from pronouncing in favour of the right of an indigent father to sue for support from his son under the Common Law.

For these reasons, it is submitted that *Jane Ranesinghe* v. *Pieris* is no authority for holding that a wife cannot bring a civil action for future maintenance. Can it be said that the decision of the Full Bench in *Lamahamy* v. *Karunaratne*[98] operates as a bar to an action ? This depends on what we understand to be the *ratio decidendi* of the case. The utmost that could be said is that the case decided that a child who seeks support from his father must proceed under the Maintenance Ordinance and not by way of a civil action. It is extremely doubtful whether the case is authority for any wider proposition such as, that the reciprocal duty of support between parent and child under Roman-Dutch Law was never introduced into Ceylon (this view cannot be maintained after the decision in *Ambalavanar* v. *Navaratnam*[99]). Much less could it be said that *Lamahamy's* case decided that a wife is confined to the Maintenance Ordinance for the enforcement of the husband's duty. As far as the wife's right to support is concerned there is much to be said in favour of the view expressed by Schneider, A.J. in relation to a child's claim for maintenance, that the Maintenance Ordinance with its limitations, restrictions and penal provisions was never intended " to do anything more than provide a speedier, less expensive, and more summary and rigorous procedure to recover maintenance " and that it did not " abrogate the right of action in an ordinary Court of civil jurisdiction to enforce payment of maintenance."[100]

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97. *Ambalavanar* v. *Navaratnam* 56 N.L.R. 422. The father's right was enforced by means of an action instituted in the Court of Requests. Cf. the case of a husband suing his wife for maintenance, p. 181 n. 43.

98. 22 N.L.R. 289.

99. 56 N.L.R. 422.

100. 22 N.L.R. at 293. Cf. Bonser, C.J. in *Subaliya* v. *Kannangara* 4 N.L.R. 121.