A

DETTKE

v.

MILLER

B

[SUPREME COURT, 1967 (Hammett J.), 16th December 1966, 11th April 1967]

Appellate Jurisdiction

Bastardy—proceedings in—civil and not criminal in nature—summons served out of the jurisdiction—waiver of defective service by appearance to defend on merits—Criminal Procedure Code (Cap. 9)—Bastardy Ordinance (Cap. 33) ss.16, 19(2).

C

Court—jurisdiction—civil proceedings—defect in service—waiver of irregularity by appearance to defend on merits.

Practice and procedure—bastardy proceedings—civil in nature—defect in service—waiver by appearance to defend—Criminal Procedure Code (Cap. 9)—Bastardy Ordinance (Cap. 33) ss.16, 19(2).

D

The respondent filed a complaint with the Magistrate's Court at Suva under the Bastardy Ordinance alleging that the appellant was the father of her child. Leave to serve the summons out of the jurisdiction was given by a magistrate and it was served on the appellant at Honiara in the British Solomon Islands Protectorate. The appellant appeared by counsel in the proceedings in the Magistrate's Court at Suva and contested the complaint on the merits, though counsel finally submitted that there was no jurisdiction as the summons had been served outside Fiji. An order was made in favour of the respondent and the appellant appealed therefrom, alleging excess of jurisdiction by the Magistrate's Court.

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Held: 1. That although, by virtue of the provisions of sections 16 and 19(2) of the Bastardy Ordinance, the procedure in matters arising under the Ordinance is governed by the Criminal Procedure Code, proceedings under the Ordinance are nevertheless civil proceedings and not criminal or quasi-criminal in nature.

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2. The service of the summons outside the jurisdiction was irregular, but in civil proceedings it is open to a party to waive a defect such as defective service.

3. By contesting the complaint on the merits counsel for the appellant had submitted to the jurisdiction and waived any objection he might have taken at the outset and it was too late for him to take such objection thereafter.

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Cases referred to: *Parker v. Green* (1862) 2 B. & S. 299; 121 E.R. 1084: *R. v. Lightfoot* (1856) 25 L.J.M.C. 115; 6 E. & B. 822: *S. v. E.* [1967] 1 Q.B. 367; [1967] 1 All E.R. 593.

H

Appeal from an order of the Magistrate's Court made under the Bastardy Ordinance.

C. D. Singh and *B. March* for the appellant.

A *R. A. Kearsley* for the respondent.

HAMMETT J. [11th April 1967]—

On 28th June, 1966 the Complainant-Respondent, a single woman, filed a complaint with the Magistrate's Court at Suva under the Bastardy Ordinance that at Suva on 11th July, 1965 she was delivered of a bastard child
B of which the Defendant-Appellant is the father. The address for service of the Defendant-Appellant was stated to be Honiara in the British Solomon Islands Protectorate and leave was given by the learned trial Magistrate for the summons to be served outside the jurisdiction of the Court.

The summons which was returnable at Suva on 26th August, 1966 was served on the Defendant-Appellant in Honiara on 26th July, 1966.

C On 26th August, 1966 when the case was called in the Magistrate's Court at Suva the Complainant-Respondent appeared in person. Counsel appeared for the Appellant and informed the Court that the Appellant would defend the action but would not be appearing personally. The case was adjourned to 23rd September, 1966 when each side was represented by Counsel and the hearing took place.

D The Complainant gave evidence in support of her complaint and was cross-examined by Counsel for the Appellant. Her witnesses — three in all — were then called and each of them was cross-examined by Counsel for the Appellant.

At the close of the case for the Complainant-Respondent, the Appellant's Counsel informed the Court that no evidence would be called for the Defence. He then made submissions on behalf of the Defence:

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Firstly — that there was insufficient corroboration of the evidence of the Complainant. He submitted that the evidence of the Complainant did not amount to more than that the Appellant had the opportunity of having sexual intercourse with her.

Secondly — that even though a person submits to the jurisdiction of
F the Court, the Court still had no jurisdiction because the summons was served outside Fiji.

In his careful Judgment the learned trial Senior Magistrate held that the Appellant had in fact submitted to the jurisdiction of the Court and had waived any defect or irregularity that there may have been in service. He reviewed the evidence and held that there was ample corroboration of the evidence of the Complainant which he accepted. He properly direct-
G ed himself and adjudged the Appellant to be the putative father of the Complainant's child and ordered him to pay the weekly sum of £1.5.0 for the child and to pay the Complainant's costs which he assessed at £8.8.0.

It is against this decision that the Appellant appeals on the following grounds :

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(i) That the said Magistrate's Court exceeded its jurisdiction in that the proceedings under the Bastardy Ordinance, Cap. 33, being criminal or quasi-criminal in nature (by virtue of the common law, Sections 16 and 19(2) of the Bastardy Ordinance, Section 87

of the Criminal Procedure Code, Cap. 9) required the said summons to be served within the Colony of Fiji, and that because the said summons had not been so served the proceedings in the said Magistrate's Court were a nullity notwithstanding the Petitioner's apparent submission to jurisdiction. The said Magistrate's Court did not have power to permit the Petitioner to submit to jurisdiction which the said Court could not possess at law. A

(ii) That the said Magistrate's Court erred in law in not complying with the provisions of Section 3(b) of the Bastardy Ordinance in that it had decided that the "date of complaint" shown on the said summons is not at law the "date of application" by the said Mary Miller. The said Magistrate's Court therefore did not have jurisdiction to try the matter notwithstanding the Petitioner's apparent submission to jurisdiction through his solicitor. B

(iii) That the said Magistrate's Court erred on the facts in finding that there was sufficient evidence of corroboration of a standard required by law. C

The second and third grounds of appeal are on the merits but these were abandoned at the hearing where the Appellant only relied upon the first ground.

On this ground of appeal it is first the contention of the Appellant that proceedings under the Bastardy Ordinance are criminal or quasi-criminal in nature. This is a contention that has been raised before and it arises, I think, because of the provisions of Sections 16 and 19(2) of the Bastardy Ordinance which read: D

"16. Except as provided for or varied by this Ordinance all procedure including the computation of and other matters with respect to costs shall be as near as may be according to the procedure under the Criminal Procedure Code. E

19. (2) The provisions of the Criminal Procedure Code relating to appeals shall, as far as may be applicable, apply to an appeal under this Ordinance."

It is quite clear from the express words of these sections that all they do is to provide for the procedure to be followed in Bastardy Cases. The mere fact that the procedure is to follow the provisions of the Criminal Procedure Code does not of itself make them criminal proceedings if they are not in fact criminal proceedings. F

The only authorities I have been able to trace do not support the contention of the Appellant that at Common Law these are criminal or quasi-criminal proceedings. As far as I am aware there is no cause of action at Common Law in the nature of Affiliation proceedings — they are the creature of Statute.

In 1862 in *Parker v. Green* 2 B. & S. 299, 311 Crompton J. said:

"It is well established that, wherever a party aggrieved in suing for a penalty, where the proceedings can be treated as the suit of the party, — as, for instance, an application for an order in bastardy, — the proceeding is a civil one, and the defendant is a competent witness."

It will be remembered that in those days, in England, a defendant in criminal proceedings was neither a competent nor a compellable witness and a decision on the question of whether proceedings were criminal or civil was of considerable importance.

Again in 1856 in *The Queen v. Lightfoot* 25 L.J.M.C. 115, 118, a case that arose out of Bastardy proceedings, in the Judgment of Lord Campbell C.J. is the following passage:

> "The matter here in dispute was entirely of a civil nature viz: the obligation to maintain a child and the defendant might have been examined as a witness on his own behalf."

I have not overlooked the fact that the other Judges in Lightfoot's case did not reach the same final conclusion in the case as Lord Campbell but on the question of whether the proceedings were of a civil nature or not was not referred to in their judgments and the view of Lord Campbell C.J. on that issue was not questioned.

This matter was considered again in 1966 in the Supreme Court in England by Chapman J. in *S. v. E.* of which a brief report appeared in "The Times" dated 6th December, 1966. In the report of the Judgment in that case appears the following passage:

> "Mr. Swinton Thomas contended that these proceeding were quasi-criminal and not "civil" within the Act of 1856. It could be said for his argument that in this country, affiliation proceedings had many of the trappings of criminal proceedings. The trend of the legislation and authorities — including the Affiliation Proceedings Act, 1957, *Regina v. Lightfoot* ((1856) 25 L.J.M.C. 115) and *Parker v. Green* (1862) 2 B. & S.299) — were entirely one way. His Lordship entertained no doubt that affiliation proceedings were civil proceedings. That meant that the defendant was not merely competent but compellable, and there was no privilege entitling him to decline to answer the questions."

I know of no reason why different considerations should be applied in Fiji to proceedings under the Bastardy Ordinance. I cannot therefore accept the Appellant's contention that such proceedings are criminal or quasi-criminal in nature. The learned trial Senior Magistrate was, in my view, correct in his view that proceedings under the Bastardy Ordinance are civil proceedings and not criminal proceedings.

There can be no doubt however irrespective of the question of whether the proceedings in this case were of a criminal or civil nature, that the service of the summons on the Appellant at Honiara, out of the jurisdiction, was irregular. This appears to have been recognised in the Court below despite the fact that leave to effect such service had been given by that Court.

On the other hand, it is open to the parties in civil proceedings to waive any objection to defects in procedure — such as to defective service — and this is what the Court below held had been done in this case. After having been served, whether defectively served or not, the Appellant appeared twice at the Court below by his Counsel. His Counsel participated fully in the proceedings on the merits and cross-examined the witnesses called by the Complainant. At the end of the hearing the Appellant's Counsel submitted that, on the merits, the Complainant had not

made out her case against the Appellant. It was only after that that he raised for the first time the question of whether the Court had jurisdiction by reason of defective service of the summons.

In my opinion it was then too late for the point to be raised as by his conduct the Appellant had waived any objections he might have taken at the outset to the case being heard at all by reason of (a) defective service or (b) want of jurisdiction.

I have considered all the authorities cited before me, none of which appear to be on all fours with the present case. Counsel for the Appellant in effect conceded both before me and in the Court below that he had submitted to the jurisdiction of the Court in his submissions he made at the close of the Complainant's case.

Further in the second ground of appeal to this Court (which he admittedly has abandoned) the Appellant again conceded that he had 'apparently' submitted to the jurisdiction of the Court below through his Solicitor.

By appealing as he has to this Court against the finding of the Court below on the merits the Appellant has, in my view, again submitted to the jurisdiction. If he had not submitted to the jurisdiction or had not wished to do so he could have applied to the Supreme Court originally for a Writ of Prohibition or alternatively later for a Writ or Order of Certiorari to bring up the decision of the Court below for the purpose of being quashed as being made without jurisdiction.

It is well established that a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction.

As is said in *Dicey's Conflict of Laws* (7th Edn.) at page 1021:

> "Where such a litigant, though a defendant rather than a plaintiff, appears and pleads to the merits without protesting the jurisdiction there is clearly a voluntary submission."

In these circumstances I am of the opinion that no sound reasons have been advanced on behalf of the Appellant why the order made against him in the Court below should be disturbed.

For these reasons the appeal is dismissed with costs which I assess at £10.10.0.

Appeal dismissed.