

The Court holds that the sum of £39 18s. 6d. realized at the sale represents the fair value of the chattels sold.

It follows that the value of the chattels sold in excess was £27 11s. 6d., and such sale must be held to have been made in respect of the claim for rent of the 18 acre plot.

Hence under s. 4 of the Distress Act 1689, the plaintiff is entitled to recover double the amount of such excess, that is £55 3s. od. with costs.

NEVILLE v. NEVILLE.

[Appellate Jurisdiction (Corrie, C.J.) January 27, 1938.]

Maintenance Orders (Facilities for Enforcement) Act, 1921 (N.Z.)—Destitute Persons Act, 1910 (N.Z.)—provisional orders for maintenance of wife and child made in N.Z.—orders confirmed by Magistrate in Fiji—conduct of wife equivalent to admission of adultery—whether admissible as against her—whether admissible as regards order for maintenance of child.

John and Gladys Neville were married in 1925 and had one child born in 1927. In 1931 a deed of separation was drawn up but was never signed. At that time John Neville was an officer of H.M.C.S. *Pioneer* and lived aboard; Gladys Neville lived in Suva until September 17, 1935 when she went to New Zealand with the child. On March 23, 1936 a second child was born (in New Zealand). Gladys Neville did not inform her husband that she was pregnant when she left Fiji nor did she inform him later. He heard rumours however and eventually obtained a birth certificate for the second child from New Zealand. He had been making monthly payments of maintenance up to September 1937, when he discontinued them. On July 7, 1938 Gladys Neville obtained a provisional order for maintenance of herself and the first child under the Destitute Persons Act, 1910 (N.Z.) and the Maintenance Orders (Facilities for Enforcement) Act 1921 (N.Z.). In these proceedings she did not mention the birth of the second child. On August 26, 1938 John Neville appeared before the Chief Magistrate at Suva to show cause why the provisional order should not be confirmed. His evidence disclosed for the first time the birth of the second child and the Chief Magistrate ordered the remission of the case to New Zealand for further evidence. On September 26, 1938 the Magistrate's Court in New Zealand, after hearing further evidence made an additional provisional order for maintenance of the second child. On November 4, 1938 John Neville appeared in Suva to show cause why the two provisional orders should not be confirmed, opposing them on the grounds of his wife's misconduct (as to her maintenance) and that he was not the father of the second child (as to the maintenance of the child). The Orders were confirmed, and he appealed on the same grounds.

HELD.—(i) (Following *Roast v. Roast* [1937] 4 A.E.R. 423) a wife's conduct tending to show that she has been guilty of such misconduct as would be reasonable cause for her husband to fail to provide for her is admissible against her in proceedings for her maintenance.

(ii) The rule in *Russell v. Russell* [1924] A.C. 687 excludes evidence of either spouse as to non-access if such evidence tends to bastardize a child prima facie born in wedlock.

Cases referred to :—

- (1) *Russell v. Russell* [1924] A.C. 687.
- (2) *Roast v. Roast* [1937] 4 A.E.R. 423.

APPEAL against confirmatory orders in respect of two provisional orders for maintenance. The facts are fully set out in the judgment.

R. L. Munro for the appellant.

R. A. Crompton for the respondent.

CORRIE, C.J.—This is an appeal from (1) an order of the Chief Police Magistrate, Suva, made on the 4th November, 1938, whereby a provisional order made by a Stipendiary Magistrate at Christchurch, New Zealand, on the 7th July, 1938 was confirmed subject to certain amendments, and it was ordered that the appellant should pay, weekly, as maintenance for the respondent, the sum of £2 New Zealand currency, and as maintenance for the child of the marriage, Edith May Neville, the sum of ten shillings New Zealand currency; and (2) an order of the Chief Police Magistrate, Suva, dated the 4th November, 1938, whereby a provisional order made by a Stipendiary Magistrate at Christchurch, New Zealand, on the 28th September, 1938, was confirmed with amendment, and it was ordered that the appellant should pay weekly the sum of ten shillings New Zealand currency towards the maintenance of the child Graeme Barry Neville. The appellant does not contest the order for payment of maintenance for the child Edith May Neville.

As regards the respondent, the appellant contests the order for maintenance on the ground that the finding that the appellant had not reasonable cause to fail to provide for her is against the weight of evidence.

The material facts are as follows: The parties were married on the 7th July, 1925, and the child Edith May Neville was born in 1927. In June 1931 a deed of separation was drawn up but was never signed. The appellant was at that time an officer in H.M.C.S. *Pioneer* and lived in the ship; the respondent lived in Suva until the 17th September, 1935, when she went to New Zealand with the child and has not since returned. The child Graeme Barry Neville was born on the 23rd March, 1936. The appellant made monthly payments to the respondent until September 1937.

The appeal as regards the order for maintenance for the respondent is based upon the principle laid down in *Roast v. Roast*, [1937] 4 A.E.R. page 423. In that case the wife, who gave birth to a child in May, 1937, told her husband at some date in the preceding month that he would have to keep the child whether it was his or not. The Court held that evidence as to this statement was admissible; and upon that and other evidence, held that the husband was justified in leaving the wife. On appeal from the Magistrate, Bucknill J. said (at page 431): "The Magistrate accepted the evidence of the husband. He says in terms that the defendant (the husband) said that she (the wife) made an admission about the child, and he says that he is satisfied that the

defendant has told him the truth. She, also, by her conduct, in the mind of the Magistrate, acted in a significant way. She wanted to go back to her husband about the time when the conception started, and, if an admission by the wife is admissible against her, I think that conduct tending to show the same result is also equally admissible".

In the present appeal the appellant relies entirely upon the conduct of the respondent. His case may be summarized as follows :—

When the respondent left Suva, which was only six months before the birth of the child, Graeme Barry Neville, she did not inform the appellant that she was pregnant, nor did she ever inform him of the birth of the child. It was only in consequence of rumours that he made inquiries, and eventually obtained from the Registrar-General of New Zealand a certificate of the child's birth. The respondent's reply is that at the time she left Suva she was not certain that she was pregnant and that she assumed the appellant would hear of the birth of the child from the father who lived in Suva.

The appellant, however, points out that in commencing these proceedings, the respondent made no mention of the child, Graeme Barry Neville, and swore that there was only one child of the marriage. From that fact and from the fact that the respondent, who, on her own evidence, was in poor financial circumstances, did not claim maintenance for the boy and had never made any claim upon the appellant for the additional expenses arising from his birth, the appellant argues that the inference must be drawn that the respondent had doubts as to the boy's paternity, and that such doubts point inevitably to the conclusion that she had committed adultery.

The respondent's explanation is as follows : " I did not refer to this child in my early evidence because he was born after I left Suva and I thought there was no need to mention it. I never took advice as to whether I was entitled to maintenance for the boy. I know now that I am entitled to maintenance for this boy. I want a maintenance order for the boy "

Taking all the circumstances into consideration I hold that a finding that the appellant had not reasonable cause to fail to provide the respondent with maintenance is against the weight of evidence. As regards payment of maintenance for the respondent, therefore, the appeal is allowed and the order of the Chief Police Magistrate's Court is set aside.

The order to pay maintenance for the child, Graeme Barry Neville, is based on the ground that some other person unknown may be the parent of the boy within the meaning of s. 26 of the New Zealand Destitute Persons Act 1910 and hence that it is against the weight of evidence to hold that the appellant is such parent.

Under the rule in *Russell v. Russell*, [1924] A.C. page 687, that neither spouse may give evidence in a matrimonial cause or proceeding tending to show that he or she did not have marital intercourse, if such evidence would tend to bastardize a child prima facie born in wedlock, neither of the parties can give evidence, and there is no other evidence as to access or non-access at the time when the child was conceived. There is thus nothing to rebut the presumption that the appellant is the father of the child Graeme Barry Neville, and the appeal in respect of the order for payment of maintenance for the child therefore fails.