1921.

Present : Shaw J.

ROSALINAHAMY *v.* SUWARIS.

375—P. C. Panadure, 69,795.

Evidence Ordinance, s. 112—Child born within three months of marriage—Is marriage conclusive proof that husband was the father?—Physical impossibility of access.

The appellant married A, who was not known to her till marriage. A child was born within three months of marriage. The appellant alleging that respondent S was the father of the child claimed maintenance.

Held, that section 112 of the Evidence Ordinance did not stand in the way of appellant's claim, and that the fact of marriage was not conclusive proof that A was the father.

Obiter.—Section 112, on the face of it, appears to apply to actions in which legitimacy comes into question, and it does not, on the face of it, appear to have any application to proceedings under the Maintenance Ordinance.

[1] *(1904) 8 N. L. R. 70.*

[2] *(1904) 1 Bal. 44.*

THE facts appear from the judgment.

Wijemanne, for the appellant.

J. S. Jayawardene, for the respondent.

May 3, 1921. SHAW J.—

This is a somewhat peculiar case under the Maintenance Ordinance. The appellant took proceedings against the respondent to obtain an order for the maintenance of a child, which she said was the child of the respondent. The facts, as found by the Magistrate, are briefly as follows, namely, that the respondent in fact seduced the applicant, and that she became pregnant from him of the child in question, that the respondent on discovering this arranged a marriage between the applicant and a man named Abraham. This man was a stranger to the girl until the marriage contract was made shortly before the marriage took place; that by the promise of the dowry of Rs. 200, and by concealing from Abraham the fact that the young woman was pregnant, he induced him to consent to the marriage. The marriage took place, and the next day Abraham deserted his wife, having discovered that she was pregnant, and not having received the dowry which he had been promised. The facts that I have mentioned appear to be satisfactorily proved, and the evidence of the applicant supported in material particulars by other evidence. Although the Magistrate has found this state of facts to be true, he has dismissed the applicant's case, in consequence of what he thinks is the law under section 112 of the Evidence Ordinance. That section is as follows: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten, or that he was impotent." That section, on the face of it, appears to apply to actions in which legitimacy comes into question, and it does not, on the face of it, appear to have any application to proceedings under the Maintenance Ordinance. But it has been so applied, and I need not discuss the matter, but for the purposes of this case assume that it applies to the present case. It will be noticed that that section provides that this irrebuttable presumption arises, unless it can be shown that the respondent had no access to the mother at any time when the child might have been begotten. The language of that section has been, if I may say so with due deference, considerably extended by the Full Court in the case of *Sopi Nona v. Marsiyan*.[1] The Court there, following more some English decisions than the wording of our

[1] *(1903) 6 N. L. R. 379.*

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Statute, appear to have held that it is necessary to show impossibility of access of the husband to the wife at the time the child may have been begotten. The wording of the judgments are somewhat different, but Layard C.J. goes so far as to express an opinion that it must be shown to be " physically " impossible. That case is, of course, binding on myself and other Courts of this Colony, until it is in any way changed by legislation or by the decision of the Privy Council. In several later cases it has been pointed out by Judges that that case does not really go so far as the wording of it would seem to indicate. The case was considered in a later Full Court case of *Rabot v. De Silva*,[1] and in that case Hutchinson C.J. expressed his opinion of what the Court meant in the case of *Sopi Nona v. Marsiyan*.[2] He said : " I think that all that the Court meant in that case was that it must be shown to have been impossible consistently with the facts proved. It must be proved affirmatively, and not merely inferred as a probability, that the man had no access." And this same view is taken by Pereira J. in the case of *Kalo Nona v. Silva*.[3] I may also point out that Chief Justice Wood Renton, in the case of *Ango v. Podisingho*,[4] whilst admitting the authority of the case of *Sopi Nona v. Marsiyan*,[2] points out that in the Privy Council case in *Rabot v. De Silva* [1] the respondent's counsel admitted that he could not contend that under section 112 of the Ceylon Evidence Ordinance that it is necessary to prove absolute impossibility of access. In the present case I think that within the words of Hutchinson C.J. it has been shown to have been impossible consistently with the facts proved that the husband, Abraham, was the father of the child. If, as the evidence shows, he did not even know the girl at the time when this child was begotten, it is impossible that he can be the father of the child which was born three months after the marriage. I think that the obligation imposed by section 112 of the Evidence Ordinance has been met, and that it has been sufficiently proved that Abraham had no access to the applicant at the time the child was begotten. That presumption of paternity having been disposed of, it is open to the Magistrate to find, as he has in fact found upon the evidence in the case, that the respondent is the father of the child, and therefore is liable for its maintenance. In the event of this appeal from his decision being successful, he has found the amount which he thinks right should be ordered to be paid by the respondent, and that is the sum of Rs. 12 per mensem. I accordingly allow the appeal, and direct an order to be entered that the respondent pay to the applicant Rs. 12 per mensem from February 1 in respect of the maintenance of the child. The appellant is entitled to the costs of the appeal.

Appeal allowed.

[1] *(1909) A. C. 276.*
[2] *(1903) 6 N. L. R. 379.*
[3] *(1912) 15 N. L. R. 508.*
[4] *(1911) 15 N. L. R. 511.*