1956 *Present :* Sansoni, J.

ANDIRIS FONSEKA, Appellant, *and* ALICE PERERA, Respondent

S. C. 40—M. C. Matugama, 22,985

Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy —"Access".

The word "access" in section 112 of the Evidence Ordinance means "opportunity of intercourse" and not "actual intercourse". The judgment of the Full Bench in *Jane Nona v. Don Leo* (1923) 25 N. L. R. 241 is no longer law.

APPEAL from a judgment of the Magistrate's Court, Matugama.

R. A. Kannangara, for the defendant appellant.

C. D. S. Siriwardene, for the applicant respondent.

Cur. adv. vult.

March 28, 1956. SANSONI, J.—

This appeal arises out of an application for maintenance made by the applicant-respondent against the defendant-appellant, who is not her husband, claiming maintenance from him on the ground that he was the father of her child Ranjit. The applicant-respondent was married in 1949; that marriage has not been dissolved and the child in question was born to her on 10th August, 1953. The defendant denied paternity, but after inquiry the learned Magistrate held that the defendant was the father of the child and ordered him to pay maintenance.

The learned Magistrate carefully considered the question whether there was intimacy between the applicant and the defendant at the time relevant to the application, and there can be no doubt that on the evidence before him the learned Magistrate came to the only possible conclusion on that matter. But since the child was born during the continuance

of a valid marriage between the applicant and her husband, the more important question which requires consideration is whether the applicant has discharged the onus of rebutting the conclusive presumption created by S. 112 of the Evidence Ordinance. Unless the applicant has succeeded in doing so, the fact that she was intimate with the defendant has no bearing on the question of paternity.

In order, I suppose, to rebut that presumption evidence was given by the applicant and her witness the Village Headman to the effect that the applicant and her husband had separated in 1950 or 1951. The time of the alleged separation is itself uncertain. The applicant stated in her evidence in chief that she and her husband separated in 1950 ; under cross-examination she stated at first that they lived together till about the middle of 1951, but she later said that they separated in the latter part of 1951. According to the Village Headman the applicant and her husband came to him on 20th January, 1950 and informed him that they were separating from each other and signed his diary. The diary entry itself is open to suspicion because the date first appears as 18th January 1950 ; this date has then been scored off and the date 20th January 1950 substituted. No evidence was led as to the place of residence of her husband thereafter, and it is impossible to conclude that because the husband and wife told the Headman they were separating, they did not meet again. The applicant's evidence itself disproves such a theory.

Every assumption should be made in favour of the legitimacy of this child, and its illegitimacy can only be conceded if the applicant proved beyond reasonable doubt that her husband had no "opportunity of intercourse" with her at any time when the child could have been conceived. This she has completely failed to do. It cannot be held, therefore, that the child Ranjit, in respect of whom this application has been made, was the child of the defendant.

I use the phrase "opportunity of intercourse" advisedly for that, I think, is the authoritative definition of the word "access" in S. 112. On this question there are conflicting decisions. Basnayake, J. in *Pesona v. Babonchi Baas*[1] and Swan, J. in *Kiri Banda v. Hemasinghe*[2], held that the word meant "actual intercourse", as decided by the Full Bench in *Jane Nona v. Don Leo*[3]. Howard, C.J. in *Ranasinghe v. Sirimane*[4], and Dias, J. in *Selliah v. Sinnamma*[5] followed the decision of the Privy Council in *Karapaya Servai v. Mayandi*[6], in which it was held that the word meant "opportunity of intercourse".

I have no doubt that this decision of the Privy Council is binding on me. It dealt with S. 112 of the Evidence Act of India (1 of 1872) which is in almost identical terms with our S. 112. The only question which their Lordships had to decide in that case, as they themselves say, is whether it had been shown that a husband and wife had no access to each other at any time when the person claiming to be their lawful son could have been begotten. Therefore, the meaning of the word "access" had a direct bearing on that question, although their Lordships said that nothing

[1] *(1943) 49 N. L. R. 442.*
[2] *(1950) 52 N. L. R. 69.*
[3] *(1923) 25 N. L. R. 241.*
[4] *(1946) 47 N. L. R. 112.*
(7) 48 N. L. R. 261.
I. R. (1934) P. C. 49.

seemed to turn upon the *nature* of the access. The judgment contains a close examination of the evidence, and the conclusion arrived at was that no Court could hold on that evidence that non-access at the relevant time had been proved.

That being my view I consider myself bound to follow that decision. Any doubt which may have existed previously has, I think, been removed by the judgments of the Privy Council in *Nadarajan Chettiar v. Tennekoon*[1] and *Cooray v. The Queen*[2]. In *Cooray v. The Queen* the Court of Criminal Appeal in Ceylon had not followed a line of English decisions which had construed an English Act upon which S. 392 of the Penal Code was modelled. Lord Porter therefore had occasion to consider whether the rule in *Trimble v. Hill*[3] still held good. In *Trimble v. Hill* the Privy Council said :

> "Their Lordships think the Court in the Colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in Colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it".

These remarks were made because the New South Wales Court had differed from the Court of Appeal in its construction of a section which was similar to a Section which appeared in an Imperial Act. Lord Porter then said :

> "It is true that in that case the decision referred to was one given by the Court of Appeal and that the Courts which it was said should follow it were Courts of a Colony, but in their Lordships' view English Courts should themselves conform to the same rule where there has been a long established decision as to a particular section of an Act of Parliament and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the Courts of a member of the British Commonwealth of Nations a similar course should be followed".

In *Nadarajan Chettiar v. Tennekoon*, Sir John Beaumont said that the rule still applied to the Courts in Ceylon except in cases where local conditions make it inappropriate.

The comment of de Villiers (then J. P.) in *Benkes v. Knights Deep*[4], when referring to this rule will bear repetition. He said :

> "Even apart from this ruling, the Court of this Province naturally inclined, on account of their inherent weight, to follow so eminent a College as a Court of Appeal in England".

Even, therefore, if there was no duty cast on me to follow the Privy Council in *Karapaya Servai v. Mayandi*, I should have no hesitation in following that decision, for, to quote the words of Goddard, L.J. in *Ingall v. Moran*[5] when referring to another Privy Council judgment,

[1] *(1950) 51 N. L. R. 491.*
[2] *(1953) 54 N. L. R. 402.*
[3] *(1879) 5 A. C. 342.*
[4] *(1917) T. P. D. at 689.*
[5] *(1944) 1 A. E. R. at 102.*

"though not technically binding on this Court, it is impossible to treat a pronouncement of such high authority as otherwise than conclusive of the point".

In my view the judgment of the Full Bench in *Jane Nona v. Don Leo* is no longer law.

For these reasons I allow this appeal and dismiss the application for maintenance.

Appeal allowed.