SOPI NONA *v.* MARSIYAN.

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P. C., Balapitiya, 23,485.

Maintenance—Evidence in support of affiliation order—Legitimacy of child born during subsistence of valid marriage—Rebuttal of legitimacy—Evidence Ordinance, s. 112—Competency of husband and wife to give evidence as to sexual intercourse with each other.

If a woman seeks to charge her husband with the maintenance of her children born during the continuance of their marriage, she should prove a valid marriage and the birth of her children during its continuance.

To evade responsibility for such maintenance, the husband, if he admits the marriage, must prove that he is either impotent or that he had no possibility of access to his wife.

The words "no access to the mother" in section 112 of the Evidence Ordinance (No. 14 of 1895) mean impossibility of access.

Neither the husband nor the wife is a competent witness as to their having or not having sexual intercourse with each other, when the legitimacy of the wife's child is in question.

IN this case the accused was sued for the maintenance of his wife and three children aged nine years, five years, and one year, respectively. The Police Magistrate found that the accused was

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liable to maintain the first two children, and, as regards the last child, he held that it was not the husband's, inasmuch as it was proved that he visited his wife only once, a few days after the second child's birth, but not after that, and that the wife begot this child while living in adultery with a man named Kovis.

The mother appealed.

The appeal came on for hearing before Mr. Justice Middleton, who directed the case to be reserved for the consideration of the Full Court as to the construction of section 112 of the Evidence Ordinance (No. 14 of 1895). It was argued before Layard, C.J., Middleton, J., and Grenier, A.J., on the 18th May, 1903.

Morgan, for appellant.—Section 112 of the Evidence Act speaks of conclusive proof of the legitimacy of children born during the continuance of marriage. The presumption could be rebutted by strict proof of the impotency of the man, or the impossibility of the man to have had access. The English Law is different from our law. Our law does not allow proof of circumstances to show the moral impossibility of the man to have access, but it throws the burden on the person disputing the paternity to prove physical impossibility. *Perera v. Podisingho, 2 N. L. R. 243.*

Wadsworth, for respondent.—The presumption of law can be rebutted if it can be shown " that the man had no access to the mother." The words of the section are clear. The question of impossibility does not arise. It must only be proved that the man had in fact no access. Generally, when any law enacts that there must be proof that a certain thing was not done by a certain person, it is not necessary to show that it was impossible for him to have done it. What the law requires is that, apart from the possibility or impossibility of the act, it should be proved that the person did not in fact do it. In the case of a person who is outside the Island it would be quite possible for him to come to the Island, but suffice it to prove that he did not come. In *Perera v. Podi Singho*, Bonser, C.J., followed the ruling in the *Banbury Peerage Case*. In that case it was held that the presumption is rebutted " by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of the child." This principle was followed in *Morris v. Davis* (*5 Clark & Finnelly, 163*), where Lord Redesdale is said to have given expression to the dictum that non-access means impossibility of access. But even there it was held that, though the father and mother lived in the same house, the child was not the father's. To some

extent the English Law is different from our law. It is submitted that proof " that the man had no access " includes the two kinds of proof contemplated under the English Law, viz., non-access and circumstances tending to show that there was no access. Our law is not more stringent than the English Law. To interpret our law to mean physical impossibility would be to give the words a strict interpretation. Withers, J., in *Pavistina v. Aron* (*3 N. L. R. 13*) held that proof of impossibility of access is not absolutely necessary to rebut the presumption. Nor can it always be possible to prove that there was actual physical impossibility, except perhaps in cases where a person is confined in jail, and guards are placed over him who watch every movement of his.

Cur. adv. vult.

May 31, 1903. LAYARD, C.J.—

I see no reason to depart from the ruling of Chief Justice Bonser in *Perera v. Podisingho* (*5 N. L. R. 243*), that to bring a case of paternity within the exception of section 112 of our Evidence Ordinance it must be proved either that the husband was impotent, or that it was impossible for him to have had intercourse with his wife at the time the child was begotten. The evidence in this case does not establish that at the time the third child was begotten it was physically impossible for the defendant to have had intercourse with his wife. Under our law it is not merely a presumption of legitimacy which is to be rebutted, but what section 112 terms " conclusive proof of " legitimacy. From the evidence in this case it appears that the third child was born during the continuance of the marriage of the complainant and the defendant and that, according to our law, is conclusive proof that such child is the legitimate child of the defendant, unless it is shown that he had no access to the complainant or that he was impotent. It is not pretended that he was impotent, and the evidence in the case is free from conclusively establishing the non-access of the defendant to his wife, *i.e.*, the impossibility of such access. I hold therefore that the third child is the legitimate child of the defendant.

I desire here to point out to the Magistrate that it has been repeatedly held by this Court that neither the husband nor the wife is a competent witness as to the fact of their having or not having sexual intercourse with each other, where the legitimacy of the wife's child is in question. The evidence, which the Magistrate has recorded, of the defendant to the effect that he had no intercourse with his wife, was clearly inadmissible and ought not to have been received by the Magistrate. The evidence of the wife, in an application for an affiliation order, is only admissible

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to show who the true father was, after it has been established by independent evidence that the child is not the child of her husband.

MIDDLETON, J.—

I agree with my lord that the correct view of the effect of section 112 of the Evidence Act on the question of the legitimacy of children born during a valid marriage is that adopted by Chief Justice Bonser in *Perera v. Podisingho* (*5 N. L. R. 243*). If a woman seeks to charge her husband with the maintenance of her children born during the continuance of their marriage, she would have to prove a valid marriage and the birth of her children during its continuance. On the other hand, if the husband admits the existence of a valid marriage, he must, in order to evade responsibility for the maintenance of his wife's children, either prove that he is impotent or that he had no possibility of access to his wife. He has to meet what is termed in the section conclusive proof of legitimacy by two specified forms of rebuttal, *i.e.*, non-access, which has been defined by the learned authority of Lord Redesdale as impossibility of access, and impotency. By our law, therefore, a man is deemed to be the father of his wife's children, born during the continuance of a valid marriage, unless he can prove these two rebuttals. In the case before us the husband has not established that there was no possibility of access on his part to his wife, and there is no suggestion of impotency, and he must therefore be held responsible for the maintenance of his wife's third child to the extent of Re. 1 per month, in addition to the sums already ordered by the Magistrate for the two elder children.

GRENIER, A.J.—

In this case the complainant charged the defendant with having failed to maintain her and his three children, she being his lawful wife. The Magistrate found upon the evidence that the defendant was the father of two of the children, but not of the third child. The complainant has appealed, and the question arising for determination is one of considerable importance, and depends upon the true construction to be placed upon section 112 of our Evidence Act, Ordinance No. 14 of 1895.

In the case reported in *5 N. L. R. 243*, Chief Justice Bonser drew a distinction between the English Law and our law in regard to what constitutes proof of legitimacy, and I shall presently show that this distinction is apparent in view of the wording of section 112.

It is not open for us where the words are plain and unambiguous to place any interpretation on them in order to meet the exigencies of any particular case. We must construe the words in their ordinary sense, and give them their obvious effect.

Now, section 112 runs 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." It will be remarked at once that the words cannot admit of more than one meaning, and the fact that a person is born in lawful wedlock is conclusive proof of his legitimacy. There is no room for any presumption, as under the English Law, and the significance of the words " conclusive proof " cannot in any way be overlooked. A presumption may be rebutted, but where the law says that, given a certain state of things, there is conclusive proof of a certain fact, unless certain other facts are proved, that proof can only be destroyed or nullified by counter proof of an overwhelming character establishing those other facts. Such proof is predicated by the latter part of section 112, which says " unless it can be shown that the man had no access to the mother at any time when such person could have been begotten, or that he was impotent." In plain language these words mean that the onus is entirely thrown on the husband to prove that it was impossible for him to have had access at a particular time, or that he was impotent. The words " non-access " have been judicially interpreted by the House of Lords in the case of *Morris v. Davies* (*Clark & Finnelly's Reports, vol. V., p. 163*), following upon the judgment of Lord Redesdale in the *Banbury Case*, to mean impossibility of access. Applying this interpretation to the words of section 112, it would be for the husband to prove that he was confined in a lunatic asylum, or was beyond seas, or was placed in circumstances of such physical restraint as to have rendered it impossible for him to have had access to his wife, as the law always favours legitimacy and not bastardy. The second ground open to the husband is the ground of impotence. Here too the onus would be on him.

According to English Law, however, the presumption of the birth of a child in wedlock may be rebutted both by direct and presumptive evidence. To use the language of Lord Redesdale: " In the case of a husband and wife living in such habits of intercourse as that the husband may be the father of the child, as the fact that

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the child is the child of A, is only presumption. It may be rebutted by circumstances, and the conclusion must be drawn from all the circumstances taken together." It follows from this, therefore, that although it may be proved in England that the husband and wife were living together in the same house, the birth of a child in wedlock may be rebutted both by direct and circumstantial evidence, which would include the conduct of the parties. Such evidence, however, will not avail the husband, in similar circumstances, in this country, because access cannot be said to be impossible.

As I have pointed out, our Evidence Act expressly legislated that the fact that a child was born in wedlock was conclusive proof of its legitimacy, and that that proof could only be destroyed in the two ways I have already indicated. As far as I can see, there is no proof in this case that it was impossible for the defendant to have had access to his wife at any time when the third child could have been begotten, or that he was impotent, and I therefore hold on the question of paternity that the child was born in wedlock, and that the defendant is liable for its maintenance.

Later on, the case went before Mr. Justice Middleton for his decision on the other point raised in appeal, *i.e.*, whether there was evidence to justify the Magistrate in finding that the complainant was living in adultery with the man Kovis.

MIDDLETON, J.—

I have carefully gone through the evidence again, and I am not prepared to say that the Magistrate, who is a Sinhalese gentleman, was wrong in coming to the conclusion, on the evidence he heard, that the complainant was living in adultery with the man Kovis. I therefore dismiss the complainant's appeal on this ground, which, as a matter of fact, is not specifically raised in the petition of appeal, and she therefore fails to obtain an order for her personal maintenance.

The result of the appeal is that the respondent husband will have to pay in addition Re. 1 per month for the maintenance of his youngest child.