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[IN REVIEW.]

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

RABOT *et al. v.* DE SILVA *et al.*

D. C., Colombo 14,923.

Marriage of persons who have lived in adultery—Validity—The conclusive nature of a judgment of three Judges of the Supreme Court sitting in appeal or in review—Non-access—Impossibility of access—Evidence of husband and wife—Courts Ordinance (No. 1 of 1889), ss. 41 and 42—Evidence Ordinance (No. 14 of 1895), s. 112—Ordinance No. 24 of 1901, s. 10.

The Supreme Court (consisting of three Judges) hearing a case in review preparatory to an appeal to His Majesty in Council is bound by the decision of three Judges of the said Court pronounced in appeal or in review, unless it is founded on a manifest mistake or oversight, or is inconsistent with some previous decision which is of equal or greater authority.

Held, following this rule, that the Supreme Court sitting in review was bound by the judgment in review pronounced in *Karonchihamy v. Angohamy* (8 *N. L. R.* 1), which decided that it was not illegal in Ceylon for a man who had lived in adultery with a woman during the lifetime of his wife to marry such woman after his wife's death; and also by the judgment of the Supreme Court (consisting of three Judges) in appeal in *Sopi Nona v. Marsiyan* (6 *N. L. R.* 379).

The judgment in *Sopi Nona v. Marsiyan* explained.

WENDT J.—Under the Evidence Ordinance, the evidence of the wife is admissible to prove non-access.

HEARING in review of the judgment of tte Supreme Court reported in *N. L. R.* 364 preparatory to appeal to His Majesty in Council.

Walter Pereira, K.C., S.-G. (with him E. H. Prins), for the plaintiffs, appellants.

Van Langenberg (with him E. W. Jayewardene), for the defendants, respondents.

Cur. adv. vult.

18th March, 1907. HUTCHINSON C.J.—

This is a hearing in review before appeal to His Majesty in Council. The plaintiffs claim one-fifth of the estate of Vincent Pereira, who died on the 28th July, 1900, leaving a will of which the first and second defendants are the executors. He had five brothers and sisters; and the plaintiffs claim that the plaintiff Johanna, as the

only child of one of those brothers, became entitled on V. Pereira's death to one-fifth of his estate, because the dispositions of his estate made by his will were unlawful and ineffectual.

Vincent Pereira lived in adultery with the third defendant Justina, who was the wife of Salman Appu. Salman Appu died on the 13th April, 1889, and shortly after his death V. Pereira went through the ceremony of marriage with Justina, and the marriage was duly registered. The fourth, fifth, and sixth defendants are the children of Justina born in Salman Appu's lifetime and during the subsistence of her marriage with him and whilst she was living in adultery with V. Pereira. The seventh defendant is the husband of the sixth defendant, and the eight and ninth defendants are persons whom the testator brought up, and to whom he gives certain benefits under his will, calling them his " adopted children."

The plaintiffs contend that the evidence proved that the fourth, fifth, and sixth defendants were the children of V. Pereira, born whilst he was living in adultery with their mother Justina, and were therefore incapable of taking anything under his will; and also that, because he had lived in adultery with Justina, he could not, in accordance with the Roman-Dutch Law in force in Ceylon, contract a legal marriage with her or make any gift by will to her.

By his will V. Pereira appointed the first two defendants executors and trustees of his will, and, after some specific bequests to Justina, gave all his real estate to the trustees upon trusts for the benefit of Justina (whom he calls his wife), and of the fourth, fifth and sixth defendants (whom he called his daughters) and their descendants, and of his adopted daughters, the eighth and ninth defendants.

At the trial the District Judge found on the evidence that the fourth defendant was the child of Salman Appu, but that the fifth and sixth defendants were the children of the testator; and he held that the alleged marriage between V. Pereira and Justina was unlawful for the reasons given by the plaintiffs. He further held that the fifth and sixth defendants could not take anything under the will, because they were his children born to him by Justina whilst he was living in adultery with her; but that Justina could take under the will because at the date of the will and of the testator's death she was not living in adultery with him (her husband being then dead), but was merely his concubine. But he also held that the shares given by the will to the fifth and sixth defendants went to the other legatees by the *jus accrescendi*. He accordingly dismissed the action.

Against this judgment the plaintiffs appealed; and on the appeal Middleton J. and Grenier A.J., following the decision of the Full Court in *Karonchihamy v. Angohamy* (1), held that the marriage of V. Pereira with Justina was valid, and that the bequests in favour of Justina were good; and following the decision of the full Court in

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Sopi Nona v. Marsiyan (1) upon the construction of section 112 of the Evidence Code, they held that the fifth and sixth defendants as well as the fourth defendant were the children of Salman Appu, because it was not shown to have been impossible for him to have had access to Justina at any time during which those children might have been begotten; and they accordingly held that the bequests in favour of all the children were good. They accordingly varied the judgment of the District Judge by decreeing that the fifth and sixth defendants took under the will, and in other respects affirmed it.

On this hearing in review it has been contended for the plaintiff—

(1) That we are not bound to follow the ruling of the Court in the case in 6 *N. L. R.* 379; that the decision in that case was wrong; and that the evidence proves that Salman Appu had no access to Justina at any time when the fourth, fifth, and sixth defendants could have been begotten, and that those three defendants were the children of V. Pereira.

(2) That we are not bound to follow the ruling in the case in 8 *N. L. R.* 1; that the decision in that case was wrong; and that the marriage between V. Pereira and Justina was invalid.

(3) That, if these two points are established, the bequests in favour of the third, fourth, fifth, and sixth defendants are void.

(4) That, if we should find that the fourth defendant is the child of Salman Appu, but that the fifth and sixth defendants are the children of V. Pereira, the shares of the fifth and sixth defendants do not go to the other devicees by *jus accrescendi.*

(5) That, even if we hold that we are bound by the decision in the case in 8 *N. L. R.* 1, Justina cannot take under the will because by Roman-Dutch Law a man cannot bequeath anything to a woman with whom he has lived in adultery.

By section 42 of "The Courts Ordinance, 1889," as amended by No. 24 of 1901, before any appeal is brought to His Majesty in Council the judgment is to be brought before three Judges of the Supreme Court, who are to "pronounce judgment according to law." There is no law prescribing whether the Court so constituted is to follow the ruling of a similar Court given in review. But I think it is right that, whether it agrees with the ruling or not, it should follow it, unless perhaps it was found on a manifest mistake or oversight, or was inconsistent with some previous decision of a similar Court which appears to be of equal or greater authority. Such a ruling ought to be regarded as the law until it is reversed by His Majesty in

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Council. I hold therefore that we must follow *Karonchihamy v. Angohamy* and decide that the marriage of V. Pereira with Justina was valid. And I therefore hold that the disposition in V. Pereira's will in favour of Justina were valid.

In this connection I must refer to an authority quoted by the appellants from *Voet, bk.* 34. *t.* 9, *s.* 3, who says that a man cannot bequeath anything to a woman with whom he lives in adultery, " sive eam in matrimonio duxerit, sive tantum adulterio polluerit." But *Voet* gives the reason, viz., " cum ipsum matrimonium ob præcedens adulterium invalidum pronuncietur; " and that reason, I have already held, does not apply in Ceylon.

The case of *Sopi Nona v. Marsiyan* (1) stands on a different footing. It was an appeal from a Police Magistrate, which came first before Middleton J., who reserved it for the consideration of the Full Court as to the construction of section 112 of the Evidence Ordinance, and it was then argued before a Court of three Judges. This was done in accordance with section 41 of " The Courts Ordinance, 1889," which enacts that appeals from Police Courts may be heard by any one Judge of the Supreme Court, but that " nothing in this action contained shall preclude any Judge of the Supreme Court sitting alone in appeal from reserving any appeal for the decision of two or more Judges thereof." Is the Court of three Judges constituted under section 42 of the Courts Ordinance, as amended by the Ordinance of 1901, for review of a judgment preparatory to an appeal to His Majesty in Council, bound by the law as laid down by a Court of three Judges held in accordance with section 41 of the Courts Ordinance?

My first opinion was that the Legislature, in establishing this review procedure, intended that the Court hearing a case in review before appeal to the Privy Council should reconsider, if necessary, previous decisions of Courts held under section 41. My brothers, however, think that it is not so, and that it is right that we should, now that the question has been formally raised, lay down for our guidance the rule that we should consider ourselves bound by the ruling of a Court composed of three Judges, whether in review or not, unless the ruling appears to have been founded on some manifest oversight or mistake. I agree that that is the most convenient rule, and that we should declare that we will follow it. The uncertainty of the law which would be the result of a different rule is a greater evil than the chance that a wrong decision once given may be binding ever afterwards on all other Courts.

I think then that we ought to follow the ruling in the case of *Sopi Nona v. Marsiyan* (1). Then what was that ruling, and how does it apply here? It was stated in argument that it has been misunderstood, and that some Magistrates have, on the supposed

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authority of that case, refused to admit any evidence to prove the fact of non-access by the husband in such cases. That case was decided upon the enactment in section 112 of "The Evidence Ordinance, 1895," which is that "the fact that any person was born during the continuance of any 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." The Magistrate had held that the child of Sopi Nona, a married woman who was living in adultery with another man, was not the child of her husband, because he found it proved that the husband had only visited her once, a few days after the birth of a previous child, and not afterwards. The Supreme Court reversed this decision. Layard C.J., following a ruling of Bonser C.J. in 5 *N. L. R.* 243 said that it must be proved "either that her husband was impotent, or that it was impossible for him to have had intercourse with her at the time the child was begotten." Middleton J. said that it must be proved, "either that he is impotent, or that he had no possibility of access to his wife." Grenier A.J. used similar language, and said "it would be for the husband to prove that he was confined in an 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." The Court held that the above was the effect of section 112 of the Evidence Ordinance, and that impossibility of access had not been proved.

It seems to me that the word "impossible" is liable to be misunderstood, and the language of Lord Redesdale referred to in the previous case is no authority for the construction which Bonser C.J. placed on section 112 of the Ordinance. It is better to adhere to the words of section 112, which are plain enough: "Unless it can be shown that he had no access." "Shown," of course, means proved by evidence. It does not appear what the evidence was with which the Judges had to deal in the case of *Sopi Nona v. Marsiyan* (1); it may be that the husband was living in the same village as his wife; and I gather from the judgment that the Magistrate had allowed the husband to give evidence that he had had no access to his wife, which evidence Layard C.J. thought inadmissible. Without knowing the facts I am not sure precisely what the Court meant by "impossible." Take the case of a man living in adultery with a married woman in Colombo, the husband at large and not impotent living also in Colombo during the whole time during which the child could have been begotten; it would be very difficult to prove non-access, especially if the evidence of the husband and the wife as to non-access is excluded (and I express no opinion as to whether it ought to be excluded or not, as the point does not arise

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and was not argued). But how if it were conclusively proved that the husband was living in and never moved out of Tuticorin, and that the woman never moved out of Colombo, during the whole period.? Tuticorin is overseas, and Grenier J. thinks that that would do. Then why will it not do if it was proved that he was in and never moved out of Jaffna or Kandy? In one sense it is not " impossible " that a man who has been living for a year in Kandy or Jaffna or Tuticorin or London may have had access to a woman in Colombo, for the evidence that he never went to Colombo may be mistaken. So may any evidence. But if the Court is quite satisfied that it is shown that he never did leave his residence during the period, it must find that it is " impossible " consistently with the facts proved that he could have had access; in other words, it would be " shown that he had no access. " And I think that all that the Court meant in the case of *Sopi Nona v. Marsiyan* (1) 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.

I must therefore examine the evidence and say whether it is shown that Justina's husband had no access to her at any time when the fourth, fifth, and sixth defendants could have been begotten. The evidence on that point is sufficiently summarized by the District Judge, and I cannot say that it shows affirmatively that there was no access. Justina was living with V. Pereira in his mother's house for some years, and afterwards, until her husband's death, in V. Pereira's house; the fourth defendant was born about eighteen months after she began so to live, and the fifth and sixth defendants were born, afterwards and before Salman Appu died. Salman Appu was living in Ceylon apparently during the whole time; there is no evidence of any moment, beyond the fact that she was living with V. Pereira, which can be said to prove that Salman Apppu had no access to her; and she in fact says that he did have sexual intercourse with her and that he was the father of the fourth defendant, and that she is not sure whether he or V. Pereira was the father of the fifth and sixth defendants. I must therefore hold that Salman Appu was the father of the fourth and fifth and sixth defendants.

These findings render it unnecessary to consider the other points urged by the appellants. In my judgment, therefore, the appeal should be dismissed and the judgment of the Supreme Court affirmed.

WENDT J.—

This is a hearing in review, at the instance of plaintiffs, of the case reported in 8 *N. L. R.* 82, decided by my brothers Middleton J. and Grenier A.J. The facts are sufficiently stated in the judgment

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of the Chief Justice, which I have had the advantage of perusing, and I need not recapitulate them.

Upon the question whether Vincent Pereira could legally marry the third defendant the respondents rely upon the case of *Karonchhamy v. Angohamy* (1), which was the decision of a bench of three Judges of the Supreme Court sitting in review preparatory to an appeal to the Privy Council. The appellants, in order to establish that the fourth, fifth, and sixth defendants, children of the third defendant, were not also the children of her husband Salman but of Pereira, contend that, although they have not shown impossibility of access by Salman to his wife at the time when he might have begotten the fourth, fifth, and sixth defendants, they have yet shown that in fact he had not such access, and have thereby satisfied the requirements of section 112 of "The Evidence Ordinance, 1895." The respondents, to support their contention that there must have been impossibility of access, rely on *Sopi Nona v. Marsiyan* (2), which also was a decision of three Judges of this Court, but not sitting in review. The appellants have argued that we are not bound by these two decisions, and that they were wrong in law. This contention raises a most important question as to the effect of such decisions of what has been called the "Full Court," that is, of a bench of three Judges. Until the passing of the Ordinance No. 24 of 1901 which came into operation on 18th December, 1901, the Supreme Court consisted of three Judges, but since then of four.

The practice upon the point we are considering has varied from time to time, and while some Judges have considered themselves bound by judgments of the "Collective Court" or "Full Court," others have not hesitated to disregard them when opposed to their own opinions, without however saying in so many words that they were not binding. The result is seen in the conflicting decisions which are to be found in the reports, and which, emanating from the highest tribunal in the land, have produced a most unsatisfactory state of uncertainty as to the law on several points of importance. It is therefore much to be desired that the law regarding the effect of Full Court decisions should be made clear, or that at least this Court should lay down some rule for itself in dealing with such decisions. I am not now speaking of those old decisions which, though not rendered by three Judges, have long been acted upon as declaring the law, and which therefore even a Full Court would refuse to disturb, though it had the power to do so.

The Charter of 1833 (sections 4, 3, and 47) empowered a single Judge to reserve for the decision of all the Judges sitting collectively any question arising before him. This provision was repeated in the Ordinance No. 11 of 1868 (sections 25 and 40), which replaced the Charter. Section 52 of the Courts Ordinance, which succeeded

(1) (1904) 8 *N. L. R.* 1. (2) (1903) 6 *N. L. R.* 379.

the Ordinance of 1868, enabled a single Judge to reserve a question for the decision of " two or more Judges," and that is the enactment now in force. There never was express power given to a bench of two Judges to reserve questions for decision by three; and there never was any class of case which required a bench of three Judges for its decision, excepting always the hearings in review. In practice, besides these hearings in review, and besides cases specially reserved, many cases (especially in the earlier years, even up to the seventies, when the number of appeals was small) came before the Full Bench of three Judges, who, not having other demands upon their time, sat together to hear a mixed list composed of two-Judge cases and one-Judge cases. There were thus decisions of the Full Court which dealt with appeals not involving any " doubt or difficulty," and which sprang out of a two-Judge Bench reserving for the opinion of the Full Bench cases involving points upon which conflicting decisions existed with the view of obtaining a definitive ruling thereon.

Now as to the weight attached to the rulings of the Full Court. In *Punchihamy v. Arnolis* (1), which was not a review case, but probably one reserved by two Judges on account of conflicting authorities, Burnside C.J., sitting in the Full Court, said: " These cases were fully discussed by a Full Bench of the Court in D. C., Kandy, 78,175 (2), and after a very elaborate and exhaustive examination and review of all the authorities bearing on the point, in which all the Judges took part, it was solemnly decided . . . . . (This judgment) 'being a solemn decision bearing directly upon the case before me, is binding on me, and I should not have considered myself at liberty to disregard it in favour of my own opinion, even if that opinion had been supported by dicta in other cases.' " D. C., Kandy, 78,175, was not a review case either, but apparently reserved by two Judges for a similar reason to that in *Punchihamy v. Arnolis* (1).

In 1896 the case of *Emanis v. Sadappu* (3) came before the Full Court, consisting of Bonser C.J. and Lawrie and Withers JJ., apparently under similar circumstances to those I have already mentioned. The Full Court decision there discussed was that in *Canepady v. Valy* (4), a two-Judge case decided, it did not appear for what reason, by all three Judges. Bonser C.J. said: " In this case, which raised a serious question as to the authority of decisions of the Collective Court, I have the misfortune to differ from the rest of the Court. That question may be shortly stated thus: Is a solemn and unanimous decision of the Collective Court on a question of law delivered in 1862—a decision which followed previous decisions of this Court—to be treated as a binding authority

(1) (1883) 5 *S. C. C.* 160.
(2) (1880) 3 *S. C. C.* 61.
(3) 2 *N. L. R.* 261.
(4) *Ram.* (1862) 189.

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or not? It is obvious that if this question is to be answered in the negative, it will be impossible in the future to regard any question of law as finally settled. The result will be that the law, which is proverbially uncertain, will be rendered more uncertain still, and the passion for litigation, which is one of the curses of this Island, will be fostered. Cases will be instituted and appeals taken on the chance that the Court will be induced to refuse to follow its former decisions." Having stated that his own opinion was against the old decision, the Chief Justice proceeded: "But in my opinion this question is not open; even if the Court as at present constituted was unanimously of opinion that the original decision was wrong, it would, I conceive, be out of our power to alter the law as laid down by our predecessors. That can only be done by the Privy Council reversing those decisions, or by an enactment of the Legislative Council."

Lawrie and Withers JJ. adhered to the later case, which had in effect over-ruled *Canepady v. Vally* (1) because they thought the Legislature had subsequently altered the law bearing upon the point there decided, and because to go back to the older view would be confusing to the public and to the profession.

In *Raheem v. Yoosuf Lebbe* (2) Layard C.J., sitting with Moncreiff J., was asked to reserve the case for the consideration of a Full Court with the view of having a former decision of three Judges, not sitting in review [*Konnamalai v. Silva Kalanthu* (3)] over-ruled, but he declined to do so, saying he was doubtful as to whether the Collective Court had the power to over-rule that decision.

In *Perera v. Perera* (4) (August, 1903) the authority of *Ayanker Nager v. Sinnatty* (5), which, although decided by three Judges, was not a review case was discussed before Layard C.J. and my brother Middleton and myself. The Chief Justice said: "Immediately it was admitted that this Court sitting collectively forty-three years ago had decided that. . . . . .and that there had been no collective decision of this Court questioning that judgment, I felt that this Court is bound by the collective judgment of 1860, and that it was not in our power to review it. If the judgment of the Collective Court (which has been, as pointed out by my brother Wendt, always followed, save in the cases referred to by him) is wrong, the error can only be reviewed by appeal from a judgment of this Court to His Majesty in Council, or by legislation . . . . . I consider that the Court sitting collectively has no power to over-rule the previous judgment of a Collective Court. If there had been a conflict of collective judgments of this Court, it might have been possibly necessary to determine which we should follow. There is

(1) *Ram.* (1862) 189.
(2) (1902) 6 *N. L. R.* 169.
(3) (1891) 9 *S. C. C.* 203.
(4) (1903) 7 *N. L. R.* 173.
(5) *Ram.* (1860) 75.

no such necessity in this case." My brother and I agreed that we should follow the judgment of 1860. In *In re Sundara* (1), which was reserved by a two-Judge Bench for " a Full Bench " and was heard by Layard C.J., my brother Middleton, and myself, the old three-Judge decision in question was that in *Mahatmaya v. Banda* (2), itself not a review case, the Chief Justice reiterated the opinion that he was bound by the collective decision of the Court.

In an unreported case, P.C., Hatton, 5,087 (3), Layard C.J., sitting in a Full Bench, said he did not think it was in the power of this Court to review the decision in *Hunt v. Muttan* (4)—the decision in a criminal case, not in review, but reserved by Cayley C.J. for the consideration of the Full Court. My brother Middleton said: " I agree we are concluded by the decision of the Collective Court."

Section 42 of Ordinance No. 1 of 1889 (as amended by Ordinance No. 24 of 1901, section 10), under which we are dealing with this case, requires that the judgment against which it is sought to appeal to the Sovereign shall be brought by way of review before three Judges of the Supreme Court sitting at Colombo, who shall thereupon pronounce judgment according to law. Until the Ordinance of 1901, the review was before " the Judges of the Supreme Court collectively holding general sessions at Colombo at which all the Judges of the said Court shall be present and assisting." No criminal appeal could ever be brought in review; and of civil appeals, only those involving a value of Rs. 5,000 and over, so that almost without exception the judgments reviewed were those of a bench of at least two Judges. The object of the review was, I take it simply to give the Court an opportunity of reconsidering the case, and this on exactly the same footing as the original appeal; the powers of the Court were the same, and the fuller bench was prescribed merely in order to afford an additional security that the facts and the law had been correctly ascertained and declared, and that parties should not needlessly be put to the expense of an appeal to the Privy Council.

Having given the matter my most careful consideration, I think that as three Judges sitting together are invested with the highest function of the Court, viz., the hearing in review, we should not regard the Full Bench of four Judges as possessing the power to overrule the decision of three Judges in any matter. I suggest that this Court, whether hearing an original appeal or sitting in review, should consider itself bound by a decision upon a question of law of a three-Judge Bench, whether pronounced before or after the Ordinance of 1901 became operative, and whether upon an original appeal or in review, provided it appears that the law and the existing decisions of the Court have been duly considered before the three Judges

(1) (1893) 7 *N. L. R.* 364.
(2) (1899) 2 *S. C. R.* 142.
(3) *S. C. Min., May* 3, 1905.
(4) (1880) 4 *S. C. C.* 3.

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arrived at such decision. If, however, it were made clear that the decision in question was founded on manifest mistake or oversight, I should recognize that as an exception to the rule.

In this view we are bound by the decisions in *Karonchihamy v. Angohamy* (1) and *Sopi Nona v. Marsiyan* (2) and I will not enter upon the question whether they were rightly decided.

The Solicitor-General argued that, even if the marriage of Pereira with the third defendant was valid, there nevertheless still remained the prohibition against such a woman deriving any benefit from her husband's will. On this point I entirely agree with the Chief Justice in thinking that that prohibition depended upon the reprobation with which the law regarded such a connection, and that when the view of the law was so far modified as to permit of a lawful marriage being contracted between the guilty parties the prohibition disappeared. The maxim *cessante ratione legis cessat ipsa lex* applies. It then became a question of a man leaving a legacy to his wife, which of course is perfectly lawful.

If we assumed appellant's construction of section 112 of the Evidence Ordinance to be right, the question would arise (which was argued before us) whether the evidence shows that Salman had no access to the third defendant at any time when the fourth, fifth and sixth defendants could have been begotten. I think it desirable to express the opinion I have formed that it does not. It was not argued that the mother's evidence had been wrongly admitted on the question of non-access. By the English Law she would not be a competent witness in the present case, but the Indian Evidence Act has not adopted the English rule. And it appears to have been held in India that the evidence of the husband and wife is admissible. Our Evidence Ordinance is an adaptation, with slight modifications not material to the present question, of the Indian Act has not adopted the English rule. And it appears to have It would therefore seem that the third defendant's evidence was rightly admitted.

There is no suggestion that Salman was impotent. The evidence is not directed with sufficient precision to those periods anterior to the ascertained dates of the children's births which would be material to the question of non-access. Salman lived in Colombo within a very short distance of the house in which his wife lived with Pereira, and he was constantly seen in the neighbourhood of that house. Don Thomas Appu (the husband of third defendant's daughter Helena, who is not a party to the action) says that Salman, who was a drunkard, used to abuse his wife Justina and Pereira from the street, and that " sometimes Justina used to give him money and quit him." After his mother's death in 1873 Pereira placed the third defendant for about five years in a house of his at

(1) (1904) 8 *N. L. R.* 1. (2) (1904) 6 *N. L. R.* 379.

Hendala (a part of Colombo, about four or five miles from his residence), where he visited her, and fifth defendant was apparently born there. While living there third defendant used to visit Colombo. It is not unlikely that she then had opportunities of meeting her husband Salman. From Hendala Pereira removed the third defendant to Mahara, a village about seven miles from his Colombo house, and a station of the Colombo-Kandy Railway. Sixth defendant was born there. From here too third defendant used to visit Colombo, presumably going to Pereira's house. It is also stated that Salman used to speak to Helena and her brother Simon while they lived in Pereira's Colombo house, and that they were told that Salman was their father. It would seem that Pereira always regarded his Colombo house as his permanent residence, even while he was keeping the third defendant at Hendala and Mahara and visiting her there.

This is the nature of the evidence which is relied upon to prove non-access, and I have no hesitation in pronouncing it insufficient. In saying so I have left out of consideration the third defendant's own testimony. If that be admitted, it completely destroys plaintiff's case, even although I bear in mind that she has a strong interest in making her children out to be issue of her husband Salman, in order to secure to them the benefits provided by Pereira's will.

For the foregoing reasons I think that we ought to confirm our judgment now under review and leave the plaintiffs to prosecute their appeal to His Majesty in Council. The appellants must pay the costs of the hearing in review.

MIDDLETON J.—

I have had the advantage of perusing the judgments of my Lord and my brother Wendt, and I see no reason after hearing the argument in review to alter the opinion I expressed in my judgment as reported in 8 *N. L. R.* 87.

I would only desire to explain what appears to be an ambiguous paragraph at page 91, where I said: " *Grotius* (*Introduction* 2, 16, 6, and *Maasdorp's translation, p.* 133) speaks of children born *ex prohibito concubitu*, but if I am right in my opinion derived from *Voet* 23, 2, 27, the connection here was not *prohibitus concubitus*, and Grotius' opinion does not help the appellants. " I should have added after the words " the connection here was not *prohibitus concubitus* " " because there was no proof that any promise of marriage had passed, nor that any attempt had been made on the innocent spouse's life which were the elements making it, according to *Voet*, 23, 2, 27, *prohibitus concubitus*." I would wish also to say that in my judgment in *Sopi Nona v. Marsiyan* (1) I do not think I have gone further than

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holding that the proof that is required to rebut the legitimacy of a child born under the conditions set out in section 112 of the Evidence Ordinance is that of no access or impotency.

So long as there is a reasonable possibility of access the rebuttal will not be effected, and therefore it is necessary for any one seeking to support the rebuttal to establish that there was not a possibility of access.

In my view the proof must depend on the circumstances of the case, and they might be such that although the spouses were living in the same town or village it is conceivable there might not be, according to the particular facts of the case, a possibility of access. It might require minute and detailed evidence to establish it, and that perhaps adds to the difficulty, but does not obviate the necessity. The word " access " I take to mean in the section rather more than is ordinarily understood by that word. I should construe it as meaning an opportunity for sexual connection.

In order to establish a conclusive *alibi* it is necesary to prove that the accused was not in the place at the time when and where the crime was committed, but evidence which leaves it reasonably possible for him to have been in the place where the offence was committed at the time it was committed is not sufficient; it is necessary to show that it was reasonably impossible that he could have been there. What has to be proved is no possibility of presence at the place of the crime at the time of its commission.

In the same way, under section 112, to rebut the conclusive proof of legitimacy of the child it will be necessary to show that it was reasonably impossible under the circumstances that the man had an opportunity of sexual connection with the mother. This is no more than proving affirmatively that the man had no access to the mother, or, as I have paraphrazed it, had no opportunity of sexual intercourse with her. If it is shown to be possible under the circumstances that he had access, it cannot be said to have been proved that he had no access. I have introduced the word " reasonably " into my argument as being significant of an element which tacitly applies to all judicial constructions.

Assuming, however, that *Sopi Nona v. Marsiyan* was incorrectly decided, in my opinion the evidence in this case does not prove that Salman Appu had no access to his wife Justina.

There remains the question of the force and effect to be given to judgments of what has hitherto been known as the Full or Collective Court. It derived the latter name from the fact that it actually comprised all the Judges of the Supreme Court collected as one Court, but since 1901 the Court has consisted of four Judges.

The consensus of judicial opinion as collected by my brother Wendt shows that decisions of a Court of three Judges have hitherto been looked on as conclusive, and not to be disturbed but by a ruling of the Privy Council. The highest function exercised by the Court in

civil matters is, as my brother puts it, the hearing in review. This function may be exercised by three Judges only, but on order by the Chief Justice, under section 54A of the Courts Ordinance enacted by section 13 of Ordinance No. 24 of 1901, by all four.

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My view is that we should, as hitherto, look upon a judgment of three Judges of this Court on a point of law as binding on a subsequent Court of three Judges, whether sitting in review or otherwise, to the extent suggested by the terms of my brother Wendt's judgment. Whether a Court of four Judges should be deemed to have power to over-ride the decision of three is a matter that I would leave to be decided by that Court if necessary when it is first called into operation.

Judgment in appeal confirmed.