1946 *Present :* **Howard C.J.**

RANASINGHE, Appellant, *and* SIRIMANNA, Respondent.

76—M. C. Chilaw, 23,343.

Evidence Ordinance, s. 112—Meaning of " access to the mother "—Legitimacy of child born during subsistence of marriage.

The word " access " in section 112 of the Evidence Ordinance means no more than opportunity of intercourse.

***Per* HOWARD C.J.—" In view of this decision [*Karapaya Servai v. Mayandi* A. I. R. 1934 P. C. 49] the judgment of the Full Bench in *Jane Nona v. Leo* (25 N.. L. R. 241) that the word ' access ' in section 112 of the Evidence Ordinance is used in the sense of ' actual intercourse ' and not ' possibility of access ' or ' opportunity for intercourse ' can no longer be regarded as binding authority ".**

APPEAL from a judgment of the Magistrate's Court of Chilaw.

H. W. Jayewardene, for the defendant, appellant.

No appearance for the applicant, respondent.

Cur. adv. vult.

March 18, 1946. HOWARD C.J.—

The appellant in this case appeals from a judgment of the Magistrate's Court of Chilaw holding that he is the father of the children (1) Ethelreda, (2) Hector, and (3) Alreda and directing him to pay Rs. 15 per month for the three children at the rate of Rs. 5 for each child. Mr. Jayewardene on behalf of the appellant contends that the order of the Magistrate cannot be allowed to stand, as the applicant, the mother of the children, a married woman, has not proved that her husband had no access to her at any time when such children could have been begotten. It is contended that the applicant has failed to rebut the legal presumption created by section 112 of the Evidence Ordinance. This section is worded as follows :—

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty 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."

In the case of *Karapaya Servai v. Mayandi* [1] it was held by their Lordships of the Privy Council that the word " access " means no more than opportunity of intercourse. It had been suggested in that case by Counsel for the appellant that the word implied actual cohabitation. In view of this decision the judgment of the Full Bench in *Jane Nona v. Leo* [2] that the word " access " in section 112 of the Evidence Ordinance

[1] *A. I. R. 1934 P. C. 49.* [2] *25 N. L. R. 241.*

is used in the sense of "actual intercourse" and not "possibility of access" or "opportunity for intercourse" can no longer be regarded as a binding authority. In this connection I have not been unmindful of the judgment of Wijeyewardene J. in *Alles v. Alles* [1]. At p. 225 I observe that the learned Judge in referring to section 112 of the Evidence Ordinance stated that the section had been construed in *Jane Nona v. Leo* which was a decision of the Full Court and binding on him. He went on to hold that the first defendant had had actual intercourse with the plaintiff and was the father of the child. The effect of the decision in *Karapaya Servai v. Mayandi* on the authority of *Jane Nona v. Leo* does not seem to have been considered by the Judges in *Alles v. Alles*. The omission to do so is no doubt accounted for by the fact that it was unnecessary for their decision in that case.

From a perusal of the judgment of the Magistrate it would not appear that the latter has addressed his mind to the question as to what evidence is required to rebut the presumption created by section 112 of the Evidence Ordinance. The applicant in her evidence states that she was married to Joseph Goonetilleke of Irattakulam and that after she became intimate with the appellant she had nothing to do with Goonetilleke. Ethelreda was born to the defendant at Madampe, Hector at Kegalla and Alfreda at Dalugama at times when he lived in those respective places. In cross-examination she says that she cannot remember when she left her husband but in 1935 she was living in a house at Madampe rented out by the defendant near the Dispensary. In regard to the birth of Ethelreda the birth certificate (D 4) was produced showing that this child was born on February 13, 1936, at Madampe, and that her husband gave the information and is recorded therein as the father. The applicant also states that she lived with the defendant for 2½ years at Udagama in the Kegalla District and that her husband did not visit her at that time. The birth certificate of Hector was produced (D 5) and indicates that this child was born on May 21, 1937, at Udagama. The applicant's husband is shown as the father. The applicant denies that she was pregnant before she went to Udagama. The birth certificate of Alfreda (D 6) indicates that this child was born on March 9, 1938, at Badalgama, Meegahawatta, that the applicant's husband was registered as the father and his profession is described as that of a teacher and that the applicant was the informant. With regard to D 6 the applicant states that the appellant took her to the Registrar of Waragoda, Kelaniya, and that something was written and she was asked to sign it. She also says she was pregnant before she went to Waragoda. She cannot remember the year. The applicant called two witnesses to support her story. Rupesinghe, a landed proprietor of Madampe, and a relation of the defendant, stated that while the defendant was at Madampe the applicant left her husband and lived with him. Thereafter they left the village together, but he cannot say where they went. During the earlier part the defendant visited the applicant at her husband's house. He denies that her husband visited the applicant. Hector Wijesinghe, also a land owner living at Madampe, also states that the defendant and applicant lived together at Madampe and then

[1] *46 N. L. R. 217.*

left the village together. This witness also does not know where they went. The defendant admits that he was intimate with the applicant but maintains that it was with the permission of her husband. He also states that the applicant and her husband are living together in the same house. The defendant called two witnesses. The Village Headman of Ihalagama, Madampe, stated that in 1935 and 1936 the applicant lived with her husband, but he cannot say whether they lived at Madampe after 1937. The Village Headman of Dippitigoda, Kelaniya, states that both the defendant and her husband were visiting the applicant at Badalgoda, Kelaniya, between the middle of 1937 and 1938.

In my opinion the applicant has not rebutted the presumption created by section 112 of the Evidence Ordinance. She has not proved that the husband did not have an opportunity of intercourse. Even if her evidence and that of her witnesses is accepted, it merely shows that after 1936 she was living with the defendant in another village and not with her husband at Madampe. This testimony does not establish that there was no possibility of intercourse.

For the reasons I have given the order of the Magistrate is set aside. I make no order as to costs.

Appeal allowed.