1926.

Present : Dalton J.

AMINA UMMA *v.* NUHU LEBBE.

778—P. C. Kurunegala, 30,625.

Maintenance—Application by married woman on behalf of child—Birth of child thirty-one weeks after marriage—Denial of paternity—Presumption of legitimacy—Evidence Ordinance, s. 112.

Where a married woman applied for maintenance on behalf of a child and the husband denied paternity,—

Held, that evidence that the child was born thirty-one weeks after marriage was not sufficient to displace the presumption of legitimacy arising under section 112 of the Evidence Ordinance.

APPLICATION for maintenance brought by the applicant against her husband on behalf of a child stated to be three months old. Defendant admitted the marriage, but denied paternity. The parties were married on October 19, 1925, and the child was born on May 25, 1926. The Magistrate dismissed the application on the ground that that it was unlikely that the child could have been procreated as the result of intercourse after marriage.

No appearance for appellant.

Vethavanam, for respondent.

December 21, 1926. DALTON J.—

This appeal arises under the Maintenance Ordinance, 1889. The applicant, Amina Umma (appellant), stated in her complaint that the respondent Ana Nuhu Lebbe was married to her and that a child stated to be three months old at the time of the complaint (August 17, 1926) was born to them. She pleads that he deserted her some eight months prior to the complaint. Defendant (respondent) did not deny the marriage, but denied the paternity of the child.

The facts disclosed in the evidence are very meagre. Both parties however had full opportunity to put their respective cases before the Court. They are, to judge from the names, both Muhammadans and have been dealt with as such, although I can find no evidence

on the record on the point. Applicant has been previously married three or four times and respondent admits he his now living with his seventh wife, the previous ones having been divorced by him or having died. The applicant was his fifth wife. It is admitted they were married on October 19, 1925. The child in question was born on May 25, 1926. There is no evidence whatsoever to show whether or not at birth the child had the appearance of a fully matured or full term child, or whether it was a case of premature delivery. All that is stated is that the child is healthy, which is not of very great assistance on this point. Applicant, however, states that there was sexual intercourse between them prior to the marriage although this is denied by the husband. Soon after the marriage trouble arose between the parties. The applicant says it was due to the presence of her other children, respondent saying that it was due to the discovery that the woman was pregnant. This, he says, he discovered when he went to his house with the woman, but he admits he continued to live with her if only for a few days. Other independent evidence goes to show that he lived with her longer than this. Ismail Arachchi, called, stated they lived together for about two months, whilst the head Moorman states that respondent came to him in November saying he could live with applicant no longer. He denies that either applicant or respondent mentioned the pregnancy of the former ; no cause for the trouble between the parties being mentioned to him. After trying to settle the dispute, he says the marriage was dissolved in December. There is no evidence, whatsoever, to suggest that applicant was on intimate terms with anyone else prior to the marriage who could be the father of her child. The Magistrate has dismissed her claim however on the ground that it is " highly unlikely " that the child could have been procreated as the result of intercourse after marriage. He then continues " the parties being unmarried at the time when the child must have been procreated " the burden of proof lay on applicant to show defendant was the father.

It is laid down by section 112 of the Evidence Ordinance that the fact that any person was born during the continuance of a valid marriage between the 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. This is a statutory recognition of the principle underlying the maxim, *pater est quem nuptiae demonstrant*, which is recognized in both Roman-Dutch and English law.

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(*Banbury Peerage case.*[1]) The marriage having been dissolved in December, 1925, the child was not born during the continuation of the marriage, but there is no question that it was born within two hundred and eighty days of its dissolution. Taking the dissolution to have been even on December 1, the child was born one hundred and seventy-five days thereafter. The question to be answered then is, has the defendant shown that he had no access to the mother at any time when the child could have been begotten and born in the course of nature. He admits intercourse after the marriage.

Between the date of marriage and birth is a period of two hundred and seventeen days or thirty-one weeks or seven and three-fourth lunar months. As I have pointed out, there is no evidence placed before the Court by either party as to the appearances or condition of the child at birth ; three months after birth the child is said to be healthy. Has the defendant then shown that he had no access to the mother at any time when the child could have been begotten and born in the course of nature ? That evidence, having regard to the provisions of section 112, must be strong and satisfactory.

The Magistrate has based his decision upon the conclusion that the birth of the child as the result of postnuptial intercourse is, if not possible, at any rate highly unlikely. He has however placed the onus upon the applicant and not upon the respondent. Further medical authority does not support his conclusion to the extent to which he goes. Several cases are set out in Taylor's *Medical Jurisprudence, 7th ed., p. 44 et seq.* The learned author points out that whilst all births before thirty-eight weeks may be regarded as premature, and all those after the fortieth week as protracted, it is universally admitted that children born at the seventh month of gestation are capable of living, although they are more delicate and in general require greater care and attention to preserve them. He discusses various cases and concludes that it is established from them that children born at the seventh and even at or about the sixth month may be reared. In this connection I would especially call attention to the two cases cited by him at pages 48 and 49. He points out that in these two cases six months children were living and healthy after four months and three and a half years respectively, and he calls attention to the great injury which may be done by speculative medical opinions against the chastity of the parties concerned. Another authority also comes to the conclusion that it

[1] *(1811) 1 Sim. and St. 153.*

would be unjust to brand a child with illegitimacy, or its mother with want of chastity, merely because a six months' child is born alive and viable (Luff, *Forensic Medicine, p. 233*).

The principle laid down in *Gaskill v. Gaskill*,[1] having regard to the provisions of section 112 of the Evidence Ordinance, is applicable here. That was a case of possible prolonged gestation. As pointed out in Smith's *Forensic Medicine, p. 241*, from a medical standpoint, it is much easier to give an opinion as to an abnormally shortened period than to a protracted one for the condition of the immaturity of the child allows a more accurate estimate of age to be given. The husband petitioned for a divorce on the ground of his wife's adultery. He had left his wife on October 4, 1918, and sailed for England on October 12. He did not return until December, 1919. On September 1, 1919, his wife gave birth to a child. There was no evidence against the wife except the lapse of time between coition and the birth of the child, namely 331 days. The Lord Chancellor (Lord Birkenhead) adjourned the hearing of the action, and requested the Attorney-General to attend as *amicus curiae* and call the best specialist evidence which could be procured. Evidence was thereafter given by three leading medical authorities on the subject to the effect that such an interval could not in the present state of medical knowledge be said to be impossible. In dismissing the husband's petition the Lord Chancellor states he has no doubt as to the principles upon which he should act in coming to a conclusion of fact upon the evidence. He quotes with approval the decision of Lord Lyndhurst in *Morris v. Davies*.[2] Lord Lyndhurst himself cites with approval the opinion of the Judges in the *Banbury Peerage case* (*supra*). He points out that " presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."

In *Gaskill v. Gaskill* (*supra*) the only evidence of adultery was the admittedly abnormal length of pregnancy. In this case the only evidence adduced by the respondent that he is not the father of the child is the admittedly shortened period of gestation. Adopting the words of Lord Birkenhead, I can only find the applicant guilty of unchastity before marriage if respondent's story is true and the respondent not the father of her child, if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the respondent can be the father of the

[1] (*1921*) *Pr. p. 425.*

[2] *5 Cl. and F. 265.*

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child. From the authorities I have set out above it is manifest that there is no such impossibility. Therefore the respondent has failed to discharge the onus placed upon him and the applicant is entitled to an order for the maintenance she claims.

The appeal is allowed with costs in the Court below and the case will be sent back for the Magistrate to fix the amount of maintenance.

Appeal allowed.