[FULL BENCH.] 1923.

Present: Bertram C.J., Ennis, Porter, and Schneider JJ., and Garvin A.J.

JANE NONA *v.* LEO.

666—P. C. Kandy, 10,440 H.

Evidence Ordinance, s. 112—Access to the mother—Legitimacy of child born during subsistence of valid marriage—Impossibility of access.

The word "access" in section 112 of the Evidence Ordinance, 1895, is used in the sense of "actual intercourse," and not "possibility of access."

Per BERTRAM C.J., SCHNEIDER and GARVIN J.J. (*dissentiente* ENNIS and PORTER JJ.).—A judgment of the Supreme Court is not to be treated as a collective judgment unless all the Judges are present. A judgment of three Judges delivered at a time when four Judges constituted a Full Bench is not a judgment of the Full Bench, and may be over-ruled by the Collective Court.

BERTRAM C.J.—It is not competent for a bench of three Judges to over-rule the opinion of a previous bench of three Judges, just as it is not competent for a bench of two Judges to over-rule a judgment of two Judges.

SCHNEIDER J.—A judgment of a bench of two Judges is not binding upon another bench of two Judges.

The rule of the English law that parties to a marriage shall not be entitled to give evidence as to the fact of the absence of intercourse between them, and the principle that has been developed from the rule that in maintenance cases, where a married woman seeks to charge a person not her husband with the maintenance of her child, the fact of the husband's non-access must first be proved by independent evidence, and that she may then, and not till then, give evidence herself as to the parentage of the child, is not our law.

IN this case the applicant, who was a married woman, claimed maintenance for an illegitimate child from the defendant. The defendant denied paternity. The learned Magistrate dismissed the application as the applicant had not proved impossibility of access by her husband. The applicant appealed. The case was reserved for argument before a bench of five Judges by Bertram C.J. The case came up for argument before the Collective Court on November 27, 192.

The following is the judgment of the learned Magistrate (W. O. Stevens, Esq.) :—

The applicant alleges that the defendant is the father of a child which was born to her on July 11, 1918, and sues him for its maintenance under section 3, Ordinance No. 19 of 1889. At the time of

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the child's birth the applicant was the legal wife of a certain Abaranhamy, who married her several years prior to that date. The defendant denies paternity, and the applicant has to rebut the presumption raised by section 112 of the Evidence Ordinance that the child is the son of Abaranhamy. To do so she must prove that Abaranhamy had no access to her at any time when the child could have been begotten, or that he was impotent. There is no suggestion of impotency. The question for decision is, therefore, whether there was possibility of access. Under the Roman-Dutch law the period of pregnancy was limited to a minimum of seven and a maximum of eleven months. The child, therefore, must have been conceived between August 11 and December 11, 1917. Now, the applicant and her mother state that towards the end of 1916 Abaranhamy quarrelled with the applicant and left her, and that a few weeks later the defendant, under whom Abaranhamy was employed, induced her to go with the defendant to Negombo on the pretext that Abaranhamy was ill in Negombo and wished to see her. The applicant states that after her arrival in Negombo she never saw Abaranhamy, but was induced by the defendant to become the defendant's mistress; that she lived with him as such, and some months later bore him the child in question. She further states that the defendant duly maintained her and the child until about the middle of 1922, when he induced her to accept a lump sum of money in composition of all future claim on him. The defendant himself is said to have been legally married to another woman about the time when the child was born, and she seems to have objected to the continued presence of her husband's mistress in the same town as herself.

Now, the only proof that Abaranhamy did not have access to the applicant between August 11 and December 11, 1917, is the statement of applicant herself. There is no proof that it was impossible for him to have access. Indeed, quite apart from the positive evidence called by the defendant, the probabilities are that Abaranhamy was himself in Negombo during that period. For he was employed by the defendant, and had admittedly lived with the applicant in Negombo before they quarrelled. No doubt the defendant did keep the applicant as his mistress for some time. But she has not proved the impotency or impossibility of access of her legal husband, and has therefore not rebutted the presumption that her husband is the father of her child. I accordingly dismiss her application.

H. V. Perera (with him *Sri Nissanka*), for the applicant, appellant.—Recent cases show that the question of access is a question of fact which can be proved as any other fact. Section 112 of the Evidence Ordinance merely embodies the English law on the subject. The decision in *Sopi Nona v. Marsiyan*[1] was not approved by Hutchinson C.J. in *Rabot v. De Silva*[2] and by Wood Renton C.J. in *Ango v. Podi Singho*[3] and by Perera J. in *Kalo Nona v. Silva*[4] and by Shaw J. in *Rosalina Hamy v. Suwaris.*[5]

The English law is clear on the point. A child born of a married woman during the continuance of the marriage, or within the period of gestation, after its termination is presumed to be legitimate. This presumption may only be rebutted under the English

[1] *(1903) 6 N. L. R. 379.*
[2] *(1907) 10 N. L. R. 140.*
[3] *(1911) 15 N. L. R. 511.*
[4] *(1912) 15 N. L. R. 508.*
[5] *(1920) 23 N. L. R. 68.*

law by proof that the husband was impotent at the time when the child might have been begotten, or had no opportunity at such time for sexual intercourse with his wife, or by cogent evidence that though such opportunity existed, nevertheless the child was not the offspring of the husband. Counsel cited *Head v. Head*,[1] *Banbury Peerage Case*,[2] *Morris v. Davies*.[3] A decision of three Judges when the Supreme Court consisted of four Judges is not a Full Court and is not binding on this Court.

Wife can give evidence as to non-access of the husband. The rule on the point has been modified in England in recent times. The husband or wife is under no such disability in Ceylon. [GARVIN J. referred to the *Russel Case*.]

Counsel cited *Rozairo v. Ingles*,[4] *Howe v. Howe*,[5] *Menchy Hamy v. Hendappu*,[6] *Podina v. Sada*,[7] *Pavistina v. Aron*,[8] *Perera v. Singho*,[9] *Kaliyattan v. Tamotarampillai*,[10] *Lucihamy v. Fonseka*,[11] *Batcho v. David*.[12] *See also 5 S. C. C. 160 ; 2 N. L. R. 261 ; 7 N. L. R. 173 ; 7 N. L. R. 364 ; 6 N. L. R. 169.*

December 20, 1923. BERTRAM C.J.—

The point reserved in the present case is in fact one which has already been considered by a bench of three Judges in *Sopi Nona v. Marsiyan* (*supra*). The question is a question of interpretation of section 112 of the Evidence Ordinance, 1895, and in particular as to the meaning of the word "access" as used in that section. The section declares that the fact that a child was born during the continuance of a valid marriage shall be "conclusive proof" of its legitimacy, unless it can be shown that "the man had no access to the mother at any time when such child could have been begotten or that he was impotent." In *Perera v. Podi Singho* (*supra*), Bonser C.J. for the first time expressed the opinion that in this section "access" means "possibility of access," and this opinion was subsequently adopted by all three Judges in *Sopi Nona v. Marsiyan* (*supra*). They based their opinion upon an expression of Lord Redesdale in his judgment in the *Banbury Peerage Case* (*supra*). Lord Redesdale there treated "non-access" as being equivalent to "impossibility of access," and the learned Judges above referred to appear to have formed the conclusion that section 112 was drawn with direct reference to the law as thus formulated by Lord Redesdale. The interpretation involved the further conclusion that the intention of the section was not to declare the English law, but to depart from

[1] (*1823*) *1 Sim. & St. 150.*
[2] (*1811*) *1 Sim. & St. 153* (*H. L.*).
[3] (*1836*) *5 Cl. & F. 163.*
[4] (*1893*) *18 Bom. 468.*
[5] (*1913*) *38 Mad. 466.*
[6] (*1861*) *Ram. 1860–62, p. 90.*
[7] (*1900*) *4 N. L. R. 109.*
[8] (*1898*) *3 N. L. R. 13.*
[9] (*1901*) *5 N. L. R. 243.*
[10] (*1887*) *8 S. C. C. 119.*
[11] (*1890*) *9 S. C. C. 96.*
[12] (*1890*) *1 S. C. R. 25.*

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it on a most material particular, and this further conclusion the Judges adopted.

This was the unanimous opinion of three distinguished Judges of our Court, nevertheless it is now recognized that this is an opinion which is very difficult to follow. Why, in the midst of a long discussion, should this sentence of Lord Redesdale have been singled out as stating the English law. There are other and more authoritative statements of the English law in which the expression "access" is quite differently interpreted. In the *Banbury Peerage Case* (*supra*) the English law was solemnly formulated by the unanimous opinion of all the Judges. That opinion took note of the confusion that might arise with regard to the meaning of the word "access." In one sense it might be interpreted as meaning "opportunity for intercourse," in another sense it might be interpreted as meaning "actual intercourse." To prevent this confusion from arising, they explained in express words their own intention :—

> "The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife,' and we understand those expressions as applied to the present question as meaning the same thing, because in one sense of the word "access," the husband may be said to have access to his wife as being in the same place or the same house; and yet, under such circumstances, as instead of proving, tend to disprove that any sexual intercourse took place between them."

Now, the judgment of Lord Redesdale, from which the sentence in question was quoted, is very difficult to find. It was pronounced in the discussion in the House of Lords subsequent to the delivery of the unanimous opinion of the Judges. This opinion is fully reported in *1 Sim. & St.*, but the discussion in the House of Lords is, as a matter of fact, not reported in any regular report. It appears, however, to be quoted in two works—the one being a Mr. Le Marchant's report of the *Gardner Peerage Case*, the other a *Treatise on Adulterine Bastardy* by Sir Harris Nicolas. But the judgments delivered in the course of that discussion are freely cited by the Lord Chancellor in his judgment in *Morris v. Davies* (*supra*). The passage from Lord Redesdale is among those cited in this judgment (p. 247), and I strongly suspect that it is from this source that our own Judges derived it.

But the singular thing is that the part of the judgment of the Lord Chancellor in which the passage is cited is prefaced by this observation: "In all these cases much confusion arises from the various senses in which the word 'access' is used." The Lord Chancellor cites this passage as an instance of this confusion, and

he proceeds to lay down the law on the same principles as those laid down in the opinions of the Judges in the *Banbury Peerage Case* (*supra*), making it quite clear that he uses the word " access " in the sense of actual intercourse.

There is not the least likelihood, therefore, that the draftsman of the Indian Evidence Act used any statement of the English law in which the word " access " was used in this special and confused sense as the basis of his draft. It is still less likely that having adopted it as his basis, he then proceeded to depart from it by introducing an important modification of the English law.

It seems certain, therefore, that the word " access " in section 112 should be interpreted in the sense in which it was interpreted in the unanimous opinion of the Judges in the *Banbury Peerage Case* (*supra*). But we are met with an initial difficulty. There is a decision of a Court of three Judges which expresses the contrary view. Even though we ourselves take the view of the law above explained, are we, in the face of this decision, entitled so to declare it. Or must all be reduced to the expedient of " explaining " the judgments of these Judges in a sense which was in fact foreign to their minds ? Hutchinson C.J. in *Rabot v. De Silva* (*supra*) who dissented from the view expressed in *Sopi Nona v. Marsiyan* (*supra*), suggested that all that the Court meant was that " access must be shown to have been impossible consistently with the facts proved." Everyone must recognize the unsatisfactory nature of this means of escape. Yet another escape has been suggested —see the judgment of Wood Renton J. in *Ango v. Podi Singho* (*supra*). It appears that when the case of *Rabot v. De Silva* (*supra*) went to the Privy Council, respondent's counsel, Mr. Arthur Cohen, K.C., disclaimed the contention that it was necessary to prove absolute impossibility of access. The point was accordingly not argued, and it was suggested that, in view of what thus happened in the Privy Council, it might be necessary for us to consider whether the earlier decisions of this Court ought to be followed. It would, however, hardly be satisfactory, in the absence of any expression of opinion by the Privy Council, that we should decide not to follow a considered judgment of this Court simply because an eminent counsel of the English Bar felt that it could not be supported. It is necessary, therefore, though I undertake the task most reluctantly, to consider what is the nature of the authority which must be attributed to a decision of a Court composed of three Judges at a time when the full membership of the Court was four.

From the earliest years of our history special importance has been attributed to the considered opinion of the " Full Court." The Charter of 1833 authorizes any Judge to reserve any question for the decision of the Judges of the Court collectively. See sections 43 and 47. This provision was repeated in Ordinance

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No. 11 of 1868, and there was a corresponding provision in section 52 of the Courts Ordinance, No. 1 of 1889. But in 1901 there was a change in the constitution of the Court. A fourth Judge was added, and a special enactment was introduced into the Courts Ordinance by section 54A. This enactment empowered the Chief Justice to reserve any case for the consideration of all four Judges, and declared that " the decision of such Judges when unanimous, or of the majority of them in the case of any difference of opinion, or of the Chief Justice and any one other Judge in the event of their opinions being opposed to that of the other two Judges, shall in all cases be deemed and taken to be the judgment of the Supreme Court." In spite of this enactment, there was a series of cases reserved, not for four Judges, but for only three Judges out of the four. The decisions in these cases were treated as " Full Bench " cases. This practice has prevailed down to the present day, and even since our numbers have been increased to five, a Court of three Judges has been referred to in our official law reports as constituting a Full Bench. Wendt J. in *Rabot v. De Silva* (*supra*) discussed the question as to what was to happen when a Full Bench of four Judges had to consider a previous decision where the Court was constituted by three Judges out of a possible four. He suggested as a practical rule that " we should not regard the Full Bench of four Judges as possessing the power to over-rule the decision of three Judges in any matter . . . . whether pronounced before or after the Ordinance of 1901 became operative." He suggested two qualifications to this proposed rule: Firstly, that it must appear that the law and the previous decisions of the Court had been duly considered before the three Judges arrived at the decision; and, secondly, that it must not appear " that the decision in question was founded on manifest mistake or oversight." Hutchinson C.J., while assenting to the general rule that a Court of three Judges, even though sitting in review, shall be bound by the law as laid down in a previous Court of three Judges, said nothing about Wendt J.'s proposed rule as to the powers of a Court of four Judges. Middleton J. also agreed that a judgment of three Judges of this Court was binding on a subsequent Court of three Judges, but expressly reserved the question of the powers of a Court of four Judges. It cannot be said, therefore, that we have any decisive ruling on the subject, but there is nevertheless a very strong and continuous *cursus curiæ* by which three Judges out of four have been considered to constitute the " Full Court." Opinions have been expressed in the most unqualified terms to the effect that a judgment of a bench of three Judges is not open to re-consideration. Nevertheless, it is necessary that we should consider this question afresh, now that our numbers have been increased to five. If a judgment of a Court of three Judges is to bind a Court of four Judges, what

is to happen when the judgment embodies the views of a majority only? Is the opinion of two Judges to bind the four, even though the other two are of a contrary opinion, and even though one of these two may be the Chief Justice, whose opinion is given a preponderant effect by the Courts Ordinance? What is to happen now that our membership consists of five? Is a judgment of three Judges binding on the five? Again, what is to be the case if the judgment is a majority judgment? Supposing our numbers are increased to six, is a judgment of a Court of three to bind the whole?

The gravest inconvenience would, no doubt, arise if all the questions determined during the last twenty years by Courts of three Judges and considered to be authoritatively and finally settled were liable to be re-opened, and, no doubt, in determining a question of this kind great weight must be attributed to a long-continued *cursus curiæ*, but with due regard to that consideration, the question must be determined on principle, and the logical principle seems to be that a judgment of this Court is not to be treated as a collective judgment, unless, in fact, all the Judges are present. Special statutory force is given to the judgment of a Court so constituted by section 54A of the Courts Ordinance, and such a judgment alone, in my opinion, must henceforth be considered the collective judgment. It would seem to follow that any judgment delivered at any previous time, not representing the full membership of the Court, should be subject to consideration by the Collective Court. I would still hold that it would not be competent for a bench of three Judges to over-rule the opinion of a previous bench of three Judges just as, in my opinion, it is not competent for a bench of two Judges to over-rule a judgment of two Judges (though I am aware that my brother Ennis dissents from this opinion). Any inconvenience which might be supposed to result from the rule thus formulated would be greatly mitigated by the fact that a bench of five Judges can only be constituted by a special order of the Chief Justice, and it would only be in most exceptional circumstances that the Chief Justice would make such an order where the question at issue has already been considered and determined by a Court of three Judges.

For these reasons, I am of opinion that sitting as a Collective Court, we should over-rule the judgment of the three Judges who decided the case of *Sopi Nona v. Marsiyan* (*supra*) and that the determination of the learned Magistrate, being based upon that decision, should be declared to be erroneous. We must take it, therefore, that the question of "access" is a question of fact, to be determined by evidence in the ordinary way without any artificial restriction. This was the principle of English law, and it was noted and endorsed in the *Poulett Peerage Case*.[1] It is not necessary for

[1] *(1903) A. C. 395.*

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us to remit the case for the consideration of the facts, because we are all agreed that the facts proved in the case leave no doubt whatever that the child was the child of the respondent.

There is, however, one subsidiary question of law which we had occasion to consider. It is a rule of the English law, said to be founded upon considerations of decency, that parties to a marriage shall not be entitled to give evidence as to the fact of the absence of intercourse between them. That rule was recited and affirmed in the *Poulett Peerage Case* (*supra*), though distinguished with reference to the facts. In view of that rule, the further principle has been developed that in maintenance cases, where a married woman seeks to charge a person, not her husband, with the maintenance of her child, the fact of her husband's non-access must first be proved by independent evidence, and that she may then, and not till then, give evidence herself as to the parentage of the child. See *Taylor on Evidence, 10th ed., section 951.* Is this rule with its corollary a rule of our own law? It seems clear that it is not. The principles of our law with regard to the competency of witnesses, whether generally or with regard to any particular class of evidence, are now formulated in chapter XI. of the Evidence Ordinance. That formulation is to be considered exhaustive, and there is no occasion to have recourse to the provisions of the English law under section 100 of our Ordinance. This has been formally decided in India by authoritative decisions (see *Rozario v. Ingles* (*supra*) and *Howe v. Howe* (*supra*)), and is in accordance with the opinion of Wendt J. expressed in *Rabot v. De Silva* (*supra*) on page 150. In the present case the evidence of the mother as to the parentage of the child was admitted, and rightly admitted, at the initial stage of the case. Indeed, as Mr. Perera has pointed out, it would be almost impossible to work the Maintenance Ordinance if the law were otherwise. See, in particular, section 14. The appeal, in my opinion, must be allowed, and the case remitted to the learned Police Magistrate to enable him to fix the monthly rate of maintenance.

ENNIS J.—

I agree with the order proposed by my Lord the Chief Justice, and with the reasons for the order. The decision in the case of *Sopi Nona v. Marsiyan* (*supra*) was considered in *Rabot v. De Silva* (*supra*) in a review preparatory to an appeal from a decision in the case when heard by two Judges.[1] Middleton J., who was one of the Judges who heard the earlier case of *Sopi Nona v. Marsiyan* (*supra*) explained his decisions in the earlier case, and said that circumstances might show that although the spouses were living in the same village there might be no possibility of

[1] *(1906) 8 N. L. R. 82.*

access, and that it was a question of fact in each case. The explanation in *Rabot v. De Silva* (*supra*) was followed by Pereira J. in *Kalo Nona v. Silva* (*supra*), by Shaw J. in *Rosalina Hamy v. Suwaris* (*supra*), and by myself in *Hamis v. Gunawardene* (648—P. C. Colombo, 12,468, S. C. Min., November 2, 1923).

During the hearing of this appeal we were invited to express an opinion as to whether the decision of a Court of three Judges is binding on a Court of four or more Judges. I am content in the interest of finality to follow the *cursus curiæ* of the last twenty years, and hold myself bound by such decisions.

PORTER J.—

I have had the opportunity of reading the judgment of Ennis J., with which I agree, and for the same reasons.

SCHNEIDER J.—

I have had the advantage of reading the judgment of my Lord the Chief Justice. I agree with it as regards the interpretation of section 112 of our Evidence Ordinance, and the admissibility of the evidence of the parties to a marriage to prove that they "had no access to each other." Under our law non-access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact.

On this section Ameer Ali and Woodroffe (*Law of Evidence*) offer these practical and useful comments :—

> "As a child born of a married woman as in the first instance presumed to be legitimate, such presumption is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that the husband was (*a*) incompetent (*8*); (*b*) entirely absent so as to have no intercourse or communication of any kind with the mother; (*c*) entirely absent at the period during which the child must, in the course of nature have been begotten; or (*d*) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.
>
> "Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman (1).
>
> "Where evidence of access is given, it requires the strongest evidence of non-intercourse, or other proof beyond reasonable doubt, to justify a judgment of illegitimacy. (8) Adultery on the wife's part, however clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of the gestation, unless there is positive proof of non-intercourse : (1) From evidence

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of 'access'—as this word is used in this connection the presumption of sexual intercourse is very strong. (2) But evidence of access is not conclusive. It being only proved that the opportunity for sexual intercourse had existed—as that the parties lived in the same house—and the fact itself not being proved, evidence is admissible to disprove the presumption that it did take place. The parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. In other words, the proof of sexual intercourse being conclusive, the presumption cannot be attacked, but the evidence by which such fact is to be established may be contradicted. (3) To rebut the presumption under this section, it is for those who dispute the paternity of the child to prove no-access."

Even if the case of *Sopi Nona v. Marsiyan* (*supra*) be considered a judgment of the Collective Court, and as such binding on us in this case, the effect of *Rabot v. De Silva* (*supra*), which is also a judgment of a bench similarly constituted delivered subsequently, would justify our not so regarding it. Especially in view of the fact that Middleton J., who took part in the decision of *Sopi Nona v. Marsiyan* (*supra*), explained that he had intended by that judgment to hold that no access meant no opportunity for sexual intercourse.

I agree also with the Chief Justice, that it is only the decision of a Collective Court which should be regarded as binding upon another Collective Court. As far as I am familiar with the practice of our Court, a judgment pronounced by a bench of two Judges has not been regarded as binding upon another bench of two Judges, but a single Judge considers himself bound by a decision of a bench of two Judges.

GARVIN J.—

I am in complete agreement with all that has been said by my Lord the Chief Justice, and would add nothing to what he has said, except in regard to one point, upon which there appears to be a difference of opinion. This Court has always acted on the principle that a judgment of a Full Bench of this Court, at whatever point in its history such a judgment was delivered, was to be regarded as final and binding on every Court in this Island, unless and until the law declared by such judgment was over-ruled by His Majesty's Privy Council or altered by the Legislature. But I cannot assent to the proposition that a judgment of three delivered at a stage in the history of this Court when four Judges constituted a Full Bench must be deemed to be the judgment of a Full Bench.

Set aside.