1948 *Present :* **Basnayake J.**

PESONA Appellant, *and* BABONCHI BAAS, Respondent.

S. C. 16—M. C. Gampaha, 40,157.

Evidence—Child born of wedded parents—Presumption of legitimacy—How it may be rebutted—Meaning of non-access—Decision of Privy Council in appeal from another country—How far binding—Evidence Ordinance, section 112.

The presumption of legitimacy created by section 112 of the Evidence Ordinance can be rebutted only by clear and cogent evidence which admits of no reasonable doubt.

Obiter.—(i.) The word " access " in this section connotes not only actual intercourse but also personal access under circumstances which raise the presumption of actual intercourse. Mere opportunity of intercourse under circumstances which do not raise the presumption of actual intercourse is not " access " within the meaning of this section.

(ii.) A judgment of the Privy Council in an appeal from some other country is not binding on the Supreme Court until adopted by that Court.

APPEAL from a judgment of the Magistrate, Gampaha.

H. W. Jayewardene, for the appellant.

S. W. Jayasuriya, for the respondent.

Cur. adv. vult.

July 30, 1948. BASNAYAKE J.—

In this action the applicant-appellant (hereinafter referred to as the applicant), one Ilandari Pedige Pesona, seeks to recover maintenance

from the respondent in respect of a child called Somaratne, aged one year and four months. She alleges that the respondent is the father of the child and that it was born during the subsistence of her marriage with the respondent. The respondent denies that he is the father of the child.

It appears that the applicant and the respondent were married in 1938. They had three children of whom all but one Seelawathie died in infancy. On May 8, 1943, the applicant left the respondent and lived with her father, a well-known Ayurvedic Physician known as Bandua Veda. In September of that year she sued the respondent for maintenance for herself and for her child Seelawathie. The respondent offered to maintain her on condition of her living with him, but she refused to go back to him on the ground that he was living in adultery. On account of her refusal, which the learned Magistrate appears to have regarded as without sufficient reason, he ordered the respondent to make a monthly allowance of Rs. 5 in respect of the child only. The respondent fell into arrears with his payments and in April, 1945, he was arrested for failure to pay maintenance for 10 months. He paid the money into court and was released. In May, 1945, the applicant asked for the enhancement of Seelawathie's maintenance and the respondent was ordered to pay Rs. 7·50 per mensem. On November 23, 1945, the respondent instituted proceedings for divorce against the applicant on the grounds of malicious desertion and adultery with an unknown man. On May 19, 1947, divorce was granted on the ground of malicious desertion. After the institution of the divorce action, but before decree nisi, the child Somaratne was born, on March 10, 1946.

The applicant and the respondent were at the material time living in the same neighbourhood. Their houses were about a quarter of a mile apart, there being only three other lands between them. The applicant alleges that she resumed her association with the respondent in 1945, when the respondent was the manager of the village Co-operative Stores to which she had to go for her rations. She alleges that during the relevant period they had intercourse at the Co-operative Stores, and that about four months after she conceived the child Somaratne she lived with the respondent for three months. The respondent denies that he had intercourse with the applicant at the Co-operative Stores or that she lived with him. He says that when the applicant, somewhere about October 7, 1945, attempted to force herself on him he had her prosecuted for house trespass and that she was discharged on her giving an undertaking not to go to his house again.

The applicant's case rests on her evidence and the respondent's on his. Neither has called any evidence in support. The learned Magistrate accepts the evidence of the respondent that he had no intercourse with the applicant after she left him. He also holds that " the respondent had physical opportunities of having access to his wife " but rejects the applicant's claim on the ground that the respondent has rebutted the presumption of paternity.

The question that arises for decision on the admitted fact of the birth of the child Somaratne during the continuance of the marriage of the parties to this action is whether the respondent has shown that he had

no access to the mother at any time when the child could have been begotten. Section 112 of the Evidence Ordinance (hereinafter referred to as section 112) declares :

> " 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. "

The fact that the child Somaratne was born during the continuance of the marriage of the applicant and respondent is therefore conclusive proof that the child is the legitimate son of the respondent, unless the respondent can show that he had no access to the mother at any time when the child could have been begotten. The judgment of the learned Magistrate indicates that he has not paid sufficient attention to section 112. It was admitted that there was a valid marriage and that the child Somaratne was born during the subsistence of that marriage. The applicant in those circumstances was entitled to rely on section 112 and if neither party led any other evidence she was entitled to succeed. But she went further and gave evidence that she had intercourse with the respondent at or about the material period. The respondent was able to do no more than deny the assertions of the applicant as to intercourse.

The meaning of conclusive proof is to be found in section 4 (3) of the Evidence Ordinance, which states :

> " When one fact is declared by this Ordinance to be conclusive proof of another, the court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. "

Notwithstanding this definition of conclusive proof section 112 permits evidence to be given for the purpose of disproving that the child is the legitimate child of the man. The words of the section are " unless it can be shown ". What is the degree of proof necessary to show that the man had no access to the mother at any time when the child could have been begotten ? Must the man prove that he had no access to the mother by a preponderance of evidence as in a civil case, or must he establish the fact beyond reasonable doubt as in a criminal case ? I shall now proceed to examine these questions.

I think the word " shown " has been advisedly used by the draftsman who appears to have avoided in this context the better known expression " proved " which he has explained earlier (section 3) thus :

> " A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. "

The word " shown " is a familiar expression and is a word which has a wide range of meaning according to its context. As it is not defined in the Evidence Ordinance it should be given a meaning appropriate to this

context. In view of the very strong presumption on the other side, I think it should be construed in the sense of "*to convince*", "*to make clear*". In any discussion of the degree of counter proof required under section 112, the following words of Lord Langdale in *Hargrave v. Hargrave*[1] cannot be overlooked :

> "Throughout the investigation, the presumption in favour of the legitimacy is to have its weight and influence, and the evidence against it ought, as it has been justly said, to be strong, distinct, satisfactory and conclusive."

The man must make it clear to the court or convince it that he had no access. He can do so only by clear and cogent evidence which admits of no reasonable doubt. Stated in another form, the man must establish beyond reasonable doubt that he is not the father of the child. The view I have formed is in keeping with the previous decisions of this Court.

In *Sopi Nona v. Marsiyan*[2] Grenier A.J. calls the proof necessary to rebut the presumption "counter proof of an overwhelming character", and in the case of *Menchy Hamy v. Hendappoo*[3] it is called "cogent and almost irresistible proof of non-access in a sexual sense".

This view finds support from the decisions under the corresponding provision of the Indian Evidence Act. The view has been expressed that "very cogent evidence is necessary to rebut the presumption raised by section 112 of the Indian Evidence Act[4]". In the case of *Nga Tun E. v. Mi Chon*,[5] Sir George Shaw goes even further and says "to prove non-access, the evidence must be such as to exclude all doubt".

This principle of presumption of legitimacy rebuttable ony by evidence of the highest degree appears to be common to the legal systems of all English speaking countries. It is stated in the Model Code of Evidence[6] in the following form :

> "Whenever it is established in an action that a child was born to a woman while she was the lawful wife of a specified man, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond reasonable doubt that the man was not the father of the child."

There seems to be another reason for requiring the highest degree of proof in regard to non-access. Strong reasons of public policy require that a child born in wedlock should be treated as legitimate. The question of access should therefore be approached in the manner laid down by Lord Chancellor Eldon in *Head v. Head*[7] :

> "Whenever it is necessary to decide that question great care must be taken, regard being had to this, that the evidence is to be received under a law, which respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon the most clear and satisfactory evidence."

[1] *9 Beav. 552 at 555 ; 50 E. R. 457 at 458.*
[2] *(1903) 6 N. L. R. 379.*
[3] *(1861) Ramanathan's Reports 1860–62. p. 90.*
[4] *Janglia v. Jhingrya (1921) A.I.R. Nagpur 71.*
[5] *16 Criminal Law Journal of India, p. 84.*
[6] *Model Code of Evidence of the American Law Institute, p. 313.*
[7] *(1823) Turn & R. 138 at 141 ; 37 E.R. 1049 at 1050.*

Another aspect of the matter that one must bear in mind is that the man's defence carries with it the implication of adultery by the woman and involves the bastardization of a child who is no party to the proceedings.

The standard of proof should therefore be the same as that required in the case of a matrimonial offence. That standard has been laid down recently by Lord Merriman [1] in the following terms :

> " The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called. "

Justices Hodson and Barnard have, in the case of *Ginesi v. Ginesi* [2] adopted Lord Merriman's view.

I now come to the question whether the husband may himself give evidence of non-access in proceedings under the Maintenance Ordinance. In England and other countries where principles of English law prevail, the husband is not even permitted to testify to non-access [3]. Under the Roman-Dutch system the rule that the husband is not competent to testify to non-access prevails in a modified form [4]. It is thus stated by Kotze J.A. [5]

> " While the Roman-Dutch writers held the presumption *pater est quem nuptiae demonstrant* to be rebuttable, they on the other hand adhered to the principle that neither the father nor the mother could bastardise their issue. But this latter principle appears to have been confined to cases where the child would be directly prejudiced by the declaration or evidence of the parent. "

In India, opinion was at one time divided, but the accepted view now seems to be that the English rule applies only to divorce proceedings on account of the provisions of the Indian Divorce Act, and that in maintenance proceedings the parents are competent witnesses on the question of non-access. Our own Evidence Ordinance contains no rule that the parents are not competent witnesses on the question of non-access when it arises in maintenance proceedings, but in the case of *Sopi Nona v. Marsiyan* (*supra*) Layard C.J. states at page 381 :

> " 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. "

This expression of opinion is irreconcilable with the provisions of section 120 of the Evidence Ordinance, which enacts that in all civil proceedings the parties to the suit shall be competent witnesses, and may be regarded as over-ruled by *Jane Nona v. Leo.* [6] It does not appear from the report that the other Judges shared the opinion of Layard C.J., nor have I been able to find any case decided since 1895, the year of our Evidence

[1] *Churchman v. Churchman (1945) 2 All. E.R. 190 at 195.*
[2] *(1947) 2 All. E.R. 438.*
[3] *Goodright ex* dim *Stevens v. Moss. 2 Cowp. 591 at 594.*
Russell v. Russell (1924) A.C. 687.
[4] *Surmon v. Surmon (1926) A.D. 47 at 53.*
[5] *Surmon v. Surmon (1926) A.D. 47 at 53.*
[6] *(1923) 25 N. L. R. 241.*

Ordinance, which expresses the same view. The cases decided before that year proceed on the English Law of Evidence which was introduced by section 2 of Ordinance No. 3 of 1846, and was our law till the enactment of the Evidence Ordinance in 1895.

Under our law therefore the husband is a competent witness, and may himself give evidence that he had no access to the mother at the material time. In the instant case, as I have already stated, the respondent's evidence is unsupported, although it appears from his evidence that, if what he is saying is true, there are many witnesses who could have been called to corroborate him. In assessing his uncorroborated testimony one has to bear in mind the fact that he is an interested witness who is seeking to gain the advantage of not paying maintenance.

A very important circumstance, which seriously impairs the value of the respondent's evidence, is the fact that in the divorce action which he brought against the applicant he alleged adultery. The applicant denied it and called upon the respondent to prove it. He failed to do so and was granted a divorce on the ground of malicious desertion only. In view of the very high standard of proof required to establish non-access, the respondent's testimony alone cannot prevail over the conclusive presumption in favour of legitimacy reinforced, as it is, by the applicant's own testimony. The appeal must therefore succeed.

I shall now examine the submission of learned counsel for the applicant that the word "access" in section 112 means opportunity of intercourse. He relies on the case of *Ranasinghe v. Sirimanna*[1] wherein My Lord the Chief Justice following the case of *Karapaya Servai v. Mayandi*[2], which is a decision of the Privy Council in an appeal from the High Court of Rangoon, holds that the word "access" in section 112 means no more than opportunity of intercourse. Learned counsel submits, on the authority of the case he relies on, that the decision of the Full Bench of this Court in *Jane Nona v. Leo* (*supra*) has been superseded by the decision of the Privy Council. In *Jane Nona v. Leo* it was held that the expression "access" in section 112 means "actual intercourse" and not opportunity for intercourse. The two decisions are irreconcilable. I find myself unable to uphold the submission of learned counsel. In the first place, there is nothing to show that the observations of Sir George Lowndes are not *obiter*. The indications are that they are, for he says :

> "It was suggested by counsel for the appellants that 'access' in the section implied actual cohabitation, and a case from the Madras reports was cited in support of this contention. *Nothing seems to turn upon the nature of the access in the present case*, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

Furthermore, a decision of this Court cannot, in my view, be regarded as over-ruled by the Privy Council until it is considered by that body and

[1] *(1946) 47 N. L. R. 112.*
[2] *(1934) A. I. R. (Privy Council) 49.*

pronounced to be not a true statement of the law of this country. I say so with great deference to My Lord the Chief Justice. When it has not even been referred to before the Board and the Board has not given its mind to the decision, it cannot be said to be over-ruled. The word over-ruled, when used in connexion with a decision of a court, carries with it the implication that a superior tribunal has considered that decision and set aside its authority as a precedent by declaring a different doctrine to be the true exposition of the law on the subject.

Section 51 of the Courts Ordinance declares that the decision of a Bench constituted in the manner prescribed shall in all cases be deemed and taken to be the judgment of the Supreme Court. This Court has at no time decided that one statutory Full Bench may over-rule the decision of another Full Bench. In fact the trend of the decisions of this Court is that one Full Bench cannot over-rule another and that a decision of the Full Bench is law until over-ruled by the Privy Council or until the law so declared is altered by the legislature. In the case of *Emanis v. Sadappu* [1] Bonser C.J. discussing the question " 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 or not ? ", says :

> " 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 these decisions, or by an enactment of the Legislative Council."

In the case of *Perera v. Perera* [2] Layard C.J. observes :

> " I consider that this Court sitting collectively has no power to over-rule the previous judgment of a Collective Court."

In the later case of *Jane Nona v. Leo* (*supra*), Garvin J. states at page 250 :

> " 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."

I have endeavoured to explain why I think *Jane Nona v. Leo* has not been over-ruled by the Privy Council. Undoubtedly, so long as the right of appeal to His Majesty remains, the Judicial Committee of the Privy Council may, in the exercise of its jurisdiction, set aside the decisions of this Court but, in my opinion, I say so with respect, it may do so only when it is considering an appeal from a judgment of this Court. In deciding an appeal from another country the question of over-ruling the decisions of this Court does not arise. This Court has, at all times, regarded decisions of the Privy Council with the highest sanctity. Its decisions in appeal from this country are binding on this Court. In all

[1] *(1897) 2 N. L. R. 261.*
[2] *(1903) 7 N. L. R. 173 at 180.*

cases in which the Bench is unfettered by any previous binding decision of this Court, it follows the decisions of the Privy Council though such decisions be in appeals from other countries. But to say that a decision of the Privy Council in an appeal from another country has the effect of automatically changing our law, is a proposition for which no authority has been cited and for which I can find no support in the case books. In my view such a Privy Council decision (hereinafter referred to whereever convenient as a non-binding Privy Council decision) does not bind this Court and does not have the force of binding authority in this country unless and until it is adopted by this Court. In adopting such a decision this Court will be guided by its own *cursus curiae*. A single judge is free to follow such a non-binding Privy Council decision in preference to a single judge decision of this Court, but in my view he is not free to follow such a decision in preference to a decision of two or more judges of this Court. Similarly, in my view, two judges may follow a non-binding Privy Council decision in preference to a decision of two judges of this Court but cannot prefer such a decision to a decision of more than two judges, nor can a non-binding Privy Council decision be preferred to a decision of a Full Bench constituted under section 51 of the Courts Ordinance even though such Bench is not composed of all the judges of this Court. I wish to guard myself against being understood as saying that one judge may over-rule the decision of a single judge or that two judges may over-rule a decision of two judges or that a Bench composed of a number of judges may over-rule the decision of another Bench consisting of an equal number. It is my view that one Bench cannot over-rule another of equal status. As I have observed earlier, a decision of this Court can be over-ruled either by the Privy Council in appeal from this country or by a Bench of this Court having greater authority than the one whose decision is over-ruled. In this connexion I should not omit to refer to the following observations of Sir Anton Bertram C.J. in *Jane Nona v. Leo* (*supra*) :

> "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)."

Although there is a dearth of authority on the question before me, instances in which Dominion Courts have not followed Privy Council decisions in appeal from Courts of other countries are not unknown[1]. The Court of Appeal of Alberta preferred a decision of the House of Lords in *London Joint Stock Bank v. Macmillan*[2] to the view of the Privy Council in *Colonial Bank of Australasia v. Marshall*[3]. The same Court adopted the views of the Court of Appeal in England and the Irish Courts in preference to the Privy Council decision in *Victorian Railways Commissioners v. Coultas*[4]. In the case of *Hare v. Trustee of Heath*[5] to which,

[1] *(1931) D. L. R. (Canada) 256 ; (1933) (1) D. L. R. (Canada) 499.*
[2] *(1918) A. C. 777.*
[3] *(1906) A. C. 559 at 568.*
[4] *13 A. C. 222.*
[5] *(1884) 3 Cape S. C. Reports 32.*

I was referred by Mr. S. W. Jayasuriya on behalf of the respondent though he did not appear at the argument, De Villiers C.J. observes :

"The case of *Tatham v. Andree* was decided by the Privy Council in 1863 on appeal from the Supreme Court of Ceylon when the Roman-Dutch Law also prevails ; but I ought here to observe that if the decision of the Privy Council in that case had been inconsistent with the rules laid down and recognised in this Court for half a century, and if those rules appeared to me to carry out the true principles of the Roman-Dutch Law, I should not consider the decision of the Privy Council as binding upon this Court in the present case."

The High Court of Australia has gone even further than the Supreme Court of South Africa when it refused, in the case of *Baxter v. Commissioners of Taxation*[1]. to follow the decision of the Privy Council in *Webb v. Outrim*[2] on leave granted by the Supreme Court of Victoria wherein the Privy Council disagreed with the view taken by the High Court in *Dekin v. Webb*[3]. The question as to the view that should prevail in the case of conflict between a decision of the Privy Council in an appeal from the Supreme Court of Gold Coast and a decision of the Federal Court, arose in the Nagpur High Court in the case of *Bhagwati Charan Shukla s/o Ravishankar Shukla v. Provincial Government, C. P. & Berar*[4] but the Court expressed no precise view on the matter.

In the case of *Sunderdas Vishendas and others v. Governor-General in Council and another*[5] O'Sullivan J. in dealing with the argument of counsel that the decision of the Privy Council in an appeal from another country is binding on him says :

"He refers to S. 212, Government of India Act, which is in these terms :

'The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts in British India, and so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federated State.'

and contends that I am bound by the judgment of the Privy Council. He fortifies his argument by pointing out that although the decision of the Privy Council was not on an appeal from India, nevertheless it was decided on an identical rule of procedure . . . . I am of the view that S. 212 must be construed as referring only to judgments of the Privy Council in Indian appeals. The Sovereign has retained the prerogative of being the supreme tribunal of justice in the Empire and the ultimate right of appeal from all parts of the Empire is therefore to the King in Council. The Judicial Committee of the Privy Council is an imperial body representing the Empire and the right of appeal to it has been defined and regulated in the case of the Dominions, colonies, dependencies and possessions by various statutes, Letters

[1] *(1907) 4 C. L. R. (Australia) 1087.*
[2] *(1907) A. C. 81.*
[3] *(1904) 1 C. L. R. (Australia) 585.*
[4] *(1947) A. I. R. Nagpur 1.*
[5] *(1947) A. I. R. Sind 154 at 159.*

Patent and Orders in Council. Laws are not uniform throughout the Empire and the Privy Council decides appeals in accordance with the laws in force at the places from which they come. It seems to follow that the decision of this supreme tribunal on an appeal from one part of the Empire, regulated as such appeal would be by a particular statute, Charter or Order in Council, and decided in accordance with a particular set of laws, is not and cannot be binding on the Courts in another part of the Empire."

In a later case, *Mahomed Mehdi and another v. Governor-General in Council and another*[1], Tyabji C.J., delivering the judgment of the Full Court of Sind, expressed disagreement with O'Sullivan J. as to the effect of section 212. He says :

"I am unable, however, to agree with the view of O'Sullivan J. cited above, that S. 212, Government of India Act, makes a decision, of the Privy Council binding on the Indian Courts only when the decision was made on an appeal from India."

It must be remembered that the Privy Council, unlike other appellate tribunals, is not bound by precedent. It reserves to itself the right of giving advice inconsistent with previous advice in another case or even in the same case. It will reconsider points decided by itself in other cases. The Marquess of Reading, in dealing with the argument of counsel that the Judicial Committee was bound by its own precedents, observes in the case *In re Payment of Compensation to Civil Servants under Article 10 of Agreement for a Treaty between Great Britain and Ireland*[2] :

"At the outset of the hearing in this reference, Mr. Dickie, who attended their Lordships on behalf of the Council of Transferred Officers Protection Association, argued that the Board is bound in law, and without examination, to follow the decision in the appeal in *Wigg's* case [(1927) A.C. 674], whether they considered it to be right or wrong. He maintained that if it was wrong, nothing short of an Act of Parliament could rectify it. Their Lordships are unable to hold that this proposition stated in such an extreme form is established. It may well be that the Board would hesitate long before disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination ; but for the proposition that the Board is, in all circumstances, bound to follow a previous decision, as it were, blindfold, they are unable to discover any adequate authority."

One cannot take it for granted that in construing section 112 the Privy Council will automatically follow what appears to be an *obiter dictum* in the Rangoon case, especially as there are certain differences, which are not entirely negligible between the corresponding section of the Indian Act and our section., When one is considering observations occurring in a judgment of the Privy Council one should heed the words

[1] *(1948) A.I.R. Sind 100 at 102.*
[2] *(1929) A. C. 242 at 247.*

of caution of Sir George Rankin[1] whose authority to speak on the subject is beyond question :

> " The danger in the case of the Judicial Committee is that the Courts, *e.g.*, in India, may regard everything in the judgment as equally authoritative with the *ratio decidendi*."

I shall now discuss the authorities cited by learned counsel for the applicant. He referred me to the cases of *Trimble v. Hill*[2] and *Robins v. National Trust Co. Ltd. and others*[3] and drew my attention to note (*r*) to paragraph 558 of Volume 19 of Halsbury's Laws of England, page 258. I find myself unable to regard *Trimble v. Hill* (*supra*) as applying to the situation that arises in consequence of the conflict of opinion between the Full Court of this Island and the Privy Council decision in the Rangoon case. It applies to a different situation which is explained in the opinion of Sir Montague E. Smith at page 344. Since 1879 the relationship of the Dominions to Britain has altered considerably and I am not at all sure that today the view expressed in *Trimble v. Hill* (*supra*) that the Dominion Courts should without question regard themselves as bound by the English Court of Appeal will be accepted either in Britain or in the Dominions. It is apparent from the case of *Robins v. National Trust Co. Ltd. and others* (*supra*) that by 1927 the attitude towards Dominion Courts had changed, for Viscount Dunedin observes at page 519 :

" These propositions will be found to be settled by the following cases : *Barry v. Butlin* (1838) 2 Moo. P. C. 480 ; *Croos v. Croos* (1864) 3 Sw. & Tr. 292 ; *Tyrrel v. Painton* (1894) P. 151.

Now their Lordships will assume that these cases are right. The reason for this form of expression is that the appellant represented that the Appellate Division of the Supreme Court of Ontario in the case of *Larocque v. Landry* [(1922) 52 Ont. L.R.479] had taken another view, in that it held that once probate was granted, though only in common form, the onus was on him who sought to set it aside, and the Court in this case held itself bound by that case. It is questionable whether that is the result of the decision. But assuming that it is, *when an appellate Court in a Colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong.* It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board."

Since the enactment of the Statute of Westminster in 1931 there has been a marked tendency in the Dominions towards judicial autonomy[4].

In certain departments of law, the principles stated by Viscount Dunedin will be applicable even to this country. I have in mind the

[1] *Cambridge Law Journal, Vol. 7, p. 19.*
[2] *(1879) 5 A. C. 342.*
[3] *(1927) A. C. 515.*
[4] *A. G. of Ontario & others v. A. G. of Canada & others (1947) 1 All. E. R. 137. British Coal Corporation v. R. (1935) A. C. 500.*

Civil Law Ordinance, sections 2 and 3 of which provide that in the branches of law therein specified the law to be administered in this Island shall be the same as would be administered in England in the like case at the corresponding period, if such question had arisen or had to be decided in England. In the decision of questions arising on the branches of law enumerated in those sections the decisions of the Courts of England and no other must be resorted to for the purpose of ascertaining the English law at a given time. The decision of the Privy Council in appeal from other countries cannot be accepted on such questions in preference to the authoritative decisions of the Courts of England.

I have now to examine note (*r*) in Halsbury. It reads :

" A decision of the Judicial Committee of the Privy Council, when it is the highest court of Appeal from the Courts of the Dominions and Colonies, is binding on all such Courts even though the decision can no longer be regarded as a guiding authority in England, Scotland, or Ireland, unless the decision is on a subject governed by English law and there is a subsequent decision of the supreme tribunal to settle English law, namely, the House of Lords, in which the House differs from the Judicial Committee of the Privy Council and points out in express terms in what respect the Board erred ; in such circumstances it is the duty of the Courts overseas to apply the law as settled by the House of Lords. The view was expressed in *Negro v. Pietro's Bread Co.* [(1933) O.R. 112] that a decision of the Judicial Committee of the Privy Council is binding only on the Courts of the Dominion, dependency or colony, from which the appeal is taken, but this view, it is submitted, is wrong."

I am unable to accept the view expressed by the learned author of this note in his concluding words, nor can I give my unqualified assent to the proposition that the decisions of the House of Lords should, without exception, prevail over the decisions of the Privy Council on a subject governed by English law. A decision of the Privy Council in an appeal from this Court is binding on it, but a decision of the House of Lords is not. So also in a matter in which our law is by statute declared to be the same as the English law a decision of the Privy Council in appeal from this Court is binding on it but a decision of the House of Lords on the same question is not. The observations of Viscount Cave in *Nadan v. The King*[1] on the history and functions of the Privy Council indicate to my mind that each jurisdiction from which an appeal lies to His Majesty in Council must be regarded as a separate entity and that a decision in appeal from one jurisdiction has not the effect of automatically over-riding the decisions of the superior tribunals of all the other countries which are irreconcilable with that particular decision of the Board.

It is noteworthy that " the appeal to the Privy Council is not as of right ; it is an appeal to the King's discretion, and it is founded on a petition that he should exercise his discretion[2] ". Appeals to the Privy Council are regulated by the Judicial Committee Acts which provide for the making of Orders in Council regulating the admission of appeals

[1] *(1926) A. C. 482 at 491.*

[2] *Hull v. McKenna (1926) I. R. at p. 405.*

from His Majesty's possessions. Each country from which an appeal lies to the Privy Council has its own machinery for regulating appeals to it. It is, of course, always open to any country to declare by legislation that all Privy Council decisions shall be binding on its Supreme Court. In such a case there can be no question that all decisions are binding. But we have not done so. The Privy Council in its appellate jurisdiction is not an appellate Court in the sense in which it is in time of war in matters relating to Prize. As the supreme appellate tribunal in Prize its decisions would bind all subordinate Prize Courts throughout the Commonwealth, but to say that its decisions when advising His Majesty in the exercise of his prerogative have the like force and effect automatically in all parts of the Commonwealth is to ignore the very basis on which appeals to His Majesty in Council rest and the law relating to the constitution and *cursus curiae* of the Supreme Court of each Dominion. In modern times the tendency of the Dominions has been to restrict and even to abolish appeals to the Privy Council[1]. The principle that each Dominion Court is automatically bound by every decision of the Privy Council regardless of the source from which the appeal has originated, is one that cannot be pressed without seriously impairing the judicial autonomy of the Dominions. Another aspect of the matter which is not entirely irrelevant to the subject under discussion is that the opinion expressed by the Privy Council is advice tendered to His Majesty and has no binding force until enacted by a prerogative Order in Council which is a Legislative Instrument applicable to the country in respect of which it is made. The Order is generally to the following effect :—

> " Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the———— day of ————19 —— in the words following, viz. ————". (The words which follow are not the judgment or reasons for the report, but contain after one or more recitals the decision and directions recommended by the Committee. The Order then continues :) " His Majesty having taken the said Report into consideration was pleased by and with the advice of his Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed and obeyed and carried into execution. Whereof, etc., etc. "

The above are the reasons for my opinion that *Jane Nona v. Leo* (*supra*) has not been over-ruled by *Karapaya Servai v. Mayandi* (*supra*) and that it contains our law as to the meaning of " access " in section 112 of the Evidence Ordinance.

If I may venture, in view of the apparent conflict of opinion between the Privy Council and the Full Bench of this Court, to express, in all humility and with the greatest respect, my own opinion as to the meaning of the word " access " in section 112, it seems to me that the Full Bench has given the word " access " a meaning too restricted, and the Privy

[1] *Section 106, South Africa Act, 1909.*
Article 66 of the Irish Free State Constitution.
Section 74 Commonwealth of Australia Act, 1900.
Canadian Statutes 23 & 24 Geo. 5, c. 53, s. 54.
Bill 9 of Fourth Session of the Eighteenth Parliament of Canada.
An Act to amend the Supreme Court Act.
Section 17, Canadian Statutes, 23 & 24 Geo. 5, c. 53.

Council a meaning too wide. To my mind Lord Eldon's explanation of the opinion of the judges in the Banbury Peerage case contains the true exposition of the word "access". He says[1]:

> "I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between the husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved, that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse."

It appears from the above statement that the word "access" connotes not only actual intercourse but also personal access under circumstances which raise the presumption of actual intercourse. Mere opportunity of intercourse, under circumstances which do not raise the presumption of actual intercourse, in my view, is not "access" within the meaning of section 112.

For the reasons given in the earlier part of my judgment, this appeal is allowed with costs. The case will go back so that the learned Magistrate may determine the monthly allowance that should be ordered.

Appeal allowed.