1912.

Present: Ennis J.

CORNELIS *v.* LORENSIA.

78—D. C. Galle, 242.

Suit for rectifying register of births—Civil proceeding—Appeal—Evidence Ordinance, s. 120—Non-access—Ordinance No. 1 of 1895.

A proceeding under Ordinance No. 1 of 1895 for rectifying the register of births is in the nature of a civil suit; it is only the procedure of appeal which is to be considered on the lines of an action under the Criminal Procedure Code.

The evidence of the husband or wife as to non-access is admissible in a suit of this kind.

THE facts appear from the judgment.

E. W. Jayewardene, for petitioner, appellant.—The child is clearly not the petitioner's child. The presumption in law would be that the child was born after the full period of gestation of nine months. Taking the woman's own evidence, the child could not be the child of the petitioner.

This proceeding under Ordinance No. 1 of 1895 is a civil proceeding, and the evidence of the husband and wife to prove non-access is admissible under section 120 of the Evidence Act. (*Wickremenayake v.Perera.*[1]) The application for rectification of the register is of a civil nature. The fact that the appeal is regulated by the rules relating to District Court criminal appeals cannot affect the civil nature of the application and inquiry.

A. St. V. Jayewardene.—The evidence of the husband and wife is inadmissible to prove non-access. There is no other evidence in the case. The appeal is as in a criminal matter. False registration is made criminally punishable. The policy of the law is to exclude the evidence of the husband or wife in inquiries of this kind. *Wickremenayake v. Perera*[1] does not apply.

E. W. Jayewardene, in reply.

Cur. adv. vult.

September 10, 1912. ENNIS J.—

This is an action under Ordinance No. 1 of 1895 for rectifying register of births. The name of the petitioner has been inserted register as the father of the child born on April 29, 1911. The in the register were made on information received from

[1] *(1908) 11 N. L. R. 171.*

1912.

ENNIS J.

Cornelis v. Lorensia

In this case much turns upon the admissibility of certain evidence given by the petitioner and his wife. It has been argued that the case is a criminal one, and that the evidence is inadmissible.

A consideration of sections 22 and 23 of the Ordinance makes it clear, in my opinion, that the action is in the nature of a civil suit, and it is only the procedure of appeal which is to be considered on the lines of an action under the Criminal Procedure Code. This being so, I consider that the evidence is admissible under section 120 of the Evidence Ordinance, and would follow the ruling of Chief Justice Bonser in *Perera v. Pody Singho.*[1]

Turning to the facts of the case, there is evidence to show that the petitioner was at sea, and did not return to Colombo until September 30. The evidence of both the petitioner and his wife show that he remained in Colombo for some weeks before returning to Galle, the place of residence of the defendant. I consider it proved that he did not reach Galle until October 10 at the earliest, viz., six and a half months before the birth of the child. It is stated in evidence by the defendant, the mother of the child, that the child was born after seven months. Taking this fact into consideration, and the other evidence in the case, viz., that the child was born in the house of Samel, in whose house the defendant was living as his mistress, that when the child was vaccinated both Samel and the defendant gave the name of Samel as the father of the child to the vaccinating officer, that the woman has been living with Samel for some years, I consider it has been shown that there was an impossibility of access by the petitioner to the mother to bring the case under the exception in section 112 of the Evidence Ordinance.

I further consider it proved that the petitioner is not the father of the child, and that the register should be amended by the substitution of Samel's name in place of that of the petitioner.

Appeal allowed.

[1] *(1901) 5 N. L. R. 243.*