1945 *Present :* **Wijeyewardene and Cannon JJ.**

ALLES, Appellant, *and* ALLES *et al.*, Respondents.

118, 119—D. C. Colombo, 586.

Divorce—Adultery of wife—Denial of paternity of child by husband—Burden of proof—Measure of damages—Costs—Civil Procedure Code, s. 612—Evidence Ordinance, Sec. 112.

Where, in an action for divorce, the husband denies the paternity of a child. the burden is on the husband to prove that he is not the father.

Where, the husband had access to his wife at a time when the child could have been begotten, the fact that during a material part of the time the wife was in terms of intimacy with another man does not entitle the husband to ask the Court to hold that he is not the father of the child.

Per WIJEYEWARDENE J.

In the assessment of compensation to the husband for injury to his feelings and the blow to his marital honour, the fact that he acted carelessly in allowing his wife to associate freely with the co-respondent, a man of a different race and creed, and neglected to determine their association, may be taken into consideration in reducing the measure of damages.

Where adultery was proved, the co-respondent alone was condemned to pay the costs of the husband in accordance with the provisions of section 612 of the Civil Procedure Code.

THE plaintiff instituted this action against the 1st defendant asking for a decree of separation *a mensa et thoro* on the ground of malicious desertion and claiming alimony and the custody of her two children Hortense and Joseph Richard.

The first defendant filed answer denying that he deserted the plaintiff maliciously and pleading that the plaintiff committed adultery with the 2nd defendant. He denied that he was the father of Joseph Richard. He asked for a dissolution of the marriage and the custody of Hortense, and claimed Rs. 25,000 as damages against the second defendant.

The second defendant filed an answer and the plaintiff filed a replication, denying the allegations made against them. The District Judge granted a decree for divorce to the first defendant and condemned the second defendant to pay Rs. 15,000 as damages. He held that plaintiff had committed adultery with the second defendant and that Joseph Richard was not the child of the first defendant.

N. Nadarajah, K.C. (with him *E. B. Wikremanayake, H. W. Jayawardene*, and *G. T. Samarawickreme*), for the plaintiff, appellant in S. C. No. 119 and respondent in S. C. No. 118.—The plaintiff asked for a judicial separation on the ground of malicious desertion and relied on the letter P 1 sent to her by the first defendant shortly after he left her. That letter contains a final repudiation of the marriage tie and, together with his evidence that he was finally leaving her, would entitle her to a

decree unless the first defendant succeeded in proving the charges of adultery. The allegations of adultery at " Merlton " depend entirely on the evidence of the servants. The evidence needed careful scrutiny, but the trial judge approached the examination of the evidence on the footing that the plaintiff was a " sexually starved woman " because her husband had been away for a short time. The assumption is unwarranted and his conclusions based on it should not be adopted. As to the incident at Bandarawela the evidence is hazy and no adverse inference should have been drawn.

Apart from the specific charges of adultery at " Merlton " and at Bandarawela the first defendant sought to prove adultery by showing that the plaintiff had given birth to a child, Joseph Richard, who could not be his child as the possible period of gestation was too short. In this connection the trial judge refused to allow the plaintiff to call Dr. Theobald, an obstetrician of international fame, on the ground that his name was not on the list of witnesses filed before the hearing of the action. It is submitted that the learned judge was wrong in doing so—*In re Chennell* [1]. Section 175 empowers the court to permit such a witness to be examined if special circumstances appear to it to render it advisable in the interests of justice. In these circumstances the Appeal Court has, under section 37 of the Courts Ordinance and section 773 of the Civil Procedure Code, the power to hear the evidence—*Herath Singho v. Appuhami* [2]; *Hendrick Appuhamy v. Pedrick Appuhamy* [3].

The first defendant has not succeeded in proving that Joseph Richard is not his child. This child was born during the continuance of the marriage between his mother, the plaintiff, and the first defendant. Section 112 of the Evidence Ordinance is therefore applicable—*Amina Umma v. Nuhu Lebbe* [4]; *Mary v. Joseph* [5]. It has been held by the Full Bench that " access " in section 112 means " actual intercourse " and not " opportunity for intercourse "—*Jane Nona v. Leo* [6]. See also *Jaganatha Mudali v. Chinnaswami Chetty* [7] and *Samuel v. Annammal* [8]. The view is expressed in the decision of the Privy Council in *Karapaya Servai v. Mayandi* [9] that the word " access " means no more than " opportunity for intercourse." In the present case, however, there is evidence not only of opportunity, but also of actual intercourse on August 9, 1941. And once it is shown that the husband had intercourse with his wife the presumption of legitimacy is not to be rebutted by proof that other men also were intimate with the woman—*Gordon v. Gordon* [10]; *Warren v. Warren* [11]; *Jaganatha Mudali v. Chinaswami Chetty* (*supra*).

The medical evidence led in this case supports the position that Joseph Richard who was born on March 26, 1942, could have been conceived as the result of the coitus on August 9, 1941. The finding of the trial judge that the first defendant cannot be the father of the child is not correct. The period of gestation of a child is taken to be about 9 calendar

[1] *L. R. 8 Ch. D. 492 at 506.*
[2] *(1920) 22 N. L. R. 361.*
[3] *(1926) 27 C. L. W. 87.*
[4] *(1926) 30 N. L. R. 220.*
[5] *(1935) 15 C. L. Rec. 35.*
[6] *(1923) 25 N. L. R. 241.*
[7] *A. I. R. 1932 Mad. 39.*
[8] *A. I. R. 1934 Mad. 310.*
[9] *A. I. R. 1934 P. C. 49.*
[10] *L. R. (1903) P. 141.*
[11] *L. R. (1925) P. 107.*

months or, more generally, 10 lunar months minus 15 days, *i.e.*, 265 days. Fifteen days are deducted on the assumption that ovulation takes place in the mid menstruum. But as most medical experts agree that ovulation may take place at any time in the inter-menstrual cycle a bigger reduction would be more correct. It may be said, therefore, that the period of gestation would normally be between 273 to 252 days. After such a period of gestation a child born will be a full term, fully developed child. But Taylor says that the most progressive development occurs in the last two months and while a 7 months' child may be clearly distinguished, an 8 months' child is not with any certainty to be distinguished from one born at the 9th month. Moreover, the period of gestation is found in cases to be lengthened or abbreviated owing to individual variations. The decisions in *Gaskill v. Gaskill* [1] and *Clark v. Clark* [2] are applicable to the facts of this case. The medical authorities say that the delivery of a full-term child may vary from 174 days to 330 days after fruitful coitus—De Lee and Greenhill's *Principles and Practice of Obstetrics (8th ed.) pp. 96-7, 65;* R. W. Johnstone's *Textbook of Midwifery (10th ed.) p. 93;* Modi's *Medical Jurisprudence and Toxicology (1943 ed.) p. 325;* Taylor's *Medical Jurisprudence (1934 ed.) pp. 41, 47, 53;* Tweedie's *Practical Obstetrics (6th ed.) p. 33;* Mazer and Israel's *Menstrual Disorders, pp. 56, 70, 185;* Cameron's *Recent Advances in Endocrinology (4th ed.) pp. 286-7;* Hartman's *Time of Ovulation in Women (1936 ed.) p. 63;* Titus's *Management of Obstetric Difficulties (2nd ed.) p. 112.* Medical Science has not yet advanced far enough to account for or give any definite reason for these variations. The doctors may not therefore say that the period of gestation in this case is not possible by comparison with the development of the child, for the degree and rapidity of development are not matters of certainty and are still a sport of nature. The calculations of the doctors in their tables and statistics are made from the last menstrual period (L. M. P.). Where the only possible day of fruitful coitus is known it would be incorrect to compare a period calculated from that date with periods calculated from the L.M.P. A reduction of like to like should be made by reducing this also to a period calculated from the L. M. P. Such a reduction was made in *Clark v. Clark (supra).*

N. K. Choksy (with him *Ivor Misso* and *J. G. T. Weeraratne*) for the second defendant, appellant in S. C. No. 118 and respondent in S. C. No. 119).—If the alleged misconduct really took place the sum of Rs. 15,000 awarded as damages in this case is excessive. The first defendant is mainly responsible for the situation which led to the misconduct. The ability of the second defendant to pay has also to be considered—Maasdorp's *Institutes, Vol. I., p. 102 (5th ed.).* The principles which should guide a court while awarding damages in a case like the present one are fully considered in *De Silva v. De Silva et al.* [3].

H. V. Perera, K.C. (with him *E. G. Wikremanayake, C. J. Ranatunge* and *G. Thomas*), for the first defendant, respondent in both appeals.—The findings of the trial judge on the question of adultery are supported by the evidence and are correct.

[1] *L. R. (1921) P. 425.* [2] *(1939) 2 A. E. R. 59.*
[3] *(1925) 27 N. L. R. 289.*

As regards the legitimacy of the child Joseph Richard the word " shown " in section 112 of the Evidence Ordinance means no more than the word " proved " in section 3 and does not indicate a higher dégree of demonstration. A presumption of legitimacy arises under section 112 from the birth of a child during the continuance of a valid marriage but may be rebutted by proof of non-access on the part of the husband. In Ceylon, unlike England, a husband or wife can give evidence of non-access to bastardize a child born in wedlock. This point and the meaning of the word " access " in section 112 were decided by the Full Bench in *Jane Nona v. Leo* (*supra*). " Access " means " actual intercourse " and not " opportunity for intercourse ". See also the decision of the House of Lords in *Russell v. Russell* [1]. The dictum of the Privy Council in *Karapaya Sarvai v. Mayandi* (*supra*) that it means " opportunity " is *obiter*. The evidence of the first defendant has been accepted by the trial court. According to it there was no sexual intercourse on the 9th and 10th of August, 1941.

Assuming that there was intercourse between husband and wife on August 9, 1941, it is submitted that the child born on March 26, 1942, could not have been conceived as the result of that coitus. The child in question did not bear the slightest sign of prematurity, and its intra-uterine life of 229 days was too short for its viability. No case has been recorded of a fully developed child born less than 260 days after a single coitus—Peterson, Haines and Webster's *Legal Medicine and Toxicology* (*2nd ed.*) *Vol. I., p. 951.* The medical evidence of Doctors Wickramasuriya, Attygalle and Navaratnam is reconcilable with the position that the child could not have been conceived on August 9, 1941. Dr. Thiagarajah's evidence is biassed. Conception can take place on any day in a woman's life—*Combined Textbook of Obstetrics and Gynæcology* by Kerr and others (3rd ed.) p. 181; Sydney Smith's *Forensic Medicine* (*1945 ed.*) *p. 318.* The date of the L. M. P. is suspect in the present case. A good number of questions put to the doctors, and the answers given by them were on the footing that the date given by the plaintiff was correct. If we eliminate that date there is complete agreement among the doctors called by the first defendant that a child of the degree of development observed by Dr. Wickramasuriya could not have been born on March 26, 1942, from a coitus on August 9, 1941. Dr. Thiagarajah finds difficulty in agreeing with the other doctors because of a premature rupture of the membranes. His dictinction between premature and early rupture does not find support in the books—Eden and Holland's *Manual of Obstetrics* (*8th ed.*) *p. 230 et seq.; Combined Textbook of Obstetrics and Gynæcology* by Kerr and others (3rd ed.) pp. 363, 365. Further, the evidence shows that what actually happened was not a premature rupture in the sense in which Dr. Thiagarajah uses the term. In these matters medical science has not yet advanced far enough for a doctor to say with mathematical precision this is possible but not that. It is a question of experience, a matter of statistical possibility or impossibility. The fact that the plaintiff was carrying on an adulterous intimacy with the second defendant at or about the time conception must have taken place is very relevant. The Court may presume a " sport of nature " only

[1] *L. R. (1924) A. C. 687.*

where the woman has been chaste. In this respect the present case is clearly distinguishable from *Gaskill v. Gaskill* (*supra*) and *Clark v. Clark* (*supra*).

Application was made in the trial court for a blood-test of the child. This is a recognized method of testing legitimacy. The application was, however, refused.

The sum awarded as damages is not excessive. It is a matter which is entirely within the discretion of the trial court—*Butterworth v. Butterworth* [1]. It is incorrect to take the value of the wife after her misconduct. Prior to her misconduct the home of the first defendant and his wife was a happy one. The first defendant had implicit faith in the second defendant. The facts of the case show that the conduct of the second defendant was that of a treacherous friend, and the injury caused by him is a grave one. It is not necessary to consider the means and income of the co-respondent; what is material is the extent of the injury caused—*Butterworth v. Butterworth* [2]. The trial Judge has not acted on any wrong principle while assessing damages.

Nadarajah, K.C., in reply:—Every child born of a married woman during the subsistence of the marriage is *prima facie* legitimate and the burden of proof on the defendant to establish illegitimacy is a heavy one and must exclude all possible doubt—*Gaskill v. Gaskill* (*supra*); Phipson on Evidence (1942 ed.) 633; *Vol. 2 Halsbury's Laws of England* (*Hailsham ed.*) *paras, 766, 768, 769.*

The distinction drawn by Dr. Thiagarajah between premature and early rupture is important. Premature rupture accelerates while early rupture retards delivery—*Midwifery by Ten Teachers* (*1925 ed.*) *p. 450; Journal of Obstetrics of the British Empire, Vol. 50 p. 337.*

The application that the child should be submitted to a blood-test was rightly refused—*E. v. E. et al.* [3]; Peterson and Webster's *Legal Medicine and Toxicology* (*2nd ed.*) *p. 218.*

Cur. adv. vult.

May 11, 1945. WIJEYEWARDENE J.—

The plaintiff instituted this action on April 2, 1942, against the first defendant asking for a decree of separation *a mensa et thoro* on the ground of malicious desertion and claiming alimony and the custody of her two children Hortense and Joseph Richard.

The first defendant filed answer denying that he deserted the plaintiff maliciously and pleading that the plaintiff committed adultery with the second defendant. He denied that he was the father of the younger child, Joseph Richard. He asked for a dissolution of the marriage and the custody of Hortense and claimed Rs. 25,000 as damages against the second defendant.

The second defendant filed an answer and the plaintiff filed a replication denying the allegations made against them.

The District Judge delivered judgment granting a decree for divorce to the first defendant and directing the second defendant to pay Rs. 15,000 as damages. He held that the plaintiff had committed adultery with

[1] *L. R. (1920) P 126 at 135.* [2] *L. R. (1920) P 126 at 147.*
[3] *S. A. L. R. (1940) T. P. D. 333.*

the second defendant and that Joseph Richard was not the child of the first defendant. He gave the custody of Hortense to the first defendant and made no order for alimony in favour of the plaintiff or Joseph Richard.

Both the plaintiff and the second defendant have appealed from the judgment of the District Judge. Appeal No. 118 is the appeal of the second defendant and Appeal No. 119, the appeal of the plaintiff.

The first defendant is a Barrister-at-Law prasticing in Colombo and was acting as a Crown Counsel during a part of the period material to this action. The first defendant's parents were members of a community known as Colombo Chetties. The plaintiff is the child of a Colombo Chetty—a cousin of the first defendant's mother—by a Burgher wife. Both the plaintiff and the first defendant are described in the marriage certificate as Ceylon Tamils. At the time of their marriage in 1933 the plaintiff was twenty years and the first defendant twenty eight years. Two children were born to the plaintiff, Hortense in 1938 and Joseph Richard on March 26, 1942.

The second defendant is a Doctor in Government Service. He is a Malay, 47 years old, married to a Malay lady and is the father of seven children.

Towards the end of 1940 the second defendant became a very intimate friend of the plaintiff and the first defendant and visited them at their residence, " Merlton ", Gregory's Road, Colombo. He began to lunch at " Merlton ", at least, every Sunday and go with them frequently to dances and concerts. About this time the first defendant had disposed of his car and whenever he and his wife wanted to go shopping or call on their friends the first defendant used to telephone to the second defendant for his car. The second defendant who did not employ a driver would drive his car to " Merlton " and wait at " Merlton " while the plaintiff and the first defendant went in his car. He had to wait sometimes an hour or two at " Merlton " until they returned.

Towards the end of January, 1941, the first defendant went to Jaffna to prosecute at the Criminal Sessions of the Supreme Court which opened there on February 1, leaving at " Merlton " besides the servants, the plaintiff, Merita (a younger sister of the plaintiff) and Noel (a younger brother of the plaintiff) who was away from home for the greater part of the day. On leaving for Jaffna the first defendant asked the second defendant to look after his wife and sister-in-law and this was understood by the second defendant to mean that he should call on them during the absence of the first defendant and take them in his car when they wanted to go shopping or to attend dances and concerts. The plaintiff herself was in Jaffna from February 27 to March 4. After returning to Colombo, she remained at " Merlton " till March 20.

Alice, the cook employed at " Merlton ", says that the second defendant visited " Merlton " frequently by day during this period when the first defendant was away at Jaffna and the plaintiff was at " Merlton ". She saw him going into the spare room and noticed the plaintiff coming out of the room while the second defendant was still in the room. She saw the plaintiff in the drawing room resting her head on the second defendant's lap and the plaintiff and second defendant behaving as an " aluthjoduwa " (newly married couple).

The plaintiff went to Bandarawela for a change about March 20, with Merita and Hortense and stayed at a boarding house run by Mrs. Solomons. On April 12, the second defendant himself was at Bandarawela having gone there two or three days earlier for the Easter vacation. He was staying at a boarding house run by Mrs. Outschoorn. Dr. Babapulle, who was spending a few days at Outschoorn's during Easter, says he saw the plaintiff entering the second defendant's room one night after dinner. He is unable to say whether the second defendant was, in fact, in the room. I do not hesitate to acept the evidence of Dr. Babapulle. It is not the case for the plaintiff that she went to the room of the second defendant for some innocent purpose. She denies going there and the seconnd defendant denies any knowledge of a visit by the plaintiff.

On April 17 first defendant was at " Merlton " having come down from Jaffna. There was a birthday party at " Merlton " that day, as it was the birthday of the first defendant. The plaintiff came from Bandarawela with Hortense for that party. That evening it was arranged with the knowledge of the first defendant that plaintiff, second defendant, Mr. Namasivayam and Miss Ludowyke—the last two being friends of the plaintiff and the two defendants—should go to Bandarawela in Mr. Namasivayam's car the next day and leave Bandarawela with Merita for a Tennis dance at Nuwara Eliya on April 19 and return to Colombo on April 20. In pursuance of this arrangement, the plaintiff wired to her friend Mrs. Jayewickreme asking her to have dinner and sleeping accommodation ready for two at her bungalow in Bandarawela on the 19th. It was arranged at the time that the plaintiff and Miss Ludowyke should spend the night of April 19 at Mrs. Jayewickreme's. The second defendant intended to go to a Hotel or to Outschoorn's if they had accommodation for the night. He had moreover some friends in Bandarawela with whom he could have stayed. When the party reached Bandarawela, Miss Ludowyke was left behind in Mrs. Solomon's boarding house contrary to the arrangement made in Colombo, and Mr. Namasivayam went to the house of Mr. Dias, a friend of his. The plaintiff went with the second defendant to the bungalow of Mrs. Jayewickreme. Mrs. Jayewickreme had prepared a room with two beds. She did not expect the plaintiff to come with the second defendant. The plaintiff and the second defendant dined at Mrs. Jayewickreme's, and the second defendant did not show any inclination to leave the bungalow. Mrs. Jayewickreme then directed her brother-in-law to prepare a bed for the second defendant in the spare room adjoining the room set apart for the plaintiff. There was a communicating door between the two rooms which were thus occupied by the plaintiff and the second defendant. These facts are admitted, but the Counsel for the plaintiff and the second defendant contended that no inference of misconduct on April 19 should be drawn from those facts. They have not been able to explain why the second defendant did not adhere to his original plan of going to a Hotel or Mrs. Outschoorn's boarding house and preferred to put Mrs. Jayewickreme into unnecessary inconvenience. He is an educated person and he would have noticed that the hostess expected him to go away after dinner. The plaintiff knew the bungalow well having stayed there

previously. She must have known that there was a communicating door between the two rooms. However, she chose to remain silent instead of asking the second defendant to go away. She need not have felt any uneasiness about making this request, as she was admittedly a close friend of the second defendant. She knew at this time that there was a good deal of talk about her and the second defendant and yet she prefered not to interfere with the second defendant who was going to place her in a false position by occupying the adjoining room.

The plaintiff and others returned to Colombo on April 20, and the plaintiff continued to live at " Merlton " with Merita and Hortense. Noel was not staying then at " Merlton ". The first defendant left " Merlton " for Jaffna on April 19, and returned to " Merlton " on August 9. He left again for Jaffna on August 10 and returned finally on August 20 to " Merlton " where he continued to reside with the plaintiff until December 19, when he left the house taking Hortense with him.

The plaintiff was taken ill on July 9, 1941, and Merita telephoned at once to Dr. Gunasekera, the family Doctor, and the second defendant. The second defendant came first and Dr. Gunasekera who came a little later found him in plaintiff's bed room with the plaintiff while Merita was in the verandah. Dr. Gunasekera thought from the symptoms that the plaintiff's illness was due to renal colic, appendicitis or ectopic gestation. He had to examine her next to the skin. For this purpose she had to undress partially. During this examination the second defendant elected to remain in the bedroom though he was not there in his capacity as a Doctor attending on the plaintiff.

Alice says that after the plaintiff's return from Bandarawela on April 20 the second defendant spent some nights as " Merlton " and the plaintiff and the second defendant occupied one room on these occasions and that the plaintiff alone was taken out by the second defendant in his car sometimes after dinner. Another servant Pabilis refers to an incident by day during this period. The plaintiff was in the spare room with the second defendant when Pabilis found the plaintiff's father coming to the bungalow. Pabilis ran and knocked at the door of the spare room and then the plaintiff rushed out of the room and by going along some passage unseen by the father contrived to make it appear to her father that she had been in her own bedroom when her father arrived. The District Judge accepts the evidence of Alice and Pabilis.

As the District Judge appered to me to have misdirected himself when he proceeded to consider the evidence of adultery on the erroneous assumption that the plaintiff was in March a " sexually starved wife "—an assumption based solely on the fact that the husband had then been away from her for three or four weeks—I examined the evidence carefully. On that examination I have reached the decision that the first defendant has established the charge of adultery.

Now I shall consider the question as to the legitimacy of Joseph Richard who was born on March 26, 1942. Section 112 of the Evidence Ordinance enacts:—

> " 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."

That section has been construed in *Jane Nona v. Leo*[1], which is a decision of the Full Bench and is binding on us. It was held in that case that the word "access" was used in section 112 of the Evidence Ordinance in the sense of "actual intercourse" and not "opportunity for intercourse". It was further held that our Courts should not act on the rule of English Law that parties to a marriage should not be permitted to give evidence as to the fact of the absence of intercourse between them.

This case has been presented on the footing that the first defendant had sexual intercourse with the plaintiff on April 17, 1941, and then again on August 9, 1941. It is not suggested that Joseph Richard was born as the result of the act of coition on April 17, 1941—343 days before the date of birth. The case of the plaintiff appears to be that the child was born as the result of an act on August 9, 1941. The child having been born to the plaintiff during the subsistence of a valid marriage between her and the first defendant the burden rest on the first defendant to prove that he is not the father of the child.

Five medical witnesses have given their opinion on this question. Four of them—Dr. Wickramasuriya, Dr. Attygalle, Dr. Navaratnam, and Dr. Gunasekera—were called by the first defendant while Dr. Thiagarajah was called by the plaintiff. Of these witnesses Dr. Wickramasuriya who is now dead was admittedly regarded as one of the most eminent obstetricians and gynæcologists in Ceylon. Dr. Gunasekera is a general medical practitioner. He did not claim to be an expert in gynæcology or obstetrics and he admitted frankly that he did not study or consider the relevant medical questions for the purpose of giving his opinion. The medical evidence dealt with the following questions:—

(*a*) What was the last menstrual period of the plaintiff ?

(*b*) Could a coitus on August 9, 1941, have resulted in conception ?

(*c*) Could not Joseph Richard have been begotten as the result of a coitus on August 9, 1941 ?

On question (*a*) there is the evidence of the plaintiff that her last menstrual period was about *July 11 to 14, 1941*. Dr. Wickramasuriya says that she made a similar statement to him in December, 1941. The first defendant disputes the correctness of the date, as, according to Dr. Wickramasuriya, the plaintiff was unable to give the date in October, 1941, when she consulted him first about her pregnancy. It is suggested that in December she gave a late date in order to be in a position to say that the baby was conceived after August 9, when the first defendant had access to her. I am not prepared to accept that suggestion. Dr. Wickramasuriya says that the plaintiff did not give the date in October and adds that "she was rather ill at the time and looked emaciated" and "she

[1] *(1923) 25 N. L. R. 241.*

was rather confused about the date ". There is some conflict of evidence between Dr. Wickramasuriya and the plaintiff as to her statement to him in October. We cannot exclude altogether the probability of Dr. Wickramasuriya making a mistake. There is clearly a conflict between Dr. Wickramasuriya and the first defendant as to what Dr. Wickramasuriya told the first defendant in November, 1941 (marginal page 339). The fact is that Dr. Wickramasuriya could not have been expected reasonably to remember all that passed between him and the plaintiff and the first defendant about October and November, 1941, when there was no talk of any trouble between the spouses. There is also the evidence of the first defendant to the effect that plaintiff told him in September that she had missed her period in September. Probably, she thought at the time that she had her period in August because she had " bleeding " in August. As that " bleeding " cannot be regarded as true menstruation, her statement made to the first defendant did, in fact, amount to her saying that her last menstrual period was in July and not earlier. Moreover, Dr. Wickramasuriya has stated that he examined the plaintiff on several occasions during her pregnancy and that he had no reason to think as a result of such examination that she had given him an incorrect date. The evidence of Dr. Gunasekera does not necessarily prove that the plaintiff could not have had her period on July 11. I would, therefore, proceed to consider the medical evidence on the footing that the last menstrual period of the plaintiff was about July 11 to 14. 1941.

With regard to question (*b*) Dr. Wickramasuriya says that while the likely period for *fertilisation* would be what is known as the mid period (*i.e.*, 9 to 17 days from the first date of the preceding menstrual period), fertilisation is possible in the case of a normal woman at any time during the inter-menstrual period. He has " seen cases where it has occurred just after or just before the period is due ". He says that this possibility is still greater in the case of a woman with irregular periods. The plaintiff's evidence shows that her periods were irregular. Dr. Attygalle says (marginal page 373) that " in the case of irregular people it is not possible for anyone to say with any precision exactly when the ovulation period is ". Though he says (marginal page 394) that " it is almost impossible " for conception to take place if the intercourse was " a couple of days before the onset of menstruation ", his later evidence (marginal page 394) appears to restrict this impossibility only to normally menstruating women. His observations on the evidence of Dr. Wickramasuriya (marginal pages 383 and 384) seem to suggest that he thought a conception about August 9 was possible in the case of the plaintiff. Though Dr. Attygalle answers each question put to him with greater confidence than Dr. Wickramasuriya and without the caution and restraint of the latter, it is at times difficult to reconcile the different answers given by him in the course of his examination.

Dr. Navaratnam thinks that in the case of a woman with a regular menstrual cycle fertilisation is impossible outside the " 9th to the 17th day period ", but he is prepared to agree (marginal page 425) that if the plaintiff had irregular periods she could have conceived even twenty-eight days after the last menstrual period. Dr. Thiagarajah says that

it is possible for any woman—whether her cycle is regular or irregular—to have a fruitful coitus at any time of the inter-menstrual period and adds (marginal page 885) that " the safe period of Ogino and Knaus has been proved to be a failure ".

Our attention has been invited to the following passage in *Menstrual Disorders and Sterility* by Mazer and Israel at page 70:—

" The assumption that ovulation does not occur before the fifteenth day of the expected flow, regardless of the length of the menstrual cycle, is now widely employed as a means of ' natural contraception ' . . . This method of contraception has not achieved universal acceptance because it is increasingly apparent, as more and more biologic data accumulate, that the reproductive cycle in the human female is complex and variable. There is, for instance, some circumstantial evidence to indicate that ovulation may occur more than once in a single menstrual cycle and that, even in the human, it may be evoked prematurely by coitus. These hypothetical concepts are seemingly supported by authentic clinical records of pregnancy following instances of isolated coitus during any phase of the menstrual cycle, even during menstruation. It is possible that a high degree of sexual excitement during intercourse may evoke the production or the release of a sufficient quantity of gonadotropic hormone in some women to cause ' untimely ' ovulation ".

The authors conclude the discussion by citing with approval the opinion of C. G. Hartman expressed in ' *Time of ovulation in Women* ':—

" We still have a long way to go before we can brand as a falsehood a woman's assertion that she conceived in the so-called sterile period of the cycle ".

I hold that the plaintiff could have had a fruitful coitus on August 9, 1941.

As regards question (*c*) it has to be borne in mind that Dr. Wickramasuriya is the only witness who attended on the plaintiff during her pregnancy and was present at the birth of the child. The other medical witnesses have to base their opinions on the evidence given by Dr. Wickramasuriya with regard to the observations made by him.

Dr. Wickramasuriya stated:—

(1) that on October 23, 1941, " the uterus was enlarged to *about* four fingers' breadth above the junction of the pubic bone " and that he considered that " she was then within 14 and 16 weeks of gestaton *from the last menstrual period*—an average of 15 weeks."

(2) that on December 17, 1941, he heard the foetal heart sounds which are " normally heard about the 20th week but occasionally a little earlier."

(3) that the child at the time of delivery was *for all practical purposes* a fully developed child and that *so far as he recollected* it weighed 6½ lbs., that the skin was smooth, there was subcutaneous fat, the finger nails had developed beyond the tips, there was a good growth of hair, the testicles had entered the scrotum, the baby cried lustily, took to the breast and sucked vigorously.

Now with regard to the observations made by Dr. Wickramasuriya on October 28 and December 17 it will be noticed that the facts observed by him are quite consistent with a conception about August 9, as the child would have been on the respective dates in the 15th week (104th day) and 23rd week (159th day) of gestation calculated from the first date of the last menstrual period. Moverover, Dr. Wickramasuriya himself admits that " there is some disagreement among authors of text books " with regard to the height of the uterus at various stages of pregnancy.

With regard to the observations at the time of delivery it has to be noted that in his evidence Dr. Wickramasuriya generally qualifies his statement that the child was fully developed by adding the words " for all practical purposes ". Moreover, he does not state the weight precisely but takes care to say that so far as he recollected the child weighed 6½ lbs. Dr. Wickramasuriya stated that he had a good look at the child, as he knew " the case would come to Court " but added that he did not adopt anyone of the " various other special methods " for ascertaining whether it was a full term child. He admitted further that he failed to measure the length of the child. In this connection it has to be noted that according to Johnstone (*Text Book of Midwifery*, Ninth Edition, page 93) " most observers lay more stress upon length than upon weight ". Dr. Wickramasuriya gave his opinion that the child might have been conceived roughly about July 18.

In assessing this opinion it has to be borne in mind that Dr. Wickramasuriya agreed with the view expressed in the following passage at page 47 of volume 2 of *Taylor's Principles and Practice of Medical Jurisprudence* (Ninth Edition), viz.:—

> " The most progressive stage of development is considered to be during the last two months of gestation—the changes which the foetus undergoes are greater and more marked at this than at any other time. The general opinion is that an eight-months' child is not with any certainty to be distinguished from one born at the ninth month ".

The months mentioned in the above passage are clearly calendar months. Dr. Wickramasuriya agrees further that a child with an uterine existence of 252 days may be a fully developed child. A baby conceived as the result of a coitus on August 9, 1941, and born on March 26, 1942, would have had a uterine existence of nearly 228 days. In making a comparison between such a baby whose date of conception is ascertained by reference to the date of coitus with the cases referred to in the text books or mentioned in records kept in hospitals it should be remembered that the period of gestation in those cases is calculated with reference to the menstrual period. Therefore, for the purpose of comparison the period of gestation of the baby conceived as the result of a coitus on August 9, 1941, should be calculated as from July 11, 1941. the first date of the last menstrual period and then the gestation period would be 258 days or over eight calendar months. Such a baby according to Taylor cannot be distinguished with any certainty from a full term baby. (See also Taylor (Ninth Edition) Volume I. page 153.)

Dr. Attygalle gives the date of conception as 270 to 275 days before the date of delivery though most of the text book writers mention the lowest limit as 265 days. Dr. Attygalle would thus fix the period between June 24 and June 29, 1941. He says then that he would allow as the extreme limits of variability " two weeks on either side " (marginal page 369). This would fix the latest date of conception according to him as July 13, 1941.

He says (marginal page 385) that he does not base his opinion " on the features only but on the general observations (Dr. Wickramasuriya) made during the pregnancy period ". He says definitely that " it is impossible in the case of a child conceived on August 9, for the uterus to have reached up to four finger breadths above the symphysis pubes on October 23 ".

No importance can be attached to this expression of view as he says later (marginal page 387) that he is unable to say what a " four finger-breadth space " is and suggests to cross-examining Counsel that he should ascertain it by measuring Dr. Wickramasuriya's fingers.

The method of measurement adopted by Dr. Wickramasuriya was undoubtedly unreliable for the purpose of forming a correct opinion. Paul Titus (*The Management of Obstetric Difficulties*, Second Edition, page 111) says:—

> " The height of the fundus of the utterus gives valuable information about the duration of the pregnancy, especially if measured routinely at frequent intervals, as, for example, at each antepartum visit ".
>
> " These measurements must always be taken from the fixed point of the upper edge of the symphysis pubes, by means of a pelvimeter or similar caliper, in order to have any degree of accuracy or scientific uniformity. It is futile to attempt any estimations of the period of gestation or probable date of confinement by such methods as the number of " finger-breadths " above the symphysis, or below the ensiform ".

Moreover, even where the measurements are accurate any opinion based on them must be qualified. De Lee and Greenhill (*Principles and Practice of Obstetrics*, Eighth Edition, page 65) say:—

> " Conclusions as to the duration of pregnancy based on the height of the fundus above the pubes must be carefully qualified . . . . Naturally the accuracy of determining the duration of pregnancy is not great, being disturbed by the inconstancy of the location of the umbilicus, the elasticity of the belly wall, intra abdominal conditions, the amount of liquor amnii, the size of the child, its position and other factors. The shape and size of the trunk alter uterine relations ".

With regard to the hearing of foetal heart beats on December 17, Dr. Attygalle says it is an " impossibility " in the case of a child conceived about August 9 (marginal page 385), but immediately after he says, " very rarely it may be possible. " Later, when he is questioned about it, he recedes so much from the first view of " impossibility " that he corrects Counsel by saying that his earlier answer was " not likely " (marginal page 388). Still later he concedes that " probably " the heart beats could have been heard on December 17.

Dr. Attygalle accepts the view expressed in the passage cited above from *Taylor's Principles and Practice of Medical Jurisprudence* and agrees that he cannot " say without very close observation the difference between a child born in the eighth calendar month " and a child born in the ninth calendar month (marginal page 389). He says again that " any boy born in the ninth or tenth month (lunar month) will have the same characteristics as a full term child " (marginal page 401). He agrees (marginal pages 403 and 404) with the following opinion given at page 93 of *Johnstone on Midwifery*:—

> " That pregnancy followed by the birth of a fully developed child may be prolonged or abbreviated is an observed fact . . . . fully developed children have been recorded as being born after gestation as short as 240 days and as long as 314, 320 and even 331 days from the *commencement of the last period* ".

Now the periods given by Johnstone are clearly periods calculated from the last menstrual period. Dr. Attygalle himself admits (marginal page 400) that " medical science and authorities have given the characteristics of children reckoned from the notional date ". A child born on March 26, 1942, as the result of a coitus on August 9, 1941, would be a child with a gestation period of about 258 days reckoned from the last menstrual period and could, therefore, according to Johnstone's view be a fully developed child.

Dr. Navaratnam says (marginal page 419) that the conception must have been " somewhere about the 19th June " and is prepared to allow two weeks " this way and that way ". This would fix the period of conception roughly between June 5 and July 3. Later he says more definitely (marginal page 429) that the child could not have been conceived " later than the end of June ". Judging solely by the height of the uteruts observed by Dr. Wickramasuriya on October 23, he thinks that the conception must have been between July 1 and 19, but admits that the height of the uterus is not determined solely by the period of pregnancy and is liable to individual variations. He concedes the foetal heart beats could be heard after the 20th week. He says (marginal page 426) that with a normal monthly cycle and proper ovulation he would have no difficulty in distinguishing between two children born in the ninth calendar month if their periods of uterine existence differ by more than two weeks. When he is asked whether the position would be different if he was considering the case of an irregularly menstruating woman his reply is, " in the case of an irregularly menstruating woman we go by other data" .

Dr. Navaratnam adds to the complexity of the problem when he seems to say (marginal page 429) that in the case of a woman with an irregular cycle, the period of gestation should not be determined from the last menstrual period.

Dr. Thiagarajah says the child " forms the characteristics of full term child in the 36th week " of gestation reckoned from the last menstrual period and that " the subsequent development of the child is in growth and weight not in characteristics ". He draws further an inference from the weight of the child that it had a premature delivery caused by the rupture of the membrane which even according to Dr. Wickramasuriya

may have hastened the arrival of the baby by about ten days. Dr. Wickramasuriya has stated in evidence that the weight of Hortense, the first child of the plaintiff, was " somewhere between six and seven, nearer seven ". Dr. Thiagarajah says, that generally " subsequent babies are heavier " and the fact that the child in question weighed less than Hortense tends to prove that this child was born prematurely. His position is (marginal page 846) that, if the last menstrual period is July 11 to 14, it is impossible to say that a coitus on August 9 could not have " produced this child ".

The first defendant denies that he is the father of the child on the sole ground that he had no access to the mother at any time when the child could have been begotten. Could it be said that the medical evidence proves that Joseph Richard could not have been begotten on August 9 ? To say so, the medical opinion must be clear and decisive. In this case the opinions of the doctors are at times conflicting where they are not hesitating and doubtful. There are, moreover, the opinions of the text book writers which throw a great deal of doubt on the case of the first defendant.

It was pointed out by Counsel for the first defendant that the present case was distinguishable from *Gaskill v. Gaskill* [1] and *Clark v. Clark* [2] as in each of these cases no evidence was led to show that the wife had a lover and the charge of adultery was based solely on the abnormity of the period of pregnancy. But the period in this case is neither so low as in *Clark v. Clark* (*supra*) or so abnormally long as in *Gaskill v. Gaskill* (*supra*). The period of pregnancy here being 228 days, the improbability of Joseph Richard having been begotten on August 9, 1941, is comparatively slight. A child born to a woman during the subsistence of a valid marriage, cannot, I think, be made a bastard on such evidence as is given by the experts in this case. The fact that during the material period of time the plaintiff was on terms of intimacy with the second defendant does not of course entitle the first defendant to ask a Court to hold that he is not the father of the child, if he had access to the mother at a time when the child could have been begotten.

In *Cope v. Cope* [3] Alderson J. said:—

> " If you are satisfied that the husband had sexual intercourse with his wife, the presumpton of legitimacy is not to be rebutted by its being shown that other men also had intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father ".

That passage was cited with approved in *Warren v. Warren* [4].

I hold that the first defendant has failed to prove that Joseph Richard is not his child.

There remains for consideration the question of damages. The damages awarded in a divorce action are compensatory and not punitive. The two main considerations governing the award of such damages are (*a*) the actual value of the wife to the husband and (*b*) the proper compensation to the husband for the injury to his feelings, the blow to his marital

[1] *(1921) Probate 425.*
[2] *(1939) A. E. R. 59.*
[3] *(1933) I Moody and Robinson 269.*
[4] *(1925) Probate 107.*

honour and the loss to his matrimonial and family life (*de Silva v. de Silva*[1]) The District Judge says that " the actual value of this wife to this husband is nil ". As regards the second consideration for the award of damages, there is no doubt that the second defendant has betrayed the trust reposed in him by the first defendant. On the other hand, the first defendant has acted very indiscreetly. He encouraged the second defendant—a man of a different race and different creed—to be on terms of closest friendship with his wife, although the second defendant's wife who is not a Purdah lady refrained from visiting his wife. He placed himself and his wife under obligation to the second defendant. He asked the second defendant to call at " Merlton " during his absence in Jaffna. He did all this though he knew before he left for Jaffna that there had been ugly rumours about the plaintiff (*vide* p. 26). He knew that his mother and plaintiff's father had spoken to plaintiff about these rumours, but he paid no heed to them. In his letter to his mother he said, " All I ask is to be allowed to live my own life in my own way ". There is, I think, in this case evidence of carelessness and neglect on the part of the husband in not determining the close association of the second defendant with the plaintiff. The second defendant gets about Rs. 1,000 a month. He has to support his wife and seven children. He has no property and no other source of income. He is in debt and his cheques have been dishonoured. His credit is so low that he is compelled to go to Afghan money lenders for loans of money.

Taking into consideration all these circumstances and also the damages usually awarded in our Courts, I think the second defendant has been ordered to pay excessive damages. As my brother thinks, however, that substantial damages should be given in view of the fact that certain suggestions were made against the first defendant in the District Court, I agree to his assessment of the damages at Rs. 10,000.

I have to refer to two incidental matters at this stage.

When Dr. Thiagarajah was being cross-examined the trial Judge put to him the question, " You deny that you have been twisting medical opinion to set up a theory " ? The witness replied, " Yes. I must emphatically protest if any such suggestion is made ". The Judge, thereupon, informed the witness that " no such suggestion has yet been made ". In the course of his judgment the Judge says about Dr. Thiagarajah :—

" His cross-examination clearly shows his partisanship and how when dislodged from one point he took refuge behind another. I further hold that being entirely biassed in favour of the side which retained him he has in this case tried to twist scientific facts in order to accord with his theories which he thought would help the plaintiff's case ". Dr. Thiagarajah must have been upset by the remark made by the Judge when he was under cross-examination. He has no doubt shown some irritation and impatience under the stress of a long cross-examination—though to a less degree than a medical witness called by the first-defendant. Some confusion has been created by the failure sometimes to formulate with precision the questions put to medical witnesses. This resulted

[1] *(1925) 27 N. L. R. 289 at 310.*

often in those witnesses understanding a question in a sense different from that intended by the party putting the question. I have examined the evidence of Dr. Thiagarajah and I think I should say in fairness to him that I have no doubt that he gave his opinion in good faith. I may add that I hold the same view with regard to the other medical witnesses.

When the first medical witness, Dr. Wickramasuriya, was giving evidence he was cross-examined by the Counsel for the plaintiff on an article contributed by Dr. Theobald to the British Medical Journal. Later, when Dr. Attygalle was under cross-examination, it transpired that Dr. Theobald was in Ceylon at the time having come here on a visit. Thereafter, the plaintiff filed a list of witnesses containing the name of Dr. Theobald and moved to call him as an expert. Acting under section 175 of the Civil Procedure Code the District Judge refused the application. The Counsel for the plaintiff appearing before us applied for leave to call Dr. Theobald even at this stage. In the course of his argument the Counsel for the first defendant stated that he would not object to the application. Even if the first defendant opposed the application, I would have granted it in the exercise of the powers vested in this Court under section 773 of the Civil Procedure Code, if the medical evidence led in the case was less uncertain and vague and thus made it desirable to admit the evidence of Dr. Theobald in the interests of the child.

To sum up, I hold (*a*) that the first defendant has proved the charge of adultery, (*b*) that the first defendant has failed to disprove the legitimacy of Joseph Richard and (*c*) that the damages should be reduced to Rs. 10,000. The District Judge will have to consider the questions of custody and alimony in respect of Joseph Richard.

I think that under section 612 of the Civil Procedure Code the second defendant alone should have been made liable for the costs of the first defendant. Such costs should not include any expenses incurred by the first defendant in placing before the Court the evidence of Dr. Attygalle and Dr. Navaratnam and in respect of the relative proceedings in Court as these witnesses were called solely for the purpose of giving expert evidence on the question whether Joseph Richard was a legitimate child. Each party will bear his or her own costs of appeal.

The decree of the District Court will stand subject to the modifications indicated in the two preceding paragraphs.

CANNON J.—

I agree with the conclusions reached by my brother Wijeyewardene J. I wish to add something about the medical evidence. The learned District Judge thought that Dr. Thiagarajah was a partisan and a biassed witness, and that he had, in consequence, unconsciously strained scientific facts to suit his theories. Mr. Nadarajah asked us to review this criticism, submitting that it was not deserved. The Judge based his criticism on the way Dr. Thiagarajah gave his evidence on three aspects of pregnancy, as regards which the Judge remarks:—

(1) " He has (perhaps unintentionally) twisted science in order to suit his theories regarding irregular and regular menses, and on the question whether there can be menstruation without ovulation. He

first said that menstruation did not depend on ovulation. He then changed that by saying ' You may get menstruation without ovulation and ovulation without menstruation and that for mestruation to take place ovulation may precede it ".

(2) " When he realised that the insemination delivery period might be an important factor in this case, he tried to trim down the effect of Dr. Wickramasuriya's evidence that the I. D. P. is from 265 to 270 days ".

(3) " It is a medical axiom that if the membranes rupture before the os dilates, it is called a ' premature rupture ', but Dr. Thiagarajah had the hardihood to suggest that the word ' premature ' as used in this connection meant premature delivery, and had nothing to do with a stage in the labour ".

On going through the record of the evidence of Dr. Thiagarajah and, indeed, of all the expert medical witnesses, one is struck by how frequently Counsel and the witnesses are at cross-purposes owing to the way in which medical terms were ambiguously used, not only in the questions and answers but also by the writers of the scientific text-books, which were being frequently cited. The word " menstruation ", for instance, has different meanings. Such bleeding may be ovulating (called "proper" menstruation) or an ovulating (called " pseudo " or " abnormal " menstruation). To the layman such words as " gestation ", " fertilisation ", " conception ", may each convey one and the same idea; but to the medical profession each of these words may have more than one meaning. Because the different senses in which such words are used were not sufficiently emphasised in the text-books and in the evidence, confusion of thought was bound to arise, and I am inclined to think that on that account false impressions were sometimes created.

The insemination delivery period of 265-270 days from coitus, given by Dr. Wickramasuriya, was based on the assumption that ovulation occurred about the fifteenth day of the menstruation cycle, but Dr. Thiagarajah was of opinion, like Dr. Wickramasuriya, that ovulation could occur on any day of the menstruation cycle, in which case the insemination delivery period could be from 250 days. It was in this way that he appears to have " qualified " Dr. Wickramasuriya's evidence. There was an apparent contradiction in terms, when Dr. Thiagarajah said that the insemination delivery period had no relation to the last menstrual cycle. The context of his evidence, however, indicates that he must have meant that the gestation itself was unaffected by the menstrual cycle. The number of days of the insemination delivery period is admittedly calculated with reference to the last menstrual period. Here the word " cycle " has been loosely used for the word " period ".

Dr. Thiagarajah drew a distinction between what he termed a " premature " rupture of the membranes and an " early " rupture. He said that an untimely rupture was called " premature " when it occurred before the onset of labour, and " early " when it happened after such onset, his point being that a premature rupture was likely to hasten birth, while an early one would not. This provoked the Judge's comment quoted above.

But the authors of " Midwifery " by Ten Teachers use the same language as Dr. Thiagarajah to distinguish premature rupture before and after labour has begun. And in an article on the subject in *The Journal of Obstetrics and Gynæcology of the British Empire* (Vol. 50, No. 5, published in October, 1943), Dr. D. S. Greig, the Medical Officer of a Maternity Hospital, reviews 320 cases and makes the following definition :—

"Premature rupture of membranes is defined as having taken place when the rupture of the membranes precedes labour pains, recognised and acknowledged by the patient ".

Apparently the degree of prematurity in relation to its effect is expressed by some medical men by the use of the words " premature " and " early ".

It is clear that Dr. Thiagarajah said that premature rupture of the membranes means premature delivery, but here again the context shows that he did not intend this answer to be taken literally, for he had just before stated that such a premature rupture "generally indicates premature delivery ". If for the word " means " he had said " generally indicates ", he would have obviously have more accurately expressed what was in his mind.

The learned Judge's criticism of Dr. Thiagarajah appears to arise from contradictions in the evidence due not to equivocation by Dr. Thiagarajah but to the equivocal nature of the medical terms which were being quoted from scientific books by Counsel and sometimes put to the witnesses in a univocal sense. This resulted in the evidence not only of Dr. Thiagarajah but of all the expert medical witnesses being sometimes apparently contradictory and therefore confusing. Taking the record of the evidence of Dr. Thiagarajah as a whole and reading it in the light of the phraseological inexactitudes mentioned, I am left with the impression that Dr. Thiagarajah was giving a *bona fide*, though sometimes obscure expression of his views on the scientific data.

Decree varied.