30990

No. 76 of 1947.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN—

JOSEPH STANISLAUS ALLES of Colombo (First Defendant) *Appellant*

— AND —

1. MERLE ALLES neé DE COSTA of Kandana (Plaintiff) *Respondent*

— AND —

2. Dr. T. S. M. SAMAHIN of Dambulla (Added Defendant) *Respondent*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from a judgment and decree of the Supreme Court of the Island of Ceylon dated the 11th May, 1945, modifying a judgment and decree of the District Court of Colombo dated the 27th February, 1943, in matrimonial proceedings instituted by the First Respondent against her husband the Appellant on the 2nd April, 1942. p. 726 p. 742. p. 624. p. 706.

2. The main questions which arise on this Appeal concern the paternity of one Joseph Richard, a child borne by the First Respondent on the 26th March, 1942. Briefly they may be summarised as follows:—

(a) Whether the evidence adduced by the Appellant was sufficient (as the District Court held) to rebut the presumption that the Appellant was the father of the child;

(b) Whether the Supreme Court of the Island of Ceylon was justified in reversing on this question the findings of the trial Judge who had seen the witnesses.

3. The proceedings were begun by the First Respondent in the District Court of Colombo by Plaint dated the 2nd April, 1942.
p. 1. Her claim was against her husband, the Appellant, on the ground of alleged desertion, and she asked for a decree of judicial separation, custody of two children, a girl Pauline Frances Hortense born on the 30th June, 1938, and the above-mentioned boy, Joseph Richard, born on the 26th March, 1942, permanent alimony for herself and both the said children, costs, and such further and other relief as to the Court might seem meet.

4. By his Answer dated the 1st July, 1942, the Appellant, while admitting that he had left the First Respondent, denied that he was
p.22. guilty of desertion. He charged the First Respondent with having committed adultery on a number of specified occasions with Dr. T. S. M. Samahin who was thereupon brought in as Added Defendant and is now the Second Respondent to this Appeal. The
p. 23, l. 8. Appellant further denied specifically that the child Joseph Richard was his son, on the ground that he had no access to his wife at any time when the said child could have been begotten. Accordingly he claimed a decree of divorce from the First Respondent, custody of the child Pauline Frances Hortense, damages for adultery against the Second Respondent, the dismissal of the First Respondent's claim, costs, and such further and other relief as to the Court might seem meet.

p. 23. 5. An Answer was filed by the Second Respondent as Added Defendant on the 28th August, 1942 denying that he had ever com-
p. 25. mitted adultery with the First Respondent. The First Respondent similarly by Replication dated the 3rd September, 1942, denied that she had ever committed adultery with the Second Respondent. In
p. 25, l. 10. addition the Replication specially averred that the child Joseph Richard was the Appellant's child and asserted that the Appellant had opportunity of access, and access in fact, at or about the time when the second child was conceived.

p. 26. 6. On the 30th September, 1942 before the commencement of the trial, the Appellant filed an application to the Court for a commission to issue to two named doctors to take blood tests of the Appellant, the First Respondent, the Second Respondent and the
p. 28, l. 31. child Joseph Richard. The First Respondent would not consent
p. 29, l. 1. to this course either for herself or for the child and the Second Respondent urged that the Court had no jurisdiction to make such
p. 28, l. 38. an order. It was conceded by Counsel for the Appellant that in
p. 29, l. 5, 15. the absence of consent the Court could not make an order, though the District Judge suggested an amendment of the law on this topic.

pp. 624-706. 7. After a trial lasting from the 11th December, 1942, until the 15th February, 1943, the District Judge, in a judgment delivered on the 27th February, 1943, answered the issues which had been framed in the following manner:—

1. The Appellant did not wrongfully and maliciously desert the First Respondent; pp. 624-6.

2. The First Respondent was not entitled to a decree of judicial separation;

3. The First Respondent was not entitled to the custody of the child Pauline Frances Hortense but was entitled to the custody of the child Joseph Richard;

4. The First Respondent was not entitled to any alimony;

5. The Appellant was not bound to maintain the child Joseph Richard: the question of maintenance for the child Pauline Frances Hortense did not arise as the Appellant was entitled to her custody;

6. The First Respondent committed adultery with the Second Respondent:—

(a) at "Merlton", Gregory's Road, Colombo, on various occasions between the 15th February, 1941 and the 20th March 1941;

(b) at the same place on various occasions between the 20th April, 1941 and the 20th August, 1941;

(c) at the boarding house of a Mrs. Outschoorn at Bandarawela on the night of the 12th April, 1941; and

(d) at the house of a Mr. Montague Jagawickzema at Bandarawela on the night of the 18th April, 1941.

7. The child Joseph Richard was not begotten by the Appellant;

8. The Appellant was entitled:—

(a) to a decree of divorce;

(b) to the custody of the child Pauline Frances Hortense;

9. The Appellant was entitled as against the Second Respondent to Rs. 15,000/- as damages for adultery.

A decree nisi of divorce was entered in the District Court accordingly and an order for payment of the Appellant's costs was made against both Respondents. p. 707.

8. The First Respondent and the Second Respondent both appealed to the Supreme Court, and the appeals were heard from the 23rd April, to the 10th May, 1945. The judgments of the Court, Wijeyewardene J. and Cannon J., were delivered on the 11th May, 1945. On the issue of adultery by the First and Second Respondents the Court upheld the District Judge and no appeal is brought from those concurrent findings of fact. This issue accordingly does not arise on this Appeal. The Court thought however that the damages awarded against the Second Respondent were excessive and reduced the figure to Rs. 10,000/-. On the issue of the paternity of the child Joseph Richard the Supreme Court differed from the District Judge and held that the Appellant had failed to disprove the child's p. 707, l. 11. p. 710-25. p. 707-10. p. 726-42. p. 730, l. 28. p. 738, l. 33-9 p. 738, l. 3.

p. 739, l. 36-8. p. 739, l. 43. legitimacy. It was ordered that the Appellant's costs in the District Court should be borne by the Second Respondent only and that in the Supreme Court each party should bear his or her own costs. Against this judgment, and particularly against so much of it as adjudged the Appellant to be the father of the child Joseph Richard, the present Appeal is brought.

9. On this fundamental issue as to the paternity of the child Joseph Richard, the relevant law is contained in Section 112 of the Evidence Ordinance which provides:—

> "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 the man had no access to the mother at any time "when such person could have been begotten, or that he was "impotent."

It has been held in Ceylon that the word "access" in this Section means "actual intercourse" and not merely "opportunity for intercourse". It has also been held that the rule in *Russell v. Russell*, (1924) *A.C.* 687, does not apply in Ceylon and that evidence of the spouses as to intercourse or the absence of it is admissible.

p. 48, l. 40. p. 48, l. 40-2. p. 49, l. 1, 12. p. 51, l. 18. p. 52, l. 9. p. 52, l. 28. p. 52, l. 33. p. 195, l. 11. 10. The relevant chronology was in its broad outlines simple and undisputed. The Appellant, being at all material times a member of the Ceylon Bar, had to go to Jaffna as Acting Crown Counsel. He left Colombo on the 1st February, 1941. The Respondent went to join him on the 27th February, staying till the 4th March, when she returned to Colombo. On the 8th April the Appellant went home for Easter arriving in Colombo on the 9th April. He left again for Jaffna on the night of the 19th April and did not return to Colombo until the morning of the 9th August, having left Jaffna the previous evening. This was just a week-end visit, and he returned to Jaffna on the night of the 10th August. He returned finally to Colombo on the 21st August. The baby was born on the 26th March, 1942. The issue accordingly narrowed down to this—the only possible date of intercourse between the Appellant and the First Respondent in the eleven months preceding the birth being the 9th/10th August, 1941, was it possible for the child born 228 days later to be the result of that intercourse? To this question a considerable amount of expert medical evidence was directed.

p. 731, l. 13. p. 195, l. 2. 11. The experts all started, as indeed they had to start, from the description of the baby at the time of its birth by the doctor who delivered it. This was Dr. G. A. Wickremasooriya, who was without any question one of the most distinguished obstetricians and gynæcologists in the Island. He was a Fellow of the Royal College

of Physicians, Edinburgh, Fellow of the Royal College of Surgeons, Edinburgh, and a Fellow of the Royal College of Obstetricians and Gynæcologists, London. He had operated on the First Respondent for sterility before the birth of her first child and had also attended at the birth of the first child. He had seen the First Respondent in October, November and December, 1941, during the months of pregnancy and, realising by March, 1942, that there were disputes and troubles relating to the marriage, took great care to maintain the strictest impartiality and in fact refused to give a statement of his evidence to either side. He said that the child was a full-term child of complete uterine development. The weight was $6\frac{1}{2}$ pounds, which is a normal weight in Ceylon. The skin was smooth; there was sub-cutaneous fat; the finger nails had developed beyond the tips; there was a good growth of hair; the testicles had entered the scrotum. On birth the baby cried lustily, took naturally to breast and sucked vigorously. No special instructions as to nursing, which would have been essential for a 7 month child, were necessary. There was some criticism of Dr. Wickremasooriya because he had not measured the length of the baby but this was a matter of trifling importance. When a doctor of his experience says that a baby is a fully mature baby, a thing which he can recognise with his eyes without making detailed calculations, his word must surely be accepted.

p. 201, l. 17.
p. 202, l. 3-5.
p. 197, l. 19, 32.
p. 198, l. 27.
p. 213, l. 1-10.
p. 695, l. 25.
p. 195, l. 12.
p. 196, l. 21-24.
p. 217, l. 22-8.
p. 196, l. 34.
p. 197, l. 2.

12. Dr. Wickremasooriya, who was called by the Appellant, was further asked his views as to the question whether the baby which he delivered on the 26th March, 1942, could have been conceived on the 9th August, 1941. His answer was unhesitating and unqualified that a child conceived on the 9th August and born on the 26th March following could not be a mature child having the characteristics of the child which he observed. He estimated that the date of conception of the child he delivered was somewhere about the first two weeks in July, 1941 but he was accepting for this purpose the date given by the First Respondent for her last menstruation.

p. 217, l. 34-9.
p. 201, l. 3-7.
p. 200, l. 5.

13. This doctor's evidence was to a considerable extent confirmed by what had taken place the previous year. It was in September that the First Respondent first told the Appellant of having missed a period, and Dr. Wickremasooriya was called in on the 23rd October. At that date he formed a view that she was in her fifteenth week of pregnancy, and he told the First Respondent she was in her fourth month. He asked her when her last period had been but she said she did not know. He accordingly based his estimate on the measurement of the enlargement of the uterus, which he described as four finger-breadths—$3\frac{3}{4}$ inches—above the junction of the pubic bone. He saw her again in November, on a Saturday in the latter half of the month, although the date was not

p. 53, l. 22.
p. 413, l. 9.
p. 197, l. 19.
p. 413, l. 26.
p. 478, l. 7.
p. 198, l. 26.
p. 198, l. 17.
p. 214, l. 3.
p. 53, l. 32.

p. 198, l. 27. p. 478, l. 15. p. 414, l. 10. p. 54, l. 2. p. 198, l. 29. certain. Again she could not give him, according to his evidence, the date of her last period, but from his examination he formed a view that she was in the fifth month of pregnancy and told her and the Appellant so. He next saw the First Respondent on the 17th December and on his examination he heard the fœtal heart sound, and formed the view that the pregnancy was about in its twenty-third week. He estimated on this occasion that the probable date of birth would be April 18th, but again he was proceeding on the basis of the date given by the First Respondent for her last menstruation. The date given him on this visit—the first occasion when she gave him any date of last menstruation at all—was the 11th to 14th July.

p. 199, l. 3. p. 203, l. 20. p. 203, l. 33. p. 200, l. 9, 38.

14. The next doctor called on behalf of the Appellant was Dr. Attygalle, Lecturer in Gynæcology in the University of Ceylon, Visiting Gynæcologist to the General Hospital, Fellow of the Royal College of Surgeons, England and Fellow of the Royal College of Obstetricians and Gynæcologists, London. He had listened to the greater part of Dr. Wickremasooriya's evidence and expressed agreement with it. He was quite categorical and positive that the baby born on the 26th March, 1942, as described by Dr. Wickremasooriya could not have been conceived on the 9th August; that the uterus could not be enlarged to the extent observed on the 23rd October, if conception was on the 9th August; that, with conception on that date, fœtal heart-beats could not be heard by the 17th December; that the probable date of its conception was round about the 24th June, 1941, with of course a margin of a week or two. He made this calculation without reference to the menstrual date.

p. 220, l. 23. p. 230, l. 25. p. 230, l. 32. p. 221, l. 29. p. 235, l. 6. p. 238, l. 24. p. 255, l. 12-6. p. 232, l. 17. p. 232, l. 20. p. 221, l. 18. p. 221, l. 12-13.

15. The next doctor called by the Appellant was Dr. Navaratnam, Lecturer in Midwifery in the University of Ceylon, Senior Visiting Obstetrician at the Lying-in Home, of which until two years before he had been Superintendent, a Fellow of the Royal College of Surgeons, Edinburgh, and Fellow of the Royal College of Obstetricians and Gynæcologists, London. He had heard the evidence given by Dr. Attygalle and was also acquainted with the characteristics of the child as given by Dr. Wickremasooriya. He also was asked:—"Is it possible for that child to have been conceived "on the 9th August?" and his answer was "No." Question:—"You are definite about that?" Answer: "Yes." He gave the date of conception as somewhere about the 19th June, although on the basis of Dr. Wickremasooriya's examination on the 23rd October, the date would be advanced to about the 1st to the 19th July. He agreed with the other doctors that it would not be possible on the 17th December to hear the fœtal heart-beat of a child conceived on the 9th August; nor, with conception on that date, would the enlargement of the uterus be as observed on the 23rd October.

p. 256, l. 1. p. 256, l. 13. p. 257, l. 1-6. p. 257, l. 13. p. 257, l. 21. p. 257, l. 29. p. 257, l. 16-23.

16. All these three doctors were cross-examined at very considerable length, mainly on the technical basis upon which their calculations were made. It was common ground among all of them that the normal period of gestation was calculated from the first day of the last menstrual period and amounted to 280 days from that date. The doctors were also all of opinion that normally ovulation would take place between the 9th and the 17th days after the first day of the last menstrual period. So that the uterine life of a fully mature child, that is to say the period from the conception until birth, would be 265 to 270 days. Furthermore, the doctors agreed that the ovum does not live more than 36 hours and that a sperm cannot fertilise after 48 hours although it may live for a longer period. They regarded it as accepted that after fertilisation it takes about 9 to 10 days for the fertilised ovum to become embedded in the wall of the uterus and that this embedding cannot take place in the 48 hours prior to the commencement of a menstruation. These technical data gave rise in the course of the cross-examination to considerable confusion, particularly because they related to the normal run of cases in which the date of conception is not and cannot be precisely ascertained. In the present case, however, the essential hypothesis upon which everything is based is the allegation that conception took place on the 9th August or at any rate within 48 hours after intercourse on that date. The notional calculation is of course all important from the point of view of a doctor advising a woman as to the probable date of the birth of her child, but it bears little relation to the question which arises in the present case, namely—What was the uterine life of the particular child born on the 26th March, 1942?

p. 207, l. 4. p. 227, l. 16. p. 256, l. 20. p. 208, l. 35. p. 222, l. 3. p. 228, l. 30. p. 256, l. 28. p. 211, l. 9-12. p. 221, l. 31-40. p. 256, l. 17. p. 228, l. 31-35. p. 228, l. 37-42.

17. Further confusion arose because it was frequently far from clear in the cross-examination whether the doctor was being asked hypothetical questions as to the possibility of coitus on the 9th August leading to a viable child on the 26th March The answer that medically this was not impossible was then used to found the suggestion that the particular child Joseph Richard could have been begotten on the 9th August. The inference was of course entirely illegitimate because Joseph Richard was a mature child whereas a child with considerable prematurity may nevertheless be viable.

p. 210, l. 30 4.

18. Confusion was caused again by the doctors being asked to assume that the first day of the last menstrual period in the case of the First Respondent was the 12th July, the suggestion being that conception on the 9th August was a possibility if that was the correct menstrual date. The doctors pointed out that if the last menstrual period had started on the 12th July, the First Respondent would be menstruating again or about to start menstruating again on the 9th August, though they conceded that, though very unusual, they could not say it was absolutely impossible, for conception to

p. 215, l. 35 p. 239, l. 3. p. 256, l. 30 p. 216, l. 4. p. 239, l. 8.

take place assuming the woman to be extremely irregular in her menstrual cycle. This entirely hypothetical question had little if any bearing on the only relevant question in this case, namely whether a child so conceived could have been born on the 26th March, 1942, with the characteristics of full maturity described by Dr. Wickremasooriya. All the doctors answered this question in the negative. This confusion between the hypothetical and the actual was increased when it was sought by cross-examining Counsel to add to the 228 days running from the assumed conception on the 9th August to the date of birth on the 26th March the prior period dating back to the first day of the alleged last menstrual period. This however was an entirely illegitimate inference from the hypothetical calculation. If the child was conceived on the 9th August, the length of its uterine life could not be increased by bringing into the picture a period of time which exists solely for notional purposes. The absurdity was demonstrated when Counsel, having arrived at a figure of 257 days back to the 12th July, suggested that this showed that the child was necessarily mature.

p. 236, l. 13.

19. The truth of the matter really was that the alleged menstruation on the 12th July did not fit in with any of the scientific facts of the case. The height of the uterus above the symphysis pubes on the 23rd October was inconsistent with menstruation on the 12th July. So were the fœtal heart-sounds on the 17th December. So also were the observed characteristics of the baby born on the 26th March. There was of course only the First Respondent's word for her having menstruated in July at all and it is to be noted when she first saw Dr. Wickremasooriya on the 23rd October she could not give him the date of her last menstruation. She said in her evidence that on that occasion she told him it was on the 18th August but this was clearly impossible. Later in her evidence she altered this to the 11th August and suggested that he noted it down with a query. On the second visit in November she could not again give the date of her last menstruation. In December, according to her own evidence, Dr. Wickremasooriya told her that the facts were not consistent with the date in August which she had given. She then for the first time gave the date in July and it is significant that the date she gave was from the 11th to the 14th July. This was duly noted by Dr. Wickremasooriya on the record cards which he had with him when he gave his evidence and was the basis upon which he had advised her that the expected date of the birth was about the 18th April. These dates were however changed by the time she gave her evidence at the trial. The reason for this alteration was it is submitted, pretty plain; the Appellant called at the hearing the family doctor, Dr. Frank Gunasekera, whose evidence was that he was called in to see the First Respondent on the 9th July. She had severe pains in the abdominal region and the

p. 233, l. 5-20.
p. 33, l. 18.
p. 238, l. 23-9.
p. 198, l. 25.
p. 413, l. 20.
p. 451, l. 25.
p. 198, l. 26.
p. 451, l. 38.
p. 451, l. 9, 43.
p. 200, l. 9.
p. 451, l. 14.
p. 200, l. 4.
p. 266, l. 38.

doctor had to examine her closely in order to diagnose whether it was appendicitis, ectopic gestation, or renal colic. He diagnosed the latter, caused by stones, and treated her accordingly. He visited her again on the 10th and on the 11th July, examining her closely on each of the latter dates. On the last date in particular there was no sign or suggestion that she was menstruating. The commencing date given to Dr. Wickremasooriya had therefore of necessity to be abandoned and another date alleged. The plain truth of the matter, as the Trial Judge in fact found as a fact, was that the First Respondent was lying when she said that she had menstruated in July. p. 267, l. 23-40. p. 280, l. 35-9. p. 267, l. 34. p. 281, l. 29. p. 268, l 1. p. 697, l. 27. p. 698, l. 3.

20. It was sought further on behalf of the First Respondent to avoid the conclusion to which the medical evidence pointed by asserting that she was extremely irregular in her menstrual periods. It was indeed suggested to Dr. Attygalle that her cycle was 18 days in one month, 24 days in the next month and 31 days in the next month to which the doctor replied "I have never come across such a woman". At a later stage, he was asked "Suppose a woman "had a 23 day cycle, or a 30 day cycle, or a 35 day cycle or a 40 "day cycle, would you call that regular or irregular?" He asked "Is it the same woman?" Counsel:—"The same woman". The doctor's answer was: "There are no such women". The First Respondent in her own evidence professed to be such a woman as the doctor said did not exist, saying that her periods were irregular in that between the end of one menstrual period and the beginning of the next there elapsed sometimes 21 days, sometimes 24, sometimes 28, 30, 40, 45. It is noteworthy that she had apparently never mentioned to her husband that she was so constituted; that when she was treated by Dr. Wickremasooriya in about 1937 for retroverted uterus and blockage in the Fallopian tubes, she made no suggestion to him that her periods were irregular and the treatment was certainly not for that; that on the occasion of her previous pregnancy, which commenced in September, 1937, and resulted in the birth of Pauline Frances Hortense on the 30th June, 1938, she was looked after throughout, and delivered, by Dr. Wickremasooriya but again gave him no indication at all that she was irregular in her periods, information which it was vital for him to have in order to forecast the date of the child's birth; that throughout her treatment by Dr. Wickremasooriya for the pregnancy in question in the present case—and he saw her not only on the 23rd October, about the 15th November and the 17th December but also on the 13th January, 11th February and the 17th March—there was again not the slightest suggestion of such irregularity. The inevitable conclusion is that on this matter also the First Respondent's evidence was untrue, as the Trial Judge in terms held. p. 252, l. 35-8. p. 382, l. 35-9. p. 216, l. 16. p. 201, l. 20. p. 203, l. 13. p. 214, l. 36.

21. For the First Respondent the medical evidence was given by Dr. Thiagarejah of whom the Trial Judge said in his judgment
p. 700, l. 1. that "he has proved himself to be a thoroughly partisan witness who "has attempted, perhaps unintentionally but in his zeal for the party "he is siding" (sic) "to twist scientific facts to suit his theories".
p. 523, l. 3. He started by giving among his qualifications that he was a Fellow of the Royal College of Obstetricians and Gynæcologists, Great Britain, but when he was cross-examined it turned out that he
p. 526, l. 28. p. 527, l. 14. had no such qualification at all. He had obtained the diploma of the Royal College of Obstetricians and Gynæcologists and thereafter sat for the examination for his M.R.C.O.G. He admitted that he had not got even this degree. He denied that the reason was that he had failed in his examination, attributing it to the fact that he
p. 529-32. had not yet held a staff appointment. He was admittedly considerably junior in his experience to the doctors who had given
p. 532-3. evidence for the Appellant. It emerged furthermore that even before the case started he had been retained as medical adviser on behalf of the First Respondent and had taken an active part in preparing her case in consultation. The manner in which he gave his evidence indicates that he conceived himself to be a medical advocate and not an expert with the primary duty of assisting the Court.

22. Dr. Thiagarejah based his evidence on calculating back
p. 523, l. 24. from the date of birth to the commencement of the last menstrual period which he accepted to be the 12th July. That gave him what he called the notional fœtal existence of the child as 257 days and
p. 524, l. 21. he asserted that a fully developed child could be conceived any time between 252 and 280 days back from the date of delivery. Here again the basic confusion between the actual fœtal existence of an actual child and the notional period of gestation for the purposes
p. 524, l. 41. of hypothetical calculation is apparent. He placed a considerable
p. 525, l. 3. reliance on Dr. Wickremasooriya having forecast the 18th April as the probable date of birth and suggested that, as the 26th March was only two or three weeks before the expected date, a fully mature child on this date was not unexpected. He ignored altogether for this purpose the fact that Dr. Wickremasooriya had not been given the details of the home life of the family and had assumed, when given the 11th July as the commencement of the last menstrual period, that this date was true and that he was dealing with a normal case of a man and wife living a normal life together. He
p. 525, l. 3-10. also placed stress on the evidence of Dr. Wickremasooriya that there
p. 541-2. was a premature rupture of the membranes and sought to suggest
p. 565, l. 21-31. that this indicated a premature birth. This was one of the distortions of medical science which the Trial Judge commented on.
p. 206, l. 3-13. It was abundantly clear that what Dr. Wickremasooriya was talking about was not a premature birth at all, but a rupture of the

membranes in the course of normal labour at an early stage. He, Dr. Thiagarejah, admitted that if there was no premature rupture of the membranes he would have said that "this" child which was born could not have been conceived on the 9th August. In cross examination, he stated that the time after intercourse on which a baby could be expected was about 250 days but he ultimately agreed that the correct period from insemination to delivery was 265 days to 270 days; and although he said this was correct, he still hovered as to whether it was generally accepted. When he was challenged as to the uterine life of the child in the present case, on the basis of conception on the 9th August, being 229 days, he denied that this suggested a premature child, because according to him, in order to estimate maturity or prematurity you must also calculate from the last menstrual period. He agreed with Dr. Wickremasooriya that the child had complete uterine development calculated from the time the fœtus came into existence, but he said that he would not express an opinion with regard to maturity or immaturity except by reference to the date of the last menstrual period. After a good deal of pressing on this he finally conceded that the cause of the disagreement between the doctors was the alleged menstruation on the 12th July and that if that date were to be eliminated conception must have taken place some time earlier than the 9th August.

p. 543, l. 11.
p. 551, l. 20.
p. 553, l. 33-43.
p. 556, l. 40
p. 565, l. 35-44.
p. 566, l. 20.
p. 569, l. 44.
p. 570, l. 4.

23. The Trial Judge delivered judgment on the 27th February, 1943. It was a long and elaborate judgment, obviously prepared with great care and extending for over 80 printed pages in the Record. Most of this is devoted to the issue of adultery which is no longer relevant but in the latter part he deals thoroughly with what he calls the medical aspects of the case on the issue as to the paternity of the child. He paid a high tribute to Dr. Wickremasooriya in stressing that "while this case was in progress "he had been approached by both sides, but realising the bitter "nature of the contest which was about to start, he decided to hold "no communication with either party and refused to make any "statement until he was called into the witness box. He therefore "comes before this Court as a perfectly disinterested, truthful, "respectable and honourable expert witness and I so find"; and in another passage "If there is one witness in this case about whom "there is a consensus of opinion as to his honour, rectitude, and "veracity it is Dr. Wickremasooriya". He accepted his evidence and the evidence of Dr. Attygalle, Dr. Navaratnam and Dr. Gunasekera when they all said that the child could not have been conceived by a coitus on the 9th August. He rejected the evidence of Dr. Thiagarejah where it differed from the others and gave instances from the record of his unreliability on matters of medical science. Having seen and heard all witnesses in the witness box,

p. 624-700.
p. 690-703.
p. 695, l. 20.
p. 695, l. 15
p. 702, l. 24.
p. 700-702.

he was the only person competent to judge of their reliability. He
p. 699, l. 24. held in terms that the First Respondent was not telling the truth when she gave her alleged history of irregular menstruations and also when she alleged that she had menstruated on the 12th July. He
p. 697, l. 27. said he had no hesitation in holding on Issue 7 that the child Joseph
p. 697, l. 44. Richard was not the child of the Appellant.

24. In the Supreme Court the Judges differed from the Trial
p. 731, l. 20. Judge as to this. Wijeyewardene J., in the leading judgment took as the first medical question the date of the First Respondent's last menstrual period. He said they could not exclude altogether the 10
p. 731, l. 37. probability of Dr. Wickremasooriya making a mistake when he
p. 731, l. 45. said that the First Respondent had given him the 11th July as the date. He also stressed that the first intimation given to the Appellant by the First Respondent of having missed her period was some time in September and that Dr. Wickremasooriya had
p. 732, l. 5. stated, dealing with the occasions when he examined her during her pregnancy, that he had no reason to think that she had given
p. 732, l. 8. him an incorrect date. With regard to the evidence of Dr. Gunasekera, the Judge said that this did not necessarily prove that
p. 732, l. 10. the Plaintiff could not have had her period on the 11th July. He 20 concluded that the medical evidence must be looked at on the footing that the last menstrual period of the Plaintiff was about the 11th July to the 14th July. It is respectfully submitted that these considerations are no ground whatever for reversing the Trial Judge's view, formed after having seen the First Respondent in the witness box, that she was not telling the truth, as, admittedly she was not doing in respect of the charge of adultery. Of course she alone could know, and a doctor who had no reason at the time to suppose that she was lying, inevitably had to accept what she said; but the fact that she said so did not establish that it was the 30 truth. It is curious that the Learned Judge should have gone back to the date which even the First Respondent in her evidence at the Court did not adhere to, and his brushing aside of the evidence of Dr. Gunasekera is difficult to understand. The fundamental error however was in treating this question apart from, and as a preliminary to, the medical evidence. The two inevitably had to be taken together and it was the proved history of the pregnancy coupled with the proved facts of medical science which showed the First Respondent's date to be quite unreliable.

p. 731, l. 21. 25. On what he terms the second medical question, namely :— 40 "Could a coitus on the 9th August, 1941 have resulted in conception?" the Learned Judge again held in the affirmative. He did so on the basis of accepting the evidence, which the Trial Judge
p. 732, l. 20. had expressly rejected, given by the First Respondent and whom the Learned Judge himself regarded as untruthful in the questions of adultery, that her periods were irregular. It is submitted that there

was no justification whatever for taking this view. In any case the question as posed by the Supreme Court seems to be largely hypothetical. The view of the experts whom the Trial Judge had found to be reliable was that it was extremely unlikely because if in fact she was within two days of menstruating (and she alleged that she had had bleeding on the 11th August) the experts agreed that fertilisation or implantation would be unlikely. Dr. Attygalle was dismissed on the ground of alleged inconsistencies in his evidence without any indication what they are, and reliance was placed, in preference to the evidence of the witnesses, on passages in text books dealing with the alleged safe period as a method of contraception. It is submitted that the Learned Judge's treatment of this aspect of the case is far from satisfactory.

p. 732, l. 31.

p. 733, l. 1-22.

26. The third medical question as formulated in the Supreme Court was :—"Could not Joseph Richard have been begotten as a "result of a coitus on the 9th August?" On this the Learned Judge starts with criticisms of Dr. Wickremasooriya, first, for having been content to have a good look at the child in order to decide whether it was a fully mature child at birth without adopting any other special methods for deciding it. This seems to ignore the evidence of Dr. Attygalle to the effect that he did not consider any one sign as an index of maturity of the child. There was a general index, looking in order to see whether the development was mature or not, and even Dr. Thiagarejah agreed that you did not go by any one characteristic; you look at the general appearance and you can take in the characteristics at a glance. There was further criticism as to the measurement made by Dr. Wickremasooriya on the 23rd October of the height of the uterus which he alleged to be four finger-breadths. It was stated that no importance could be attached to this, or at any rate to Dr. Attygalle's reliance on it, in view of the indefiniteness what a four finger-breadth space was. This however overlooked the fact that Dr. Wickremasooriya had said in terms "My four finger-breadths measure $3\frac{3}{4}$ inches". In general, the Learned Judge proceeds on the basis that the period of gestation of a baby conceived as a result of a coitus on the 9th August had to be calculated as from the 11th July, thus giving a gestation period of 258 days. This is the old confusion again between the hypothetical calculation of the gestation period and the uterine life of an actual child. The Learned Judge sought to rehabilitate Dr. Thiagarejah and seems to have preferred his views to those of the doctors whom the Trial Judge accepted as reliable witnesses. The opinions of the latter were alleged to be "conflicting where they "are not hesitating and doubtful", and reliance is once again placed upon text books in preference to the evidence of the witnesses. It is respectfully submitted that the evidence of the doctors called by the Appellant, so far from being conflicting, hesitating or doubtful,

p. 734, l. 12-16.

p. 226, l. 21-4.

p. 567, l. 29-32.

p. 735, l. 11.

p. 214, l. 3.

p. 734, l. 39.

p. 738-9.

p. 737, l. 19.

were unanimous, confident and cogent. Of course, very considerable difficulties from the medical point of view were bound to come in once the Supreme Court proceeded on the basis that there was menstruation on the 11th July. The whole trend of the medical evidence accepted by the Trial Judge demonstrated that this was impossible, and once it was accepted that the First Respondent was telling lies about it, the whole picture became completely clear and intelligible. It is submitted that the fundamental error of the Supreme Court lay in putting the cart before the horse and in determining in the first instance, irrespective of the known facts of medical science and the history of the pregnancy, whether there was such a menstruation, instead of doing as the Trial Judge, it is submitted quite properly, did, namely, consider that portion of the evidence in conjunction with the whole of the rest of the evidence in the case.

p. 740-2. 27. The concurring judgment of Cannon J. does not add anything on the technical aspects of the case to the judgment of Wijeyewardene J. Cannon J. devotes his short judgment to explaining away some of the grounds given by the Trial Judge for holding that Dr. Thiagarejah was a partisan and biased witness.

28. It is submitted that there was no adequate ground for the Supreme Court accepting as witnesses of truth those persons whom the Trial Judge had found to be untruthful or at any rate unreliable, and for rejecting as unreliable the evidence of the witnesses whom the Trial Judge had held to be honest witnesses of truth. It is true that to a substantial extent the issues involved were technical and the witnesses accordingly gave evidence as experts. But, even as between opposing experts, the views of the Trial Judge who has seen their demeanour in the witness box and the manner in which they gave their evidence should not, it is submitted, be set aside in an Appellate Court. Furthermore, it is submitted that on the face of the printed record the evidence given by the Appellant's witnesses is compelling in its effect and cannot be fairly dismissed as lacking in clarity or decisiveness.

29. On the subsidiary issue as to the damages to be awarded
p. 738, l. 5-10. to the Appellant against the Second Respondent, the Supreme Court did not differ from the direction in law which the Trial Judge gave
p. 705, l. 5-10. himself. The Trial Judge said that the damages must not be exemplary or punitive but only compensatory and that in making the assessment there were two heads under which the matter should be considered, namely, the actual value of the wife to the husband and the proper compensation to be paid to him for the injury to his feelings, the blow to his marital honour, and the serious hurt
p. 705, l. 11. to his matrimonial and family life. He proceeded, as regards the first head, on the basis that the value of the First Respondent to the Appellant was nil and the Supreme Court did not differ from him

over this. On the second head, the Trial Judge stressed the treacherous conduct of the Second Respondent in betraying the trust imposed in him by the Appellant, and again the Supreme Court did not take a different view. Where they did differ was on two points. In the first place, they said that there was evidence of carelessness and neglect on the part of the Appellant in not determining the close association between the Second Respondent and the First Respondent. This however is directly contrary to the Trial Judge's findings—surely correct—when he said:—"How can "it be neglect or misconduct in a husband to ask a loyal and trusted "friend to look after his wife and sister-in-law while he was away? "What else is a man to do when he cannot take his wife away with "him?" It is true that the Trial Judge was dealing in this passage with the question whether there was connivance or conduct conducing on the part of the Appellant, but there can be no doubt that in assessing the damages also he had these considerations in mind. It is submitted that his findings on this were entirely justifiable and reasonable and that there were no grounds on which the Supreme Court could properly over-rule him. In the second place, the Supreme Court stressed that the Second Respondent had no property or source of income other than a Government salary of Rs 1,000/- a month, that he was in debt, had had cheques dishonoured, had been compelled to resort to Afghan money lenders, and had a wife and seven children to support. It is submitted that these matters are entirely irrelevant in assessing damages caused to the Appellant by his wrongful conduct, and that the Trial Judge was right when he said that "the amount of damages does not "depend on whether the adulterer is rich or poor, because a poor "man cannot by the plea of poverty escape from the actual injury he "has caused, nor can a rich man be compelled to pay more than "proper compensation merely because he is rich".

p. 738, l. 11.
p. 705, l. 17.
p. 738, l. 12.
p. 738, l. 16.
p. 703, l. 45.
p. 738, l. 28-33.
p. 705, l. 32.

30. Conditional leave to appeal to His Majesty in Council was granted by the Supreme Court on the 3rd August, 1945 and this leave was made final on the 19th October 1945.

31. It is submitted that the judgment and decree of the Supreme Court dated the 11th May, 1945, should be set aside and the judgment and decree of the District Court of Colombo dated the 27th February, 1943, should be restored for the following amongst other

REASONS.

1. BECAUSE the evidence adduced by the Appellant established clearly and decisively that the child Joseph Richard could not have been begotten on the only material occasion on which the Appellant had access to the First Respondent;

2. BECAUSE there were no adequate grounds for the Supreme Court accepting as truthful and reliable those witnesses whom the Trial Judge had held to be untruthful and unreliable nor for discrediting the witnesses whom the Trial Judge had held to be truthful and reliable;

3. BECAUSE if the evidence on the issue as to the paternity of the said child be read as a whole the conclusion arrived at by the Trial Judge is seen to be right and that arrived at by the Supreme Court is seen to be wrong;

4. BECAUSE the Trial Judge directed himself properly on the matters to be taken into consideration in assessing damages against the Second Respondent;

5. BECAUSE there was no valid ground for the Supreme Court varying the assessment of damages awarded against the Second Respondent.

D. N. PRITT.

STEPHEN CHAPMAN.

No. 76 of 1947.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN:

JOSEPH STANISLAUS ALLES

— *v.* —

MERLE ALLES neé DE COSTA

— AND —

Dr. T. S. M. SAMAHIN.

CASE FOR THE APPELLANT.

DARLEY CUMBERLAND & Co.,
36, John Street,
Bedford Row, W.C.1,
Solicitors for the Appellant.

Electric Law Press Ltd., Law & Company Printers, Warwick Court, W.C.1
13700