APPALSAMY *v.* JANKI AMMAI AND RAMA.

[In Divorce (Corrie, C.J.) April 15, 1940.]

Evidence of adultery—birth certificate—information given by co-respondent, on registering a birth, that he was father of respondent's child—whether admissible in evidence against respondent—Russell v. Russell applied to evidence of non access—whether a District Commissioner should forward findings of fact with his recommendation for a decree.

A District Commissioner admitted in evidence a birth certificate showing that the co-respondent was the father of respondent's child. The father admitted evidence of non access by the husband.

HELD.—(1) The registration of the co-respondent as father was irregular and inadmissible against the respondent.

(2) Applying *Russell v. Russell*, neither spouse can give evidence of non access if such evidence tends to bastardise a child born in wedlock.

(3) The term " general decision " in s. 12 of the Divorce Ordinance, 1883[1] is wide enough to include a finding of fact ; the Commissioner should make findings and forward them with his recommendations.

Cases referred to :—

(1) *Russell v. Russell* [1924] A.C. 687.

Order of the Supreme Court on the record forwarded by a Commissioner under s. 12 of the Divorce Ordinance 1883.[1]

CORRIE, C.J.—Under s. 7 of Ordinance 2 of 1892,[2] the birth certificate filed in this case (exhibit " E ") is evidence that the respondent, Janki, gave birth to a child on the 27th July, 1939, and as against the co-respondent, Rama, by whom information as to the birth was given, the fact that he, when giving such information, stated that he was the father of the child, is evidence that he had committed adultery with Janki. At the date of the registration, however, Janki was the lawful wife of the petitioner ; and hence, until a competent court had declared to the contrary, the petitioner was in law the father of the child, and his name was the only name that could have been so registered.

It follows that the registration of Rama as the father was irregular, and consequently it cannot be admitted in evidence against Janki.

Statements by the petitioner have been recorded to the effect that he had no access to the respondent during the period when the child must have been conceived. Under the rule in *Russell v. Russell* [1924] A.C. 687, however, which applies in this Colony, neither spouse may give evidence in a matrimonial cause or proceeding tending to show that he or she did not have marital intercourse, if such evidence would tend to bastardise a child prima facie born in wedlock. The petitioners statements, therefore, were not admissible in evidence.

It follows that as against the respondent, the petition rests upon the evidence of Hajara Singh that " the respondent and the co-respondent have been living together since the death of the co-respondent's wife at Kondais's store."

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[1] *Divorce (Summary Jurisdiction) Ordinance (Cap. 16) Revised Edition Vol.* I *p.* 405.
[2] *Vide Cap.* 117, *s.* 8 *(Revised Edition Vol. II p.* 1162.)

Under cross-examination he said : "I have seen you and the co-respondent asleep together near the store on the same mat."

If that is all that the witness really knows, it would not appear sufficient for a finding that the respondent and co-respondent have been living together as man and wife.

But if such be the fact, there must be other witnesses from the neighbourhood who can prove it.

The record is therefore remitted to the Commissioner, for the petitioner to be afforded an opportunity of submitting further evidence, if he so desires.

It is to be noted that the petition alleges an act of adultery "in December 1938" but there is nothing in the record to support that allegation : and the petitioner may desire to amend the petition in this respect.

Reference should be made to another point.

S. 12 of the Divorce Ordinance 1883,[1] requires that the Commissioner shall forward to the Supreme Court (*inter alia*) "a statement of the decree (if any) to which the petitioner is in his opinion entitled and the general decision at which he has arrived".

What is meant by the term 'general decision' is not free from doubt, and it may be for this reason that the practice has grown up of the Commisioner limiting himself to a recommendation as to the decree.

In consequence it is left to the Supreme Court, which has not heard the witnesses, to make the findings of fact. This is obviously unsatisfactory.

The term 'general decision' is wide enough to include a finding of fact : and the Court therefore holds that the Commissioner should make findings and forward them to the Supreme Court with his recommendations.

AH BEN *ats.* POLICE.

[Appellate Jurisdiction (Corrie C.J.) July 4, 1940.]

Liquor Ordinance 1932[2]—*s.* 85—*onus of proof that a person is a native—s.* 44—*onus of proof as to licence—Summary Jurisdiction Procedure Ordinance—s.* 30—*negative averments.*

Appellant was convicted on two counts—one of selling liquor to a native contrary to s. 66 of the Liquor Ordinance, 1932 and one of selling liquor without a licence contrary to s. 44 of the same Ordinance. On the first count no evidence was tendered to show that the purchaser of the liquor was a native ; on the second count no evidence was tendered to show that appellant was not the holder of a licence.

HELD.—(1) There is a sufficient allegation to satisfy s. 85 of the Liquor Ordinance 1932 (and so shift the onus of proof to the defendant) if it is alleged in the complaint that the person is a native.

(2) The prosecution must call evidence that the person charged was

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[1] *Cap.* 16.
[2] *Rep. Vide Liquor Ordinance,* 1946, *ss.* 46, 82, 92 *and* 93.