APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Oldfield.

1913. July 30 and 31 and August 7.

JOHN HOWE, PETITIONER,

v.

CHARLOTTE HOWE AND ANOTHER, RESPONDENTS.*

Divorce—Evidence Act (I of 1872), ss. 60, 112, 118 and 120—Non-access, competency of parties to testify to—Legitimacy of child—Expert opinion on legitimacy, relevancy of.

When in a suit for divorce the petitioner (husband) did not make any person as co-respondent but simply averred that his wife was generally leading the life of a prostitute, a judge would be wrong in adding a person as co-respondent *suo motu* without calling on the petitioner to amend the petition by making the necessary allegations against him. In the absence of the adoption of such a course the proper order to make is to strike out the co-respondent's name from the proceedings.

Whatever might be the English common law on the subject, under sections 118 and 120 of the Indian Evidence Act both the parties to proceedings for divorce are competent to give evidence as to non-access and the consequent illegitimacy of the child.

Held, on the evidence in the case that a child born 11 months after the cessation of marital intercourse was illegitimate and that the petitioner was entitled to a divorce.

Rosario v. *Ingles* (1894) I.L.R., 18 Bom., 468, referred to.

Under section 60 of the Evidence Act a Court can consider and act upon the opinions of experts contained in treatises as regards the question whether a particular child could or could not have been begotten just before the period of non-access.

CASE stated under section 14 of the Indian Divorce Act (IV of 1869), by A. EDGINGTON, District Judge of South Malabar, in Civil Miscellaneous Petition No. 206 of 1911.

The facts appear from the judgment.

J. C. Adam (*amicus curiæ*) for the petitioner.

C. Pattabhirama Ayyangar for the respondent.

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JUDGMENT.—This case comes before us, under section 17 of the Indian Divorce Act, for confirmation of a decree for a dissolution of marriage made by a District Judge.

The petitioner alleged in his petition to the District Judge that the respondent had been living in adultery in his (the

* Referred Case No. 14 of 1912.

petitioner's) house and that she admitted that she was living the life of a prostitute. He also alleged that he did not know any of the persons with whom adultery had been committed and asked to be excused from making the alleged adulterers co-respondents.

In the course of the proceedings the learned Judge on his own initiative made an order making one Alexander, a corespondent. In view of the terms of the petition, and in the absence of any application by the petitioner, we do not think the learned Judge was called on to do this. In our opinion he was certainly in error in not directing the amendment of the petition so that the allegations against the co-respondent might be stated therein. As the petition stands it contains no allegations against the co-respondent. An order for substituted service of "notice" on Alexander was made, but he did not appear.

In this state of things we think the best course to adopt is that suggested by Mr. J. C. Adam, who, at our request, appeared to support the decree, *i.e.*, to strike out Alexander's name and deal with the case as if he had not been made a co-respondent.

In paragraph 8 of his petition the petitioner with reference to his allegation that the respondent had been leading the life of a prostitute, asked to be excused from making any of the alleged adulterers co-respondents. He did not make any special application under section 11 of the Act, and no order under the section was made by the Court. The effect of the absence of any formal order does not seem to us, in the circumstances of this case, to be a matter which we need consider, since we are unable to agree with the learned Judge in his findings with reference to the allegations in paragraphs 6 and 7 of the petition.

During the pendency of the proceedings the respondent gave birth to a child. The case for the petitioner was that this child was born some eleven months after he had ceased to have marital intercourse with the respondent. He relied on the birth of this child as evidence of adultery. Here again the petition ought to have been amended. It is quite clear, however, that the respondent was in no way prejudiced or embarassed in her defence by the fact that there was no amendment. The child was born in February 8, 1912. The petitioner and his witnesses were examined on April 18, 1912,

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They were not cross-examined on behalf of the respondent till September 24, 1912. The respondent's witnesses were examined and cross-examined on that date. The explanation of the delay would seem to be (in part, at any rate) that when the suit came on for hearing, in the first instance, in April 1912, the respondent did not appear. On March 21, 1912, she had applied for a fortnight's adjournment and produced a medical certificate. She stated that she desired to defend the case. The case would seem to have been adjourned till April 18. On that day the respondent did not appear and made no application for a further adjournment. The suit proceeded on April 18 as an undefended suit and, after the evidence of the petitioner and of five witnesses called on his behalf had been heard, was adjourned. Subsequently an order was made (we are told with the consent of the petitioner) that the respondent should be allowed to defend the suit. One thing is clear, and that is that the respondent had ample notice of the case made against her in connection with the birth of the child. Moreover she admitted the birth of the child. Her case was that marital intercourse took place between the petitioner and herself during March, April and May 1911, and that the petitioner was the father of the child.

[Then their Lordships dealt with the evidence as to the wife's adultery and concluded as follows :—]

Although the evidence called on behalf of the petitioner in our opinion does not establish adultery by the respondent prior to March 1911, it shows that she was a woman of loose habits and that her house was visited by men in the absence of her husband and against his wishes.

As regards the birth of the child, two questions arise: first, are the petitioner and the respondent competent witnesses? secondly, if they are, are we warranted in holding, on the evidence taken as a whole that the child is illegitimate? General rule of the English common law that evidence of non-access by the husband for the purpose of proving illegitimacy is quite clear. In England the Evidence Act of 1851, and the Evidence Amendment Act of 1853, left the parties to suits for divorce incompetent to give evidence. In 1857, when the English Divorce Act was passed doubts were caused as to how far the old doctrines of the common law in relation to the competency of

witnesses were to be recognised in the Divorce Court. It was accordingly enacted by the Evidence Further Amendment Act, 1869, that the parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties should be competent to give evidence in such proceeding (Taylor on Evidence, edition 10, volume II, pages 962, 963). The effect of this enactment is to make the parties to divorce proceedings competent to give evidence. It does not in terms abrogate so far as divorce proceedings are concerned, the rule of the common law that "neither husband nor wife can be examined for the purpose of proving non-access during marriage." See *Rex* v. *Sourton* (*Inhabitants*)(1). The judgment in *Guardians of Nottingham* v. *Tomkinson*(2) would seem to proceed on the assumption that in divorce proceedings instituted in consequence of adultery the evidence of the husband is admissible to prove non-access. In *Burnaby* v. *Baillie*(3) NORTH, J., declining to follow In re *Yearwood's Trusts*(4), held that evidence of the husband *after the dissolution of the marriage* was not admissible to prove the illegitimacy of a child born in wedlock. In *Pryor* v. *Pryor*(5) on a petition for variation of settlements after a decree for dissolution of marriage by reasons of the wife's adultery, where a child had been born between the date of the decree *nisi* and decree absolute, and fourteen months after the wife had eloped from her husband the Court refused to transfer funds in settlement to the parties free from the trusts of the settlement, and also refused to order an inquiry into the legitimacy of the child. Lord HANNEN observed that the decree was founded on the petitioner's evidence, which was not admissible to bastardize the child. We have not been able to find any English case wherein a suit for divorce in which the husband relied on the birth of the child which he alleged to be not his as proof of adultery the evidence of the husband as to non-access was tendered and excluded.

We do not propose to discuss further the law of England since we are of opinion that under the law of this country the evidence of the petitioner as to non-access is admissible. We do not think it has even been suggested that, at any rate,

(1) (1836) 5 Ad. & El., 180; s.c., 111 E.R., 1134.
(2) (1879) 4 C.P.D., 343.
(3) (1889) 42 Ch.D., 282.
(4) (1877) 5 Ch. D., 545.
(5) (1887) 12 Pr., 165.

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since the passing of the Indian Evidence Act, 1872, parties to proceedings under the Indian Divorce Act, 1869, are not competent witnesses. In England the disabilities of parties as witnesses have been removed piece-meal by a series of legislative enactments. In India we have the enabling enactment in section 118 of the Evidence Act, that all persons are competent to testify, unless the Court considers they are prevented from understanding the questions put to them or from giving rational answers. We have the further enactment in section 120 that in all civil proceedings the parties to the suit, and the husband or wife of any party shall be competent witnesses.

It does not of course follow that, because the husband is a competent witness in divorce proceedings, his competency is not subject to the rule of the English common law as to evidence by him of non-access assuming the rule would in England be held applicable in a case like the present. We think, however, the effect of section 118 is to make the husband a competent witness for all purposes. In Ameer Ali and Woodroffe on the Law of Evidence the learned authors observe (edition 2, page 771) after stating the English rule, that no such rule is to be found in or implied from the Evidence Act and in *Rosario* v. *Ingles*(1), the Bombay High Court took the view that the question was governed by section 118 of the Evidence Act.

There remains the question what should be our finding of fact on the question whether the child born to the respondent on February 8th, 1912, was the child of the petitioner or the result of some adulterous connection ?

[Their Lordships after discussing the evidence on the point concluded as follows:—]

We hold it proved by admissible evidence that no matrimonial intercourse took place after March 11, 1911, between the petitioner and the respondent. The case for the respondent was that the child was begotten by the petitioner after he left her and went to live at the Malaparamba house. As we disbelieve this evidence, it seems at least doubtful whether we are called upon to consider whether the child could have been begotten by the petitioner before March 11th. Having regard, however, to the language of section 112 of the Evidence Act, i may be that it is necessary to deal with this question.

(1) (1894) I.L.R., 18 Bom., 468.

If the petitioner was the father of the child, the period of gestation must have been 333 or 334 days. In the print of the judgment the period is stated to be 344 days. If the learned Judge said this it would appear to be inaccurate.

A period of 333 days would be altogether abnormal. The opinions of the medical authorities are cited in the judgment of the Allahabad High Court in *Tikam Singh* v. *Dhan Kunwar*(1). It would seem that it may be regarded as proved that the period may be 296 days and that most authorities agree that the interval may be as long as 308 days. The period fixed by the legislature for the purposes of section 112 of the Evidence Act is 280 days. There may be some doubt whether, in view of the language of section 112, evidence as to there lations between the parties or evidence which pointed to immorality on the part of the mother, or evidence of a long interval since the birth of a previous child is relevant to the question we are now dealing with, though these matters were taken into consideration in the Allahabad case to which we have referred. Under the law of England the matter is one of presumption which may be rebutted [see *Morris* v. *Davies*(2)]. Under the Evidence Act the fact that a child was born during the continuance of a valid marriage is conclusive proof of legitimacy, unless it can be shown that the parties had no access to each other at any time *when the child could have* been begotten. It may be said that the considerations to which we have referred are irrelevant as regards the question whether the child could or could not have been begotten prior to March 11th. Under the section it would seem that, we have to decide whether the child could or could not have been begotten immediately before the date when the marital intercourse, which, the law presumes, between the petitioner and the respondent, in fact ceased. With regard to this we are of opinion that, although there was no expert evidence in the Court below, we are entitled under section 60 of the Evidence Act to consider and act upon the opinions of experts contained in the treatises to which we have referred. We are prepared to hold that it has been shown in this case that there was no access by the petitioner at any time during which the child could have been begotten. The decree is confirmed.

(1) (1902) I.L.R., 24 All., 445 (2) (1837) 5 Cl. & Fin., 163.