APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

SETHU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

PALANI alias THIRUMENI THEVAN (PLAINTIFF), RESPONDENT.*

1925, October 20.

Evidence Act (Indian), Act I of 1872, sec. 112—Legitimacy—Presumption—Hindu woman—First marriage—Divorce—Marriage to another—Birth of a son within four months of divorce and during continuance of second marriage—Son, whether legitimate son of the first or second husband—No proof of want of access of second husband at a time when the son could have been begotten—English and Indian Law.

Where a Hindu woman was married to *S* in October 1903, was divorced by him in June 1904, married *T* in July 1904 and gave birth to a son in September 1904 and there was no proof that *T* could not have had access to her at any time when the son could have been begotten,

Held, that, under section 112 of the Indian Evidence Act, which applied to the case, the son should be held to be the legitimate son of *T*, who was the husband of his mother at the time of his birth, even though the intercourse between her and *T* was during the continuance of her marriage with *S* and was adulterous.

Collector of Trichinopoly v. *Lakkammani and others* (1874) 1 I.A., 282 (292), and *Ingestre* v. *Attorney-General* commented on in 30 Law Quarterly, page 153, relied on.

APPEAL under clause 15 of the Letters Patent against the Judgment of KRISHNAN, J., in Second Appeal No. 1115 of 1921.

The material facts appear from the Judgment. The first Court decided in favour of the plaintiff. The lower Appellate Court reversed the decree, and on second

* Letters Patent Appeal No. 27 of 1924.

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appeal, KRISHNAN, J., reversed the decree and restored that of the District Munsif. The defendants preferred this appeal. The judgment of KRISHNAN, J., is reported in 47 Mad., 706.

L. A. Govindaraghava Ayyar (with *P. S. Narayanaswami Ayyar*) for appellants.—Under the Hindu Law there are only two kinds of sons now recognized, viz., (1) aurasa son and (2) adopted son; a son begotten in adultery cannot be recognized under the Hindu Law; such a son cannot be legitimized in effect under the provisions of section 112 of the Indian Evidence Act. The plaintiff was begotten by *T* in adultery with the woman during the continuance of her marriage with her first husband. Section 112 is only a rule of presumption and cannot affect the substantive law of the parties. Under the English Law, a child of adulterous connexion does not become legitimate by subsequent acknowledgment. See *Birtwhistle* v. *Vardill*(1). See *Ingestre* v. *Attorney-General*, reported in the "Times," dated 14th October 1913, and commented on in 30 Law Quarterly, at pages 153 to 157. In English Law, though conception may be prior to marriage, if the birth is subsequent to marriage, the issue will be legitimate, but in Scotland both conception and birth may be prior to marriage, which will legitimize the issue. But both in Scotland and in England, prior conception should not be adulterous: See *The King* v. *Luffe*(2), *Rahi and others* v. *Govind Valad Taja*(3), *Nicholas* v. *Asphar*(4), Bannerjee in his book on Stridhanam (6th Edn., 1913, pp. 164-166) criticises the decision in 1 I.A., 282; Hunter's Roman Law, p. 201. The French Law is to the same effect. Hindu Law is even stricter, requiring both conception and birth

(1) (1835) 2 Cl. & Fin., 571; s.c., 6 E.R., 1270.
(2) (1807) 8 East., 193; s.c., 103 E.R., 316.
(3) (1876) I.L.R., 1 Bom., 97 at 116, 117.
(4) (1897) I.L.R., 24 Calc., 216.

to be after lawful marriage, if issue is to be legitimate. Section 112, Indian Evidence Act, does not override the substantive Law. See *Baijnath Singh* v. *Mahomed Hajee Abba*(1), *Muhammad Allahverd Khan* v. *Muhammad Ismail Khan*(2).

K. V. Krishnaswami Ayyar for respondent.—The Hindu Law is not different from the English Law on this question. Even under the Hindu Law there were sons called *Kanina* and *Gudaja* : *see* also Manu, Chapter 9, verse 173. The Evidence Act can and does enact substantive law. Conclusive proof is defined in Evidence Act, section 4. The case in *Nicholas* v. *Asphar*(3) is distinguishable, because there the remarriage had not taken place, before the child was born.

JUDGMENT.

DEVADOSS, J. DEVADOSS, J.—This appeal raises a novel question. The plaintiff's mother Pechiammal was first married to one Subramania Thevan in September or October 1903, who divorced her in May or June 1904. She married again one Thirumeni Thevan in June or July 1904. The plaintiff was born to her in September 1904. The plaintiff sues for partition of his one-third share in the property of Thirumeni Thevan. The District Munsif held that the plaintiff was the son of Thirumeni Thevan and passed a preliminary decree in his favour. The Subordinate Judge reversed the decree of the District Munsif holding that the plaintiff was not the legitimate son of Thirumeni Thevan. Mr. Justice KRISHNAN set aside the decree of the Subordinate Judge and restored that of the District Munsif holding that the plaintiff was the son of Thirumeni Thevan. There is evidence in the case to show that Pechiammal did not live with her first husband for any length of time but carried on

(1) (1925) 48 M.L.J., 339 (P.C.). (2) (1888) I.L.R., 10 All., 289.
(3) (1897) I.L.R., 24 Calc., 216.

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an intrigue with Thirumeni Theven in consequence of which there were criminal proceedings and Subramania Thevan divorced her on account of her conduct. There is also evidence that Thirumeni Thevan treated the plaintiff as his son and that at the time the plaintiff could have been conceived his mother was having criminal intimacy with Thirumeni Thevan.

The question in this case turns upon the construction of section 112 of the Indian Evidence Act. Under section 112, if a person is born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, he shall be considered to be the son of his mother's husband unless it could be shown that the husband had no access to his mother at any time when he could have been begotten. If a person is born during wedlock, the law says it is conclusive proof that he is the legitimate son of the husband of his mother, and the onus of proving that the husband had no access to the mother at any time he could have been begotten is upon the husband. In this case, complication is introduced by the mother marrying again. If the plaintiff's mother had not married Thirumeni Thevan, the plaintiff would be considered to be the son of Subramania Thevan, and the onus would be upon Subramania Thevan or any other who challenges his paternity to prove that he was not begotten by Subramania Thevan. But the plaintiff's mother married Thirumeni Thevan when she was *enceinte* and the plaintiff was born during the subsistence of a valid marriage between his mother and Thirumeni Thevan. According to section 112, plaintiff is the son of Thirumeni Thevan, and unless and until it is proved that Thirumeni Thevan had no access to Pechiammal, the plaintiff's mother, at any time he could have been

begotten, the onus is on those who challenge his paternity. There is no proof in this case that Thirumeni Thevan had not access to the plaintiff's mother at the time he could have been begotten. On the other hand, the evidence shows that Thirumeni Thevan was carrying on an intrigue with Pechiammal at the time when the plaintiff could have been begotten.

The argument of Mr. Govindaraghava Ayyar is that, according to Hindu Law, there are only two classes of sons, Aurasa and Dattaka sons, and to import section 112 of the Evidence Act into the region of Hindu Law would be giving section 112 the force of substantive law overriding the principles of Hindu Law. The Evidence Act was enacted for the purpose of enabling the Courts to act upon relevant evidence and to come to a conclusion on such evidence. In order to enable the Court to decide matters satisfactorily, the law of evidence requires the Court to raise certain presumptions and section 112 raises one of those presumptions, and the presumption is a rebuttable one, and until it is rebutted it should be considered conclusive proof. Before considering whether section 112 has made an inroad into the Hindu Law or not, it is necessary to consider whether the parties to this case are persons who are governed by the Code of Manu. No doubt the Courts have acted upon the general presumption that the Hindu Law applies to all persons who are not Christians, Muhammadans or persons professing any distinctive faith. Hindu Law, strictly so-called, cannot be applied to some of the castes in this Presidency. According to Hindu Law there can be no divorce and there can be no remarriage of widows. But according to the custom prevailing among the Maravars in Southern India a man can divorce his wife at any time he likes and a divorced woman as well as a widow could validly remarry; and

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the children of such remarriage are legitimate and inherit to their parents. It is, therefore, difficult to see how section 112 can be said to militate against or override any of the principles of the Hindu Law. Even according to Manu's Code, the plaintiff would be considered the legitimate son of Thirumeni Thevan. Section 173 of Chapter 9 is in these terms :

> "if one marries a pregnant young woman, whether pregnancy be known or unknown, the male child in her womb belongs to the bridegroom and is called the son received with the bride."

It might be said that this rule applies only to virgins. But whether it applies to virgin or divorced woman or to widow, Manu did recognize the fact that pregnant women could be validly married and the child who was *en ventre sa mere* at the time of the marriage was the child of the husband. In Manu's time, the levirate was prevalent—vide Chapter 9, section 167. In Manu's time remarriage of widows was prevalent, though Manu condemned it. When the remarriage of a widow or a divorced woman is valid according to the law of the parties, it cannot be said that the rule which says that a person born during the subsistence of a valid marriage shall be considered to be the son of the husband is opposed to the Hindu Law. Mr. Govindaraghava Ayyar for the appellant relied upon several English cases, *Birtwhistle* v. *Vardill*(1), *The King* v. *Luffe*(2). These cases have no application to the question to be decided in this case. According to the law of Scotland, the marriage between a man and a woman legitimizes their issue born before marriage. But the law of England does not recognize any person as legitimate who is not born during lawful wedlock or within 280 days

(1) (1835) 2 Cl. & Fin., 571 ; s.c. 6 E.R., 1270.
(2) (1807) 8 East., 193 ; s.c. 103 E.R., 316.

of the dissolution of marriage either by death or by a decree of Court. The Hindu Law is the same in this respect as the English Law. [*Collector of Trichinopoly* v. *Lekkammani and others*(1)]. On grounds of public policy, under the English Law, a person born during the lawful wedlock is held to be legitimate, and the onus of proving that he is illegitimate is on the person who asserts it. The question as it has arisen in this case has not arisen in any English case. Sir James Stephen in his Book on Evidence says that he is not aware of any decided case on the point. Thayer in his Treatise on Evidence, page 349, refers to an American case. Mr. Govindaraghava Ayyar relied upon the rule in French Code and also upon the Roman Law on the point. I think it is unnecessary to consider what the rule is in other systems of law about the legitimacy of a person. According to the Indian Evidence Act all that is necessary to show that a person is legitimate is that he was born either during wedlock or within 280 days of the dissolution of the marriage. In this case there is no question of illegitimacy at all. If Thirumeni Thevan had not married Pechiammal the plaintiff would be the legitimate son of Subramania Thevan. Thirumeni Thevan having married her he becomes the legitimate son of Thirumeni Thevan. The law no doubt leaves it to Thirumeni Thevan or any other person who challenges his paternity to prove that Thirumeni Thevan had not access to the plaintiff's mother at any time he could have been begotten. In the case of *Ingestre* v. *Attorney-General* reported in the Times of October 14, 1913, this question arose.

In that case the petitioner's mother was twice married. She had left her first husband in 1881, and on May 16, 1881, he presented a petition for divorce; a

(1) (1874) I.I.A., 282 at pp. 292 and 293.

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decree nisi was pronounced on December 10, 1881, and was made absolute on June 20, 1882. A day or two afterwards she married her second husband, with whom she had cohabited since she left her first husband, and the petitioner was born on September 8, 1882. The evidence satisfied the Court that he was the son of the second husband, and the question of law then arose whether he was the legitimate son of his father, for although he was born in wedlock he was conceived at a time when his parents could not lawfully have been married.

Sir Samuel Evans, President of the Probate Division, answered the question in the affirmative. We have not been able to get at the report of this case, but the case is discussed in 30 Law Quarterly at pages 153 to 157. The facts in that case are very similar to the present and though the judgment in the case is not before us the conclusion arrived at by the learned President of the Probate Division is in conformity with section 112 of the Indian Evidence Act.

The decision in *Rahi and others* v. *Govind Valad Teja*(1) has no application to the present case. In that case, the question was whether a person was the illegitimate son of his father when his mother was not kept continuously by the father. As I have already observed, there is no question of illegitimacy in this case. Either the plaintiff is the legitimate son of Subramania Thevan or the legitimate son of Thirumeni Thevan. If his mother had not married Thirumeni Thevan the plaintiff would be considered the legitimate son of Subramania Thevan. The words of the section have to be given their proper meaning. The legislature intended that if the mother married again, the child born during the subsistence of a second marriage would

(1) (1876) I.L.R., 1 Bom., 97.

be considered to be the child of the man whom the mother married again. Without going into the public policy of the law enacted in section 112 it is sufficient to say that, if a person is born during lawful wedlock, he is the son of the husband of his mother. It is open to those who say that the plaintiff is not the son of Thirumeni Thevan to prove that Thirumeni Thevan could not have had access to Pechiammal at any time when the plaintiff could have been begotten. If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not have had access to the woman when the pregnancy commenced, make out that the child is not his. But if a person knowing that a woman is pregnant marries her, the child of the woman though born immediately after the marriage becomes in law his child unless the man proves that he had no access to the woman, when he could have been begotten. The plaintiff therefore is the son of Thirumeni Thevan and is entitled to a share of his properties.

In the result the appeal is dismissed with costs.

WALLER, J.—This appeal raises a question under section 112 of the Indian Evidence Act. The facts found are these. Plaintiff's mother was married to one Subramania Thevan in October 1903. She was divorced in June 1904 and married Thirumeni Thevan a month later. In September, Plaintiff was born to her. The question is whether, on these facts, plaintiff is to be regarded as the legitimate son of Thirumeni Thevan. The District Munsif thought that he should be so regarded. The Subordinate Judge held that he was the legitimate son of the first husband. KRISHNAN, J., agreed with the District Munsif.

On the language of section 112, I think that KRISHNAN, J., is right. Plaintiff was born during the

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continuance of a valid marriage between the mother and Thirumeni Thevan and there is no proof of non-access during the material period. The argument contra is that a child conceived during adulterous intercourse can never become legitimate even though the parents have been validly married before its birth. That was at one time the view of English lawyers and it appears to be still the law in France. In English Law, where, as a concession, a child conceived before marriage as the result of a non-adulterous connexion was regarded as legitimate if born after the marriage of its parents, the concession was based on a fiction which dated back the marriage to the conception. The fiction was, of course, not applicable to the fruit of an adulterous connexion, for the parents could not lawfully have married at the time of conception. That, however, is not the law of India as stated in section 112 of the Indian Evidence Act. Nor is it the present law of England, vide *Ingestre* v. *The Attorney General*, a case of which we have got no report, but which is commented on in an article in 30 Law Quarterly, p. 153. Mr. Govindaraghava Ayyar argues that it is opposed to Hindu Law but the Privy Council in *Collector of Trichinopoly* v. *Lekkamani and others*(1), decided that the English and Hindu Law do not differ in such matters. An Indian case has been referred to, *Nicholas* v. *Asphar*(2). There the first husband died in November 1841. The widow married again in December 1841 and gave birth to a daughter in April 1842. The learned Judge found that the daughter was the legitimate daughter of the first husband. No doubt, she was born within 280 days after the first husband's death but the section requires that the widow *should not have re-married*. If she does, the presumption is that the child is the legitimate child of the second

(1) (1874) 1 I.A., 282.

(2) (1897) I.L.R., 24 Calc., 216.

husband. No doubt, that presumption can be rebutted by proof of his non-access during the material period. If such proof be forthcoming another presumption would arise that the child was the legitimate offspring of the first husband. But with great respect, I do not think that the learned Judge stated the law correctly when he said that "presumption of legitimacy arising from conception during a valid subsisting marriage is conclusive." The date of birth and not that of conception is the test. In the case of a dissolution not only must the birth be within 280 days but the widow should further not have re-married. I agree that the appeal should be dismissed with costs.

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K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

S. K. MARIYA PILLAI AND ANOTHER (RESPONDENTS), PETITIONERS,

v.

MUTHUVELU PANDARAM (PETITIONER), RESPONDENT.*

1925, July 13.

Local Boards Act (XIV of 1920) ss. 56 and 57—Taluk Board—Meetings—Failure of member to attend meetings—Discontinuance of membership, when caused—Non-attendance for three consecutive months, not three meetings, necessary—Computation of period of three months—From date of first default—Erroneous ruling of President that there was no discontinuance—No opportunity to Board to restore member—Decision as to discontinuance, whether affected.

Under section 56 (1) (*h*) of the Local Boards Act, 1920, it is the failure of a member of a Taluk Board to attend meetings of the Board for three consecutive months, and not three consecutive meetings, that entails discontinuance of his membership.

* Civil Revision Petition No. 311 of 1924.