APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

JAGANNATHA MUDALI AND THREE OTHERS (DEFENDANTS 3 TO 6), APPELLANTS,

1931, April 21.

v.

P. T. CHINNASWAMI CHETTI AND EIGHT OTHERS (PLAINTIFF AND DEFENDANTS 1, 2, 8, NIL AND LEGAL REPRESENTATIVES OF PLAINTIFF), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 112—"Access" in—Meaning of—Presumption in favour of legitimacy under the section—Nature of—Limit to.

"Access" in section 112 of the Indian Evidence Act means sexual intercourse and not merely "opportunity of access".

Under section 112 there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference.

Observations on the kind of evidence required to rebut the presumption that the husband had intercourse with the wife.

APPEAL against the decree of the Court of the Subordinate Judge of Vellore in Appeal Suit No. 36 of 1926 (Appeal Suit No. 146 of 1925 on the file of the District Court, North Arcot) preferred against the decree of the Court of the District Munsif of Vellore in Original Suit No. 962 of 1921.

B. C. Seshachala Ayyar for appellants.

S. Varadachari (with him *A. S. Sivakaminathan* and *C. Rajagopalan*) for respondents.

Cur. adv. vult.

* Second Appeal No. 368 of 1928.

JAGANNATHA MUDALI v. CHINNASWAMI CHETTI.

JUDGMENT.

This appeal raises a question regarding the construction of section 112 of the Indian Evidence Act.

The eighth defendant is the wife of one Kuppathai Mudali and the third and fourth defendants are her sons. The plaintiff disputes their legitimacy alleging that the eighth defendant was living in adultery. The point to be decided is, whether the third and fourth defendants are the legitimate sons of Kuppathai. The findings of fact, which, this being a second appeal, I must accept, are that Kuppathai married the eighth defendant about 1876, but discarded her in 1881 owing to some suspicion about her chastity; that he then married a second wife and lived at a place called Govindanpadi, whereas the eighth defendant left for Kilachur, a village within two miles of that place. There she was residing, and the Subordinate Judge thinks that she was having immoral relations with some person. The third defendant was born in 1891 and the fourth in 1898. It is not found that Kuppathai did not have opportunities of access to his first wife; on the contrary, the evidence seems to indicate that he had them. In regard to the period to which reference must be had, the evidence no doubt is very vague; but Kuppathai in 1902 purchased for her some property and in 1905 executed a document settling some lands on her and on her children. In this, Kuppathai describes the boys as the sons of the eighth defendant. I may remark in passing that the learned Subordinate Judge thinks that these words strongly support the contention that the children are illegitimate. There are other passages on which the Judge relies, to which I need not refer. Later in the same year and again in 1906, Kuppathai bought for her some more property. The evidence also shows that he allowed the boys to visit him and took some kind of interest in them, though what precisely its

nature was, it is difficult to say. In 1909, he executed a writing repudiating the children as illegitimate. That was attested by several persons, including one Rasappa, a brother of the eighth defendant. This man has not been cited as a witness, although the eighth defendant admits that they have been on friendly terms. What led to this repudiation the evidence does not clearly show; but it is suggested that it was some members of his caste that induced Kuppathai to take this step. This was followed in 1915 by a deed which he executed revoking the settlement of 1905. Then there was an open quarrel which led to various proceedings in Courts—where the legitimacy of the boys was asserted by the one side and disputed by the other. I have forgotten to mention that in 1909, about the time when Kuppathai repudiated the boys, he married a third wife. He having died in 1918, his second and third wives sold a part of his estate to the plaintiff, who thereupon has brought the suit. It is in this way that the question of the legitimacy of the third and fourth defendants has been raised. The Subordinate Judge, differing from the trial Court, has decided the point against them.

Their Counsel has not succeeded in showing that his findings, so far as they are questions of fact, can be attacked in second appeal. I have referred in this judgment to those facts alone which bear on the question whether Kuppathai had opportunities of access to his wife or not. That being the important point with which I have to deal, as I shall show presently, I do not propose to refer to the other facts on which the Subordinate Judge relies. The question, as I have said, is, what is the effect of section 112 of the Evidence Act?

According to that section, the fact that a child was born in lawful wedlock is "conclusive proof" that it

JAGANNATHA MUDALI v. CHINNASWAMI CHETTI.

is the legitimate son of its mother's husband. If the section had stopped there, the presumption would be an irrebuttable one, what is termed *presumtiones juris et de jure*. But the section does not end there, for then follows a clause beginning with the word "unless" which reads thus :—

"Unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The effect of the section taken with that clause, therefore, is that the presumption is not an irrebuttable one, though the words "conclusive proof" (defined in section 4) are used. The section itself enacts how that presumption can be rebutted. It can yield only to positive proof of want of access, whatever the word "access" may mean. If that access is proved, nothing further remains, the presumption rebuttable in the first instance becomes at once irrebuttable. This is the effect of section 112. That there are two distinct presumptions, differing in kind from each other, is sometimes lost sight of, and that has led to some confusion. With these remarks, let me now turn to the meaning of the word "access". If that means "opportunity of access", the plaintiff must fail, for Kuppathai, I have said, had such opportunity. If, on the other hand, it means sexual intercourse, I am afraid I cannot disturb the Subordinate Judge's finding in second appeal. In my opinion, there can be no possible doubt on the authorities that the word means sexual intercourse. That was declared after great deliberation to be the law in the *Banbury Peerage Case*(1). It was there pointedly stated that access in this connection means sexual intercourse and nothing short of it. Now the learned Judges go so far as to use the word "access" in the sense of

(1) (1811) 1 Sim. & Stu. 153; 57 E.R. 62.

sexual intercourse to distinguish it from non-access or non-generating access. The expression "opportunities of access" is also found used by the Judges as something different from actual intercourse. The effect of the *Banbury Peerage Case*(1) may be thus summed up: The presumption of legitimacy arises from the birth of a child during wedlock; but that presumption may be rebutted by evidence that such access did not take place between the husband and the wife as by the laws of nature is necessary, for the man to be, in fact, the father of the child. It is not the opportunity of access that matters, but sexual intercourse. The presumption in favour of legitimacy is also thus expressed:

"Where a child is born in lawful wedlock . . . sexual intercourse is presumed to have taken place between the husband and the wife, . . . "

This presumption, in whatever way it may be stated, is, as pointed out, a rebuttable presumption, a presumption that may be rebutted by counter-evidence, showing non-access.

Then comes the question, where does the other presumption to which I have referred *presumptiones juris et de jure* come in? Now let us turn to the next leading case on the point, *Morris* v. *Davies*(2). The Lord Chancellor (in the House of Lords), after stating that the presumption that in the case of husband and wife sexual intercourse took place can be rebutted, goes on to observe:

"If sexual intercourse be proved, that is, if the Jury or the Judge trying the question of fact be satisfied that sexual intercourse took place between the husband and the wife at the time of the child being conceived, the law will not permit an inquiry whether the husband or some other man was more likely to be the father of the child."

(1) (1811) 1 Sim & Stu. 153; 57 E.R. 62.
(2) (1837) 5 Cl. & Fin. 163; 7 E.R. 365, 396.

JAGANNATHA MUDALI v. CHINNASWAMI CHETTI.

This is the point of distinction. If access or sexual intercourse is proved, the presumption to be drawn becomes an irrebuttable one. The point is brought out very clearly in the following passage from the judgment of SWIFT J. :—

> "Any woman may, and some do, have sexual intercourse with more than one man in the course of a few hours; and if a woman has within the period during which conception must have taken place had connection with more than one man * * * the law presumes that if one of those men is her husband, the child is his. * * * However many men she has had connection with nothing can bastardize the child unless non-access of or non-intercourse by the husband can be proved."

Warren v. *Warren*(1). In the words of ALDERSON B. in *Cope* v. *Cope*(2), the law will not, under such circumstances, allow the balance of the evidence as to who is most likely to have been the father. In short, there is a presumption to start with in favour of legitimacy ; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access ; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference. It is confounding these two presumptions, when the law is being stated, that leads to difficulty ; but as regards what the law on the point is, there can be, as I have said, no doubt.

Then the further question arises, what is the kind of evidence that is required to rebut the presumption of legitimacy, in other words, the presumption that the husband had intercourse with the wife, which should

(1) [1925] P. 107, 112. (2) (1833) 5 Car. & P. 604; 172 E.R. 1119.

have made him the father of the child? That presumption is a very strong one, but the strength of it would vary with the circumstances of each case. *The Aylesford Peerage*(1) furnishes a striking instance, where it was held that the presumption of legitimacy was rebutted. The facts are, the lady eloped in 1876 and a deed of separation was executed in 1877. From the time of the elopement till the birth of the child in 1881, the mother lived in a state of adultery with Lord Blanford. The husband and the wife, no doubt, were at the same time, during the critical period when the child might have been conceived, at different houses in London. In those circumstances, the question was raised whether the presumption was rebutted. It was answered in the affirmative. Lord BLACKBURN goes so far as to say that, although the marriage tie remained undissolved, the facts stated having been found, *no presumption can arise* that the husband had cohabited with his wife. But it seems to me, having regard to section 112 of the Evidence Act, it is unnecessary to go so far. The presumption must be drawn under that section, though, on the facts proved, it may become attenuated. In *Hetherington* v. *Hetherington*(2), where an order was made under section 4 of the Matrimonial Causes Act, 1878, authorizing a wife to refuse to cohabit with her husband, it was held that from the time of such an order "all the presumption which exists in the case of married persons as to access and the legitimacy of children *is reversed*". Again, I may point out that it is not necessary for us to go so far. The case shows that, while normally the presumption is strong, in certain cases it is not quite so strong. The last-mentioned case is approved in *Andrews*

(1) (1885) 11 App. Cas. 1. (2) (1887) 12 P.D. 112.

JAGANNATHA MUDALI v. CHINNASWAMI CHETTI.

v. *Andrews and Chalmers*(1). In the case to which I have referred, *Morris* v. *Davies*(2), the husband and wife agreed to separate and afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse. On the facts, it was held that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation was rebutted. It is unnecessary to multiply cases. The short question is, has the learned Judge correctly applied these principles? He is wrong in stating that there was judicial separation between Kuppathai and his wife. Such a conception is foreign to the Hindu Law. The statement that, in the case of children born after such separation, there is no presumption that they are legitimate is, as I have said, also open to exception. But have these errors vitiated his judgment? In the weighing of the evidence, he has not been influenced by his somewhat inaccurate statement of the rule of presumption. Indeed, the case was a difficult one to try, but all the facts were considered by the Judge. It may be, on the evidence, another Judge may come to a different conclusion, but that is no reason why I should disturb the finding in second appeal.

The appeal as well as the cross-appeal is dismissed with costs.

A.S.V.

(1) [1924] P. 255. (2) (1837) 5 Cl. & Fin. 163; 7 E.R. 365.