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I have pointed out before, the first mortgagee did not by the sale part with the personal remedy against the mortgagor. For that right he will have received no consideration whatever if the redemption money be ordered to be paid to the purchaser. I therefore concur in the order passed by the Chief Justice, and would dismiss this appeal.

BURKITT, J.—I have had an opportunity of perusing the judgments just delivered by the learned Chief Justice and my brother Blair. I fully concur in the conclusions at which they have arrived, and in the reasons given therefor. I have nothing to add.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

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TIRLOK NATH SHUKUL AND OTHERS (PLAINTIFFS) *v.* LACHMIN KUNWARI AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Act No. I of 1872 *(Indian Evidence Act), section* 112*—Presumption as to paternity of child born after death of husband—Burden of proof—Illness of husband rendering act of begetting child improbable.*

Where a child was born after the death of the husband, under such circumstances as to give rise to the presumption under section 112 of the Evidence Act (I of 1872). *Held* in a suit by the appellants to dispute the paternity of the child that the burden of proof lay on them, and that on the evidence the presumption was not rebutted (1).

APPEAL from a decree (7th August, 1899) of the High Court at Allahabad, which reversed a decree (22nd March, 1897) of the Subordinate Judge of Gorakhpur.

The suit was brought by the appellants against the respondents to have it declared that the first respondent Musammat Lachmin Kunwari had no son, and that she was not pregnant by her husband at the time of his death.

Present:—Lord DAVEY, Lord ROBERTSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1) See *Narendra Nath Pahari* v. *Ram Gobind Pahari*, I. L. R., 29 Calc., 111, Reporter's Note.

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On the 16th of May, 1895, Bish Nath Prasad Shukul died of small-pox, leaving Musammat Lachmin Kunwari his widow. He was possessed of certain landed property, and on the 10th of July, 1895, the widow applied to have her name entered in the revenue records as owner of the property belonging to her deceased husband. In her petition she stated that she was pregnant, and that her husband during his illness had given her authority to adopt in case no male child were born to her, or in case such male child did not survive. On the 7th of August, 1895, some of the plaintiffs in the present suit filed a petition stating that the allegation that the widow was pregnant at the time of her husband's death was untrue. The Revenue authorities, however, finding that the widow was in possession, ordered that her name should be duly entered as in possession of her late husband's estate. In January, 1896, an announcement was made that Lachmin Kunwari had been delivered of a son on the 4th of January; and the plaintiffs, the reversionary heirs, filed their plaint on the 25th of February, 1896, for a declaration as above, alleging that the second defendant was not the son of Lachmin Kunwari, but was the son of Ram Autar Tiwari. The defence was that Bish Nath Shukul had died during the pregnancy of Lachmin Kunwari; that after his death she gave birth to a son, the second defendant Kashi Prasad, and that as the son of Bish Nath he was entitled to the whole property and the plaintiffs had no right to it.

The only material issue raises the question of the legitimacy of Kashi Prasad.

The Subordinate Judge decided this issue in favour of the plaintiffs, holding that Kashi Prasad was not proved to be the son of Bish Nath Shukul and the first defendant Lachmin Kunwari. He therefore decreed the suit.

On appeal a Division Bench of the High Court (KNOX, C.J. and AIKMAN, J.) relying on the natural presumption, found that the second defendant was the son of Lachmin Kunwari by her deceased husband Bish Nath Prasad. They consequently reversed the decision of the Court below and dismissed the suit with costs.

On this appeal,

Mr. *J. D. Mayne* for the appellants contended that the evidence showed that Lachmin Kunwari was away from home for five or six months before her husband's illness, and only returned three or four days before he died of small-pox of which he was ill for 16 days. There was therefore, it was submitted, no such access proved as would make it possible that Kashi Prasad was the son of Bish Nath Shukul and Lachmin Kunwari. The presumption, therefore, under section 112 of the Evidence Act (I of 1872) did not arise.

Mr. *G. E. A. Ross* for the respondents was not heard.

1903, *April 30th.* — The judgment of their Lordships was delivered by SIR ANDREW SCOBLE :—

The only question in this case is whether Kashi Prasad, the second respondent, is the legitimate son of the first respondent, Musammat Lachmin Kunwari, by her deceased husband, Bish Nath Prasad Shukul.

The rule of law on the subject is contained in section 112 of the Indian Evidence Act, 1872, which provides that "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 he is the legitimate son of that man, unless it can be shown that the parties had no access to each other at any time when he could have been begotten."

Bish Nath died of small-pox after a few days' illness on the 16th of May, 1895, and Kashi Prasad was born on the 4th of January, 1896, 223 days later. The burden of proof was therefore on the appellants, who, as reversionary heirs of Bish Nath according to Hindu law, filed their suit on the 25th of February, 1896, for a declaration that Kashi Prasad was not the son of Bish Nath. They asserted that the widow had never been pregnant by her husband, and suggested that the boy put forwar as his son was really the son of one Ram Autar Tiwari.

At the hearing they offered no evidence in support of this suggestion, but called witnesses to prove that Lachmin had been absent at Benares on a visit to her parents for some time before the beginning of her husband's illness, and that she returned to

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her house only three or four days before his death, at which time "he was senseless." Two of the witnesses said that she had gone to Benares "five or six months before," and a third that she went there "in the month of Magh;" the others did not attempt to fix any date. There was a good deal of evidence upon less material points, and the Subordinate Judge, who seems to have thought that the burden of proof lay on the widow, decided in favour of the plaintiffs, the present appellants.

The High Court at Allahabad took a different view. The learned Judges who heard the appeal came to the conclusion that "the evidence adduced by the plaintiffs was so feeble that there was really no case for the defendants to meet;" and relying "upon the natural presumption," they found in favour of the legitimacy of Kashi Prasad.

In this conclusion their Lordships concur. The evidence of the widow is clear as to the possibility of access within the necessary period, and no imputation is made against her character. Her statement as to her pregnancy before her husband's death is supported by the sister, uncle, and other relatives of her husband, as well as by members of her own family; and the actual birth of the child to her is proved by witnesses who were present, and whose testimony was not shaken by cross-examination.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—Messrs. *Pyke and Parrot.*

Solicitors for the respondents—Messrs. *Barrow, Rogers and Nevill.*

J. V. W.