

1893

OCT. 16.

18 B. 468.

CRIMINAL REFERENCE.

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ENCE.*Before Mr. Justice Candy and Mr. Justice Fulton.*ROZARIO (*Applicant*) v. INGLES (*Opponent*).^{*} [16th October, 1893.]

18 B. 468.

Criminal Procedure Code (Act X of 1882), s. 488—Maintenance—Illegitimate children—Right of a married woman to claim maintenance for her illegitimate children—Evidence of wife to prove non-access—Evidence—Presumption of legitimacy—Evidence Act (I of 1872), s. 112.

A married woman is entitled under s. 488 of the Code of Criminal Procedure (Act X of 1882), to claim maintenance for her illegitimate children from the putative father.

A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children.

[R., 19 M. 461 (463) = 2 Weir 623; 25 M.L.J. 594 = 14 M.L.T. 447 = (1913) M.W.N. 983.]

THIS was a reference by Khan Bahadur P. H. Dastur, Presidency Magistrate, under s. 432 of the Code of Criminal Procedure (Act X of 1882).

[469] The reference was in the following terms:—

"The respondent in the above case is charged by one Mrs. Rozario, a married woman, with the maintenance of her three illegitimate children under s. 488, Criminal Procedure Code.

"In the course of these proceedings it was contended by Lord Colin Campbell for the defence that in England the Bastardy Acts apply only to single women, or those in the position of single women; and that as the law in India was based on the same Acts, the Legislature could never have intended s. 488, Criminal Procedure Code, to apply to illegitimate children of married women. Cites *Stacey v. Lentill* (1); 7 and 8 Vict., c. 101; 35 and 36 Vict., c. 65, in support of his contention.

"The learned counsel also maintained that the law presumes the children of married women to be legitimate, unless this presumption is rebutted by impotency of the husband or his non-access to his wife, and this could only be proved by calling independent evidence and not by examining the wife as a witness. Cites *Hargrave v. Hargrave* (2); *The King v. The Inhabitants of Sourton* (3); *Queen v. The Inhabitants of Mansfield* (4).

"Now it is no doubt true that the Bastardy Acts in England are limited in their application to single women, and it was, therefore, held in *Stacey v. Lentill* (1) that if a woman marries, she cannot be allowed to proceed against the putative father, as her husband becomes responsible for the maintenance of her children. This express provision of the English law is not, however, incorporated in s. 488, which in general terms makes a father responsible for the maintenance of his illegitimate children irrespective of their being born of a married or a single woman. For at the end of this clause provision has been made for the Magistrate ordering payment of the amount to such person as the Court deems fit. Now if the case of single woman alone were considered in this section, there would have been no adequate reason for the insertion of this provision. Moreover, this section is intended to provide for vagrants; illegitimate children of a

^{*} Criminal Reference No. 102 of 1893.

(1) 4 Q.B.D. 294.

(3) 5 A. and E. 190.

(2) 9 Beav. 552.

(4) 1 Q.B. 444.

married woman would not naturally be supported by her [470] husband; and they would, therefore, be thrown on the world if the putative father were not made responsible.

"With regard to the second objection, it is clear that some of the authorities cited by Lord Colin Campbell lay down that a wife cannot be examined in the first instance to prove the bastardy of her own children; non-access during marriage must be proved by independent evidence. But it has not been shown that this law is applicable to India. On the contrary the whole tenor of the Evidence Act shows that in it the admissibility of evidence is made the rule and its exclusion an exception. For s. 118 of this Act declares all persons competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to questions by tender years, extreme old age, disease of body or mind, and other cognate causes. This incapacity is due to physical causes, and the Legislature has, therefore, wisely excluded such evidence; but it has not gone beyond this and made exceptions in favour of those who can understand and rationally answer questions put to them. The only exception to this rule is that of an accused person, who owing to an express provision in the Criminal Procedure Code could not be examined on oath and is, therefore, incapable. Even ss. 121 to 131, Evidence Act, could not be said exceptions to the general rule laid down in s. 118, because there is a difference between competent and compellable witnesses. One can well understand why some people should not be compelled to divulge information received by them under peculiar circumstances, but there is no proper reason assigned, except a sentimental one, why the wife should not be heard against her husband or against her lover. Further, s. 120 of the Evidence Act makes a husband and wife competent witnesses for and against each other, and, if so, there is greater reason why the wife's evidence should be admitted against her lover. The only other section, then, that could apply to this case is 152, which forbids scandalous and indecent questions, and I readily admit that nothing could be more scandalous than a wife proclaiming her infamy from the witness box; but the latter part of this section expressly provides that if such questions relate to matters in issue, they shall be allowed. In the present [471] case the main fact to be established is the paternity of the children, and nobody could be in a better position than the wife to say whose they are. I do not think, therefore, that either of the objections is tenable, but the points raised by the learned counsel seem to be very important, and as I am not aware of any Indian cases deciding them, I think it proper to make this reference for an expression of their Lordships' opinion on the following two questions:—

"1st. Has a married woman a *locus standi* under s. 488, Criminal Procedure Code, to claim maintenance for her illegitimate children?

"2ndly. Could a wife be examined to prove non-access during a married life, without independent evidence being first offered to prove the illegitimacy of the children."

Inverarity (with *Mathubhai* and *Jamastram*), the opponent.—A married woman is no doubt entitled under s. 488 of the Code of Criminal Procedure to claim maintenance for her illegitimate children. The English cases on the subject are decided under s. 3 of 35 and 36 Vict., c. 65, which expressly applies to unmarried women. Refers to *Tozer v. Lake* (1). Those cases, therefore, cannot govern the present case.

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As regards the second point referred by the Magistrate to this Court, the practice in England is that neither parent is allowed to prove non-access when the legitimacy of a child is a fact in issue. A wife cannot confess her adulterous connection unless and until the fact of her husband's non-access has already been proved by independent evidence—Taylor on Evidence, p. 818; Lyon's Medical Jurisprudence, p. 505. The same principle ought to apply here. And we submit that a wife is not a competent witness to rebut the presumption of legitimacy referred to in s. 112 of the Evidence Act. Cites *Guardians of Nottingham v. Tomkinson* (1). Applicant in person.

JUDGMENT.

CANDY, J.—The first question must be answered in the affirmative. Mr. Inverarity did not contest this point, and the words of s. 488, Criminal Procedure Code (X of 1882), are manifestly wide enough to include a married woman claiming maintenance for [472] her illegitimate children. The English cases depend upon the words of the English Statute applying to a "single woman."

To the second question I would answer that a wife can be examined to prove non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of the children.

No doubt in England the positive rule at common law is clear that neither husband nor wife can be examined for the purpose of proving non-access during marriage. That is still the law except as to any proceeding instituted in consequence of adultery—*Guardians of Nottingham v. Tomkinson* (1). But in this country we must follow the provisions of the Evidence Act. Section 112 provides that "the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 290 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 to the marriage had no access to each other at any time when he could have been begotten."

Mr. Inverarity quoting a note (of which he is the author) at p. 505 of Lyon's Medical Jurisprudence contended that the above section would be construed in accordance with English decisions. So far as the possibility of presumption of the husband being father of the children born to his wife during the continuance of their marriage, being rebutted, there is no difficulty. The leading case is *Morris v. Davies* (2), which decides that non-access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact, and that the presumption as to the husband being the father of a child alleged to be illegitimate can be rebutted by the conduct of the parties (taking the whole *res gestæ*) raising a strong and irresistible conclusion that the child born was not the child of the husband, but the child of another. See also *The Aylesford Peerage* (3) case, in which it was decided that where the legitimacy of a child born in wedlock is in issue, previous [473] statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness box. Here Mr. Inverarity did not contend, and the question referred by the Magistrate does not assume, that the wife cannot under

(1) 4 C.P.D. 343.

(2) 5 Gl. and Fin. 163.

(3) 11 A. C. 1.

any circumstances be allowed to make statements in the witness box bastardizing her own issue; but the learned counsel contended, quoting Taylor on Evidence, s. 951, that in a case of bastardy, provided that the husband's non-access has first been proved by independent evidence, the wife may in the witness box confess her adulterous connection with another person, and thus enable the order of maintenance to be made in the event of her testimony being corroborated in some important particulars. I can find no authority in the Evidence Act for laying down the order in which evidence would be led to prove the fact of non-access in accordance with s. 112. Proceedings under s. 488, Criminal Procedure Code, have been held to be of a civil nature—*Nur Mahomed v. Bismulla Jan* (1). By s. 120, Evidence Act, in all civil proceedings the parties to the suit shall be competent witnesses. Here Mrs. Rozario is a party and a competent witness. If she states in the witness box that her husband had no access to her at any time when the children now in question could have been begotten, her statement may be taken for what it is worth. If her evidence of this alleged fact cannot be excluded as inadmissible, then there is no provision of law determining at what stage of the proceedings her evidence may be recorded.

FULTON, J.—I concur. The wording of s. 488, Criminal Procedure Code, and s. 118 of the Evidence Act seems to me so clear as to leave no room for doubting that both the questions referred by the learned Magistrate must be answered in the affirmative.

18 B. 474.

[474] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

GHANASHAM NILKANT NADKARNI (*Original Defendant*). Appellant v.
MOROBA RAMCHANDRA PAI (*Original Plaintiff*), Respondent.*
[9th, 16th and 17th February and 16th March, 1894.]

Easement—Light and air—Obstruction—Injunction or damages—Specific Relief Act I of 1877—Costs—Costs where lower Court grants an injunction and appeal Court refuses injunction, but awards damages.

The plaintiff was the owner of a house in Jambulwadi street in Bombay. The defendant owned a house to the east of it, and between the two houses was a gully three feet seven inches wide, the part of which next the defendant's house was a gutter. On the ground floor of the plaintiff's house were four windows and on the first floor two windows all looking out into the gully and all of them ancient windows. The defendant's house originally was a little higher than the plaintiff's house and consisted of a ground floor, a first floor and a loft. Shortly before suit, the defendant pulled down this house and on the same site began to build a new four-storied house with a loft. The plaintiff sued for an injunction, alleging that this new house, which would be of much greater height than the old one, would completely block up his ancient windows and cause him material damage, there being no other window in his house on the side next the defendant. The defendant in his written statement denied that his new house would cause material damage to the plaintiff. He alleged that his old house, which was higher than the plaintiff's, had a projecting cornice, so that hardly any direct light came to the plaintiff's windows, which were almost, if not entirely, lighted by the light that came from each end of the gully. He further stated that his new house would have no cornice and that he had widened the

* Suit No. 282 of 1892.

(1) 16 C. 781.