PAVISTINA *v.* ARON.

1897.
September 17.

P. C., Colombo, 6,628.

Maintenance—Child born in lawful wedlock—Presumption as to paternity —How such presumption may be rebutted.

A child born in lawful wedlock is presumed to be that of the husband. Proof of impossibility of access to each other of husband and wife is not absolutely necessary to rebut the presumption. It is enough to show that no sexual intercourse took place between the husband and wife at any time when in the order of nature the husband might have been the father of the child.

THE facts of the case appear in the judgment.—

Bawa, for appellant.

17th September, 1897. WITHERS, J.—

This is an application by a wife against her husband for an order on the latter to maintain her and her child, on the ground that the husband neglects to maintain the applicant and her child, he having sufficient means to do so.

The application was resisted, the defence being that the husband and wife were living apart by mutual consent, and that the child was not his child.

The case for the defendant is briefly this. Shortly after her marriage the wife went to live with her parents, and the husband complained to the headman of her misconduct and of her leaving his house with property which he thought not hers to take away. The headman endeavoured to induce the wife to return to her husband, but she positively refused to do so, and from that day to this they have not met again. The final separation was about the 18th September, 1895.

In April, 1897, the applicant gave birth to a child. Two questions arose for decision in the case: one was, Was the wife living separately from her husband by mutual consent? The other was, Was the child born in April, 1897, the child of the defendant?

The Magistrate found for the defendant on the first issue, and if I may say so, he had very good grounds for doing so. On the other issue he found against the defendant in these terms: "As "to the child, the defendant has not proved impossibility of "access, and therefore the child must be taken to be his."

This is not quite a correct statement of the law as I understand it.

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The 112th section of the Ceylon Evidence Ordinance, 1895, enacts as follows : " 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 " such person is the legitimate son of that man, unless it can be " shown that that man had no access to the mother at any time " when such person could have been begotten, or that he was " impotent."

The presumption being against the defendant in this case, it was of course for him to rebut it, but it is going too far to say that he must prove impossibility of access. It does not necessarily follow that, because the husband and wife continued to live in the same village and had on account of that proximity opportunities of access, they had sexual intercourse. The simplest way to put the question is this : Is the Magistrate satisfied from the circumstances proved for the defence that no sexual intercourse did take place between the applicant and the appellant at any time when in the order of nature the husband might have been the father of this child. The law remains very much what it was when the opinions of the Lords were delivered in the celebrated Banbury Peerage case (*1 Sim. and St. 153*). A material opinion there was this : In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

Of the Banbury Peerage case the Lord Chancellor, in his opinion on a similar question in *Morris v. Davis*, reported *5 Clark and Fin. 163 and 252*, observes : " It must therefore have been assumed " that Lord and Lady Banbury were living together as much as " if the direct evidence of their being in the same house is credited."

Yet the facts rebutting the legitimacy were so strong that the noble Lords considered themselves bound to report to the Crown that the child in question was not the child of Lord Banbury.

I therefore open the judgment, that the Magistrate may reconsider his decision.

If he is satisfied that there was no sexual intercourse between the applicant and appellant within the time above indicated, he

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will refuse an allowance for the child ; if he is not satisfied, he will repeat his order, which I have opened up for his further consideration. If he is minded to further examine any of the witnesses, I see no objection to his doing so.

If he has all the available material before him he will decide the question at once. Let the record be remitted accordingly.