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The term ' wife' necessarily connotes marriage; but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question.

Direct proof may be available, but if there be no such proof, indirect proof may suffice". Thus, marriage between the parents of the child may be established: (i) By direct proof of marriage, or (ii) By indirect, proof; Indirect proof of marriage may arise: (a) By the presumption of prolonged and continuous cohabitation, or (b) By acknowledgement of the woman as wife or by acknowledgement of the child as one's legitimate child. The indirect proof of marriage, whether on the basis of prolonged and continuous cohabitation or acknowledgement, merely raises a presumption which may be rebutted. Thus, where evidence is led, and it is established, that there was no marriage at all during the entire period when the child could have been begotten, the off spring will not be legitimate, even if proof of prolonged cohabitation, or of acknowledgement, is forthcoming.

Legitimacy Direct Proof of Marriage:

When a valid marriage between the parents of the child is established, then the child born of such marriage will be presumed to be legitimate. In order to confer the status of legitimacy on the children, Muslim law, like English common law, requires that conception should take place after the marriage, though the marriage may be sahih, fasid or muta. This is most curious aspect of law of paternity in almost all systems of law that paternity is still a matter of legal presumption, despite the great strides made in the medical science.

[568] The Muslim law-givers laid down the following three rules of presumption of paternity, when direct proof of marriage between the man and the mother of the child is available: (a) A child born after six months (i. e., six lunar months plus one day or more) of the marriage is legitimate, unless the father disclaims it. (b) A child born within months of the marriage is illegitimate unless the father acknowledges it.

(c) A child born after the termination of marriage is legitimate, if born : (i) Within ten lunar months under the Shia law, (ii) Within two lunar years under the Hanafi law, and (iii) Within four lunar years under the Maliki and the Shafii law. The reason as to why the Muslim law-givers considered the period of gestation to be as short as six months, and as long as four years, seems to be the outcome of the imperfect knowledge of gestation and pregnancy during those times, or it may be that they learned so heavily in favour of legitimacy that they gave fullest allowance to any freak of nature. Whatever explanation, plausible or otherwise, there might be for these rules of presumption, it is, in our submission, totally out-of-date, and should be abandoned without any qualms. Section 112 of the Evidence Act, 1872 lays down the rule of presumption thus; ' 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 to the marriage had no access to each other at any time when he could have been begotten". This section lays down that: (i) a child born within the lawful wedlock (at any time, even soon after the marriage), or (ii) a child born within 280 days of

the dissolution of marriage by death or divorce, will be conclusively presumed to be the child of his father, provided the mother remained unmarried. Does S.

112 supersede the rules of presumption of Muslim law? Some judicial decisions still leave the question open. It is submitted that the better opinion seems to be that it does. In an early Allahabad case, Mahmood J. said: " It may someday be a question of great difficulty to determine how far the provisions of that section [S.

112] are to be taken as trenching upon the Muhammadan law of marriage, parentage, legitimacy and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the courts in British India". Since then, the Allahabad High Court has held that S. 112 supersedes the rule of Muslim law. The Lahore High Court also took this view. In two cases, it has been held that S. 112 applies to the Muslim marriage which is valid.

The Chief Court of Oudh takes the view that a valid marriage means a " flawless" marriage, and hence a Muslim irregular marriage is not a valid marriage. It is submitted that Muslim law which leans so heavily in favour of legitimacy makes no distinction between the valid and irregular marriages from the point of view of legitimacy of child. To say that the marriage in the purview of S. 112 should be flawless, displays a lack of understanding of the Muslim notion of irregular marriage. Under the English common law a child of voidable marriage on its annulment became illegitimate retrospectively, but under Muslim law, even when an irregular marriage is terminated, any child

born of such marriage, remains legitimate. Then “flawless” is not a word of law. In law, a marriage is marriage; it may, under Muslim Law, be valid, irregular or void, but there is nothing like a flawless marriage.

Marriage is either a marriage or not a marriage. Now, in English law, and in the countries which follow English law, children of annulled voidable marriages are legitimate; so are children of void marriage in certain circumstances. The Muslim law-givers, from the earliest times, learned heavily in favour of legitimacy of children, and considered the children of void marriage alone as illegitimate.

In their concern to avoid illegitimacy they accorded recognition even to temporary marriages. The fact of the matter seems to be that even when there was a semblance of marriage, the Muslim law-givers construed it to be marriage the underlying idea being to confer the status of legitimacy on the children of such unions. In this perspective, this writer finds it difficult to agree with Prof. Hasan that in the absence of any definition of “valid marriage under the Evidence Act, it would be difficult to say as to how it applies to Muslim marriage”. It is true that the Evidence Act does not define “valid marriages”. But, is a definition necessary? A Hindu marriage will be valid, if Hindu law considers it to be so; the same is true of a Christian, Parsi, or Jewish marriage. There is no reason why the same should not be true of Muslim marriage.

Since Muslim law regards the children of valid and irregular marriages as legitimate, both the marriages will be valid within the purview of S. 112. It is submitted that the application of S.

112 to Muslim marriages will go to further the objection of Muslim law of learning in favour of legitimacy. Thus, (a) Under S. 112, a child born even a day after the marriage is legitimate, unless the parents had no access to each other at all material time during which the child could have been begotten. Under Muslim law such a child will not be legitimate, unless the father acknowledges it. This means legitimacy of the child depends upon the acknowledgement of the father, while under Section 112 the child will be treated as legitimate unless non-access is proved.

(b) Under S. 112, a child born within 280 days of the termination of marriage is legitimate, the mother remaining unmarried, unless the parents have no access to each other at all material times during which the child could have been begotten. Under Muslim law this will be subject to lian. It is submitted that lian (accusation of adultery) as a ground of divorce is understandable and accords well with the modern notions, but lian as an instrument of disclaimer of paternity is, to say the least, obnoxious. No one can say conclusively that a woman who has been found committing adultery also bears the child of her paramour.

The child may still be of her husband. (c) Whether freaks of nature there may be, a child born after two years of the termination of marriage cannot be, by any stretch of imagination, be the child of the ex-husband of the mother. The application of S. 112 to Muslim law will obviously override this rule of presumption of Muslim law and it is submitted, rightly so.

In *Ashraf v. Ashad*, where the child was born after 19 months of the termination of marriage, the Calcutta High Court said that to hold that such a

child was legitimate would be contrary to the course of nature and impossible. Some authors have expressed, it is submitted, unfounded apprehensions of this interpretation. Thus, Prof. Hasan says, " If Section 112 is made to apply to Muslims, not only will it affect the relationship of the child with the father but with other members of the family also. Even if it is taken for granted that a person should be made to support his off-spring, legitimate or illegitimate, why should other members of the family be compelled to accept a stranger [is an illegitimate child a stranger? of course, bastard he is], already socially condemned as their prospective heir, for the Muslim law of inheritance admits of minute division of property into shares and those who take shares again have reciprocal rights of inheritance inter se under certain contingencies well known to lawyers".

One is apt to say: should other members of the family be compelled to accept a child born to their relation's widow or divorced wife after a period of seven hundred and thirty days?

Legitimacy Presumed from Presumption of Marriage:

It has been seen in Chapter IV of this work, under title " Presumption of Marriage", that prolonged and continued cohabitation raises a presumption of marriage, and once a marriage is presumed to be valid, the children born of such a marriage are also legitimate. In an old case, the Privy Council said: " The legitimacy of a child of Muhammedan parents may properly be presumed or inferred from circumstances without proof, or at least, without any direct proof of marriage between the parents, or of any formal act of legitimation". In *Zamin Ali v. Aziz-un-nissa*, the Allahabad High Court observed that a statement of the deceased father that he was married to the

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mother of the child is evidence of a valid marriage, from which legitimacy of the child may be presumed. In *Inkhtor v. Md. Farooq*, the Supreme Court held that presumption of legitimacy arises in respect of a child after seven months of marriage.