# BLOOD RELATIONSHIP AS A GROUND OF INHERITANCE UNDER ISLAMIC LAW

Except for marriage and maternal relatives in the Sunni law, rights of inheritance depend upon the relationship between the deceased and the claimant, whether immediate or through any number of intermediate links, being a legitimate relationship.

Legitimacy of birth is the legal requirement for admission to the family group. No legal paternity or *nasab* exists between a father and his illegitimate child, and illegitimacy precludes the existence of any legal bond between the blood relations of the father on the one hand and the illegitimate child and its issue on the other. Sunni law however recognises the existence of legal duties and rights including those of inheritance between a mother and her illegitimate child and between their respective relatives. Under the Shia law however an illegitimate child has no legal relationship with either its father or mother.

*1. Legitimacy of birth*

Under traditional Sharia law a child is illegitimate if it is the product of *zina* i.e. a criminal offence of extra-marital sex relations. There is no process by which such child can be legitimated, for example by the subsequent marriage of its parents and the traditional law does not recognise any institution of adoption. The fundamental test of legitimacy is the conception of the child during the lawful wedlock of its parents.

The legal presumption that a child born to a married woman is the legitimate child of her husband is expressed in the hadith to the effect that "The child is for the bed and for the fornicator there is stoning to death. Schacht[1] calls this a legal maxim

[1] J. Schacht, The Origins of Muhammadan Jurisprudence, Oxford, 1950, p. 181–182.

and this is followed by Coulson[2]. Azmi[3] has however shown that the tradition has been transmitted by more than twenty companions, the number of their students and localities and growth of *isnads* being tremendous. The tradition is transmitted by Zuhri (d. 124 A.H.). Azmi says[4]

> "To say that it is against the Koranic law – as claimed by Schacht – means he has neither a clear idea of the Koranic law of 'iddah nor of the tradition, its meaning and the time when it was announced by the Prophet. The Prophet announced this tradition in 8 A.H. at Makkah after the victory. There arose a case of paternity and two people differed about a child. Then to put an end to the old custom and to uproot it and to promulgate the new law, this maxim was arrived".

According to the hadith[5] reported by Ayesha, Uqbah bin Abi Waqqas left instructions to his brother Saad bin Abi Waqqas: "Jam'ah, the son of Walidah belongs to me. Take him to you." When the year of victory come to pass, Saad took him and said "He is the son of my brother". Abd son of Jam'ah said "He is my brother". Both went to the Messenger of Allah. Saad said "O Messenger of Allah my brother took pledge from me about him". He said "Abd son of Jamah is my brother and the son of Walidah is my father. He was born in his bed". Then the Messenger of Allah said, "He is for you, O Abd son of Jamaah. Afterwards he said to Saudah daughter of Jamaah "Conceal your self from him of (what he sees of) his likeness to Uqbah. He did not see her till he met Allah. In a narration he said, "He is your brother, O Abd son of Jama'a, because he was born upon the bed of his father".

As the decisive determinant of legitimacy is the date of the child's conception and not its birth, the presumption only operates within the limits of what the law recognises to be the minimum and maximum period of gestation.

[2]N.J. Coulson Succession in the Muslim Family, Cambridge 1971, p. 23.

[3]M.M. Azmi, Studies in EArly Hadith Literature, Beirut, 1968, p. 265–266.

[4]*Ibid*, p. 266.

[5]*Miskhat-ul-Masabih* translated by Maulana Fazlul Karim, Lahore, Book II p. 720–721. H. Idris Ahmad in *Fiqh menurut Mazhab Shafii* (Jakarta 1969) Vol. 2, p 274 gives a slightly different version of the hadith.

The minimum period of gestation according to all schools of law is six months. The period of six months is arrived at on the basis of two verses of the Holy Quran to the effect —

(a) We have enjoined on man kindness to his parents; in sorrow did his mother bear him and in sorrow did she give him birth. The carrying of the child to his weaning is a period of thirty months"[6]

(b) And We have enjoined on man to be good to his parents. In travail upon travail did his mother bear him and years twain was his weaning. Show gratitude to Me and to your parents. To Me is the final goal.[7]

The maximum period varies between nine or ten months (Shii Law), two years (Hanafi Law), four years (Shafii and Hanbali Law), five to seven years (Maliki Law).[8]

In Hanafi law the presumption of legitimacy begins to run six months after the contract of marriage itself, but in the law of the three other Sunni schools it only begins to run six months after the consummation of the marriage, whether the consummation is acknowledged by the parties or presumed by law because the parties have been together in circumstances of privacy which present no moral or physical impediment to sexual intercourse. According to the Shii the presumption applies throughout the marriage only if the spouses had physical access to each other at any possible time of conception.[9]

The Hanafi law as contained in the Hedaya[10] is as follows:—

> "If a man marry a woman and she bring forth a child within less than six months after the marriage, the parentage of the child is not established in the husband, as preganancy in that case appears to have existed previous to the marriage and consequently cannot be derived from him; but if she be delivered after six months it is

[6]Surah 46 Verse 15.

[7]Surah 31 Verse 14.

[8]Coulson *op. cit.* p. 23; Syed Ameer Ali, Mahomedan Law, Vol. II, Lahore, 1976, p. 170f.

[9]Coulson op. cit p. 24. No authority is cited for this view.

[10]The Hedaya translated by Charles Hamilton, Lahore, 1957, p. 134f. See also Baillie Digest of Moohummadan Law, p. 391f; Moulvi Mohamed Yusoof Khan Bahador, Mohammedan Law, Calcutta, 1898, Vol. II p. 129f.

established whether he acknowledge it or not because then the marriage appears to have existed at the time of impregnation and the term of pregnancy is complete. If moreover the husband deny the birth, it may be proved by the evidence of one woman, after which the parentage is established in virtue of the marriage; and such being the case if he persist in denying the child, imprecation becomes incumbent because his denial then amounts to an imputation on the wife's chastity since it implies a charge of adultery against her. And if upon the birth of a child a dispute were to arise between the husband and the wife he asserting that he had married her only four months before; and she maintaining that they had been married six months, the declaration of the wife is to be credited and the child belongs to the husband, because apparent circumstances testify for the wife, as it appears her pregnancy has been a consequence of marriage and not of zina. A question has arisen among our doctors whether the woman's assertion is to be credited without being confirmed by oath? The two disciplines hold that it requires her oath but Hanifa maintains the contrary opinion."

The law as to the period of gestation has been modified in some Muslim countries as it was stated that the application of the traditional Hanafi rules encouraged people to allege the legitimate paternity of illegitimate children – a fact about which there have been many complaints.

In Egypt Law No. 25 of 1929[11] provides that a disputed claim of paternity shall not be entertained if it concerns the child of a woman between whom and her husband non-access from the date of the marriage is proved or to a woman more than a year after she was left by her husband or one born to a divorcee or a widow more than a year after the date of the divorce or the husband's death as the case may be. The year referred to is a solar year of 365 days.

In Syria it is provided in the Law of Personal Status 1953[12] that one hundred and eighty days shall be the minimum and

[11]Egyptian Law No. 25 of 1929, Ss. 15 and 23, Tahir Mahmood, Family Law Reform in the Muslim World, Delhi, 1972, p. 62–63.

[12]Syrian Law of Personal Status, 1953, Ss. 128–129, Tahir Mahmood *op. cit* p. 96–97.

one solar year the maximum periods of gestation. The child of a wife shall be regarded as her husband's child on the following conditions –

(a) the minimum period od gestation must have expired since date of the marriage; and

(b) non-access between the spouses shall not have been proved e.g. when the husband was imprisoned or was far away for a period longer than the period of gestation.

Where either of the conditions is contravened, the legitimacy of the child shall not be established except by acknowledgment. Where both those conditions are fulfilled the paternity of a child shall not be questioned except by *lian*.

In Morocco it is provided that the maximum period of gestation is one year from the date of divorce or the husband's death, as the case may be. Where after the expiry of such period, there remains some doubt as to pregnancy, the Qadi shall decide the matter with the assistance of medical experts. In that case, extension of the period of iddah or the end thereof may be decreed in accordance with medical advice.[13]

In Tunisia it is provided that the paternity of a child of a wife whose non-cohabitation with her husband is proved shall not be established; the same will be the case of a child born to a woman one year after separation from or death of or divorce by her husband. Paternity of a child born to a woman six months after the date of marriage whether valid or irregular, shall be attributed to the husband.[14]

No maximum period of gestation is prescribed in Jordan or Iraq. In Jordan it is provided that the paternity of a child shall not be established where it is proved that the parents never had access to each other from the date of marriage.[15] In Iraq it is provided that the children of a wife shall be regarded as the children of her husband on the following conditions – (1) the

[13]Morocco Code of Personal Status, 1958, S.76. Tahir Mahmood op. cit. p. 125–126.

[14]Tunisia Code of Personal Status, 1956, S.69 and 71, Tahir Mahmood, *op. cit* p. 112.

[15]Jordanian Law of Family Rights, 1951, S. 124. Tahir Mahmood op. cit. p. 84.

minimum period of gestation has elapsed since the date of the marriage and (2) meeting between the spouses is possible.[16]

In India the present rule on the subject is to be found in the presumption in S.112 of the Indian Evidence Act. The rule may be shortly stated as follows:– A child born during the continuance of a valid marriage or within 280 days after its dissolution, the mother remaining unmarried, is conclusively proved to be legitimate, unless there was no access when he could have been begotten. In the case of *Sibt Mohammad* v. *Mohammed Hameed & Others*[17] it was held that where a Muslim child was born during the continuance of a valid marriage between its parents, but its birth was within six months of the date of its parent's marriage, S.112 of the Evidence Act applied and the child was legitimate. This view has been followed in India, although in an Oudh case it has been held that S.112 cannot apply if the marriage is an irregular marriage.[18]

In Malaysia we have the Evidence Act which follows the Indian Evidence Act and in *Ainan bin Mohamed* v. *Syed Abu Bakar and others*[19] the High Court followed the case of *Sibt Mohamed* v. *Mohamed Hameed* and held that S.112 of the Evidence Enactment (now Evidence Act) ousts the provisions of the Mohammedan law in regard to legitimacy.

In Pakistan however it has been held that the repeal of section 2 of the Evidence Act by the repealing act of 1938 has revived the rules of the Mohammadan law which had been repealed by that section. In *Abdul Ghani* v. *Taleb Bibi*[20] it was held therefore that the rules of the Muslim law and not S.112 of the Evidence Act applies to questions of legitimacy.

[16] Iraqi Law of Personal Status, 1959, S. 51, Tahir Mahmood op. cit p. 149.

[17] (1926) 48 All. 625.

[18] *Musammat Kaniza* v. *Hasan* 1926 1 Luck. 71.

[19] [1939] MLJ 209.

[20] P.L.D. 1962 Lah. 531.

In the Pakistan case of *Mst. Hamida Begum* v. *Mst. Murad Begum and others*[21], the facts were that one Sh. Mehar Din was alleged to have executed a wakaf-alal-aulad under which his property was dedicated to the wakaf and the beneficiaries were the respondent, his wife, and her two daughters. The appellant who claimed to be the daughter of Sh. Mehar Din sought to have the wakaf declared void on the ground that it was executed under undue influence and fraud and while Sh. Mehar Din was not possessed of a sound disposing mind. The question arose therefore whether the appellant was the legitimate daughter of the late Sh. Mehar Din. It was alleged that she was not as she was born less than six months after the marriage of her mother to Sn. Mehar Din. The Supreme Court held that on the repeal of section 2 of the Evidence Act by Act 1 of 1938 in Pakistan, the rules of Muslim personal law were revived and would apply in matters of legitimacy where the parties were Muslims. Anwarul Haq J. in giving the judgment of the Federal Court said –

> "Under the Mohammadan law, as in all civilised systems of law, the child follows the bed (firash), that is the paternity of a child born in lawful wedlock is presumed to be the husband of the mother without any acknowledgment or affirmation of parentage on his part and such child follows the status of the father. According to the Sunni schools the presumption of legitimacy is so strong that in cases where a child is born after six months from the date of marriage and within two years after dissolution of the marital contract, either by the death of the husband or by divorce, a simple denial of paternity on the part of the husband would not take away the status of legitimacy from the child. Of course presumptions based on the bed is subject to the right of disavowal on the part of the husband for want of access. This right has to be exercised in accordance with the custom of the locality either on the day of the child's birth or at the time of purchasing articles necessary in view of its birth or during the period of rejoicing. If the husband is absent he must disown the child immediately he is informed of its birth. The shortest period of gestation according to all the schools is six months. If therefore a

[21] P.L.D. 1975 S.C. 624.

child is born within six lunar months of the marriage, no affliation would take place unless the man acknowledges it to be his issue. In other words it is the right of the man to legitimate a child born within this period by acknowledging expressly or impliedly that the conception took place in wedlock. According to the Hanafis, contrary to the Shafiis, the husband is entitled to claim the child born in wedlock as his, even if he had no access to the wife. If the husband wishes to repudiate the child so born, he can only do so by the procedure of lian, that is to say if he swears before a qadi that the child is illegitimate and fruit of adultery, in which case the court will pass a decree not only dissolving the marriage but declaring the child to be illegitimate. As observed by their Lordships of the Judicial Committee in *Syed Habibar Rehman Chowdhry* v. *Syed Altaf Ali Chowdhry* AIR 1922 P.C. 159 legitimacy is a status which results from certain facts, whereas legitimation is a proceeding which creates a status which did not exist before. This proceeding becomes necessary where either the existence of a valid marriage cannot be expressly proved or where the child is born within six months of the marriage as stated above. In such cases acknowledgemnt of legitimacy in favour of the child may be either express or by necessary implication from the course of treatment by the man of the mother and the child or from the evidence of repute and notority amongst the family, community and respectable members of the locality. Such an acknowledgment raises a presumption of valid marriage and legitimate birth".

*2. Lian*

Except in Shii law, proof of non-access between the spouses at any possible time of conception does not serve to rebut the presumption of legitimacy. Hence the only means under traditional Sunni law for a husband to effectively repudiate the paternity of a child born to his wife )apart from proving the crime of *zina*) is the procedure of *lian*. This is based on the verses of the Holy Quran to the effect –

"And for those who launch a charge against their spouses and have in received if they witness four times with an oath by Allah that they are solemnly telling the truth. And the fifth oath should be that they support no evidence but their own their solitary evidence can be solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife if she bears witness four times with an oath by Allah that her husband is telling a lie. And the

fifth oath should be that she solemnly invokes the wrath of Allah on herself if her accuser is telling the truth"[22]

There is a Hadith[23] to the effect –

"Sahl bin Sa'd narrated –" Uwaimir Al-Ajlani came to Asim bin Adi Al-Ansari and said "O Asim! Suppose a man saw another man with his wife, would he kill him, whereupon you would kill him; or what should he do? Please O Asim ask about this on my behalf". Asim asked Allah's Messenger (s.a.w.). Allah's Messenger hated the question and criticised it so much that what Asim had heard from Allah's Messenger was very hard on him. When Asim returned to his family Uwaimir came to him and said "O Asim! What did Allah's Messenger say to you?" Asim said to Uwaimir, "You never bring me any good. Allah's Messenger disliked the matter I had asked about". Uwaimir said, "By Allah I will not give up this matter until I ask the Prophet about it." So Uwaimir proceeded until he came to the Prophet in the midst of people and said, "O Allah's Messenger! Suppose a man sees another man with his wife, would he kill him, whereupon you would kill him, or what should he do?" Allah's Messenger said, "Allah has revealed some decree as regards you and your wife's case. Go and bring her". So they carried out the process of lian while I was present among the people with Allah's Messenger. When they had finished their lian, Uwaimir said, "O Allah's Messenger. If I were to retain her as a wife, then I have told a lie". So he divorced her thrice before Allah's Messenger ordered him".

Ibn Shibab added, "After their case it became a tradition that a couple involved in a case of lian should be separated by divorce. The lady was pregnant then and later on her son was called by his mother's name".

Another hadith narrated by Ibn Umar is to the following effect –

"The Prophet (peace be upon him) made a man and his wife carry out lian and the husband repudiated the child. So the Prophet got them separated by divorce and decided that the child belonged to the mother only".

[22] Surah 24 (Nur) Verses 6–9.

[23] Sahih al-Bukhari Book LXIII (Divorce) Hadith 228 translated by Dr. Muhammad Muhsin Khan, Medina, 1974 Vol. VII p. 173–174; Mishkat-ul-Masabih *op. cit* Book II p. 710–711. A slightly different and longer version is given in Idris Ahmad, Fiqh Shafii op. cit Vol. 2 p. 269–270.

Ibn Abbas also reported[24] to the following effect –

"Hilal bin Omayyah imputed adultery to his wife with Sharik bin Sahma'a in the presence of the Messenger of Allah. The Prophet said, "Proof or ordained sentence on your back for slander". He said "O Messenger of Allah when one of us sees a man over his wife – will he go to seek proof? The Prophet began to say, "Proof or else the prescribed punishment on your back." Hilal said, "By me who sent you with truth I am certainly a truthful man. Let Allah reveal what will prove me not guilty for the ordained sentence. Jibrail then came down and gave the revelation. "As for those who impute unchastity to their wives . . . if you are one of the truthful ones." (Al-Quran 24:16). Hilal came and deposed. The Holy Prophet was saying, "Allah knows that one of you is a liar, is there one of you to repent?" She got up and testified. When she came near five times they prevented her and said it would make punishment obligatory. Ibn Abbas said, Then she stopped and delayed until we thought she would return. Afterwards she said, "I shall not dishonour my people forever".

Another hadith is to the following effect[25] –

"Amr bin Shuib from his father from his grandfather reported that the Messenger of Allah said – "Among women there are four for whom there is no mutual imprecation (lian); a Christian lady under a Muslim, and a Jewess under a Muslim, and a free woman under a slave and a female slave under a free man".

Ibn Umar reported a hadith[26] to the effect –

"The Prophet allowed imprecation between a man and his wife when the man disowned her child. Then he separated her from her child and made separation between them both. He handed over the child to the woman".

Ibn Umar also reported[27] to the effect –

"The Prophet said to those two who took imprecation. Your requital is upon Allah, for one of you is a liar. There is no way to remary her".

[24] Mishkat-ul-Masabih op. cit. p. 712–713.

[25] Sahih al-Bukhari op. cit, Vol. VII p. 180.

[26] Miskhat-ul-Masabih op. cit. p. 711. See Sahih-al-Bukhari op. cit. p. 179–180.

[27] Ibid p. 711–712. See Sahih al-Bukhari op. cit p. 180.

Nawawi in the Minhaj-et-Talibin says[28] –

(a) An imprecation may be pronounced only where there has previously been an accusation of the crime of fornication and where this crime cannot be proved in the manner prescribed by law.

(b) An accusation of the crime of fornication constitutes when its truth cannot be proved in the manner prescribed by law the crime of defamation. A husband may with impunity accuse his wife of the crime of fornication, even though he is unable to furnish legal proof when he knows for certain she has been guilty of it or when he has grave and well-founded suspicions upon the subject. Among these may be included the facts of its being of public notoriety that the woman is guilty of the crime and that so and so is her accomplice and that the guilty pair were surprised together in a desert place.

(c) If a woman gives birth to a child of whom her husband knows for certain he is not he father, he should disavow it, if he does not want it to be considered his. The law admits such disavowal only where (1) the husband has had no carnal intercourse with his wife during the whole period of the marriage; (2) the accouchement takes place less than six months after their first coition or more than four years after the last.

(d) An imprecation pronounced by a husband has the following consequences –

(i) the parties are separated and marriage between them is for ever forbidden, even though the husband subsequently retract the accusations; (2) the husband is not punishable as a defamer, though unable to furnish the testimony legally required to prove his wife's crime; (3) the wife is punishable for the crime of fornication, unless she in turn pronounces the imprecation in the terms already mentioned; (4) the child whose paternity is disavowed by the husband's imprecations is not recognised as his by law.

[28] Nawawi Minhaj-et-Talibin translated by E.C. Howard, London, 1911, p. 358–364.

(c) The disavowal is unnecessary and the child *ipso facto* illegitimate if not only is the husband certain that he is not the father but this is manifest to everyone by the nature of things: for instance if the mother gives birth to it within six months after the marriage contract or if the mother was repudiated immediately after the contract in both cases before the marriage was consummated or if the marriage was effected when one of the parties is in the East and the other in the West.

(f) A husband may pronounce an imprecation in order to disavow a child even though his wife may have already pardoned his defamation and the marriage has been dissolved in some other manner.

(g) Shafii maintained in his second period, that a disavowal should take place after no long interval without prejudice however to its being effected at any time, on alleging some valid excuse for the delay. A husband may at his choice disavow a child of which the wife is pregnant either before or after her lying in; and if he excuses his delay in pronouncing his disavowal on the ground that the birth was concealed from him, the presumption is in his favour when he takes an oath. This presumption however only exists where the husband was about or if present where the length of the delay is not incompatible with his ignorance.

Marghinani in the Hedaya[29] states the Hanafi rules as follows:—

(1) If a man slander his wife (that is to say accuse her of whoredom) or deny the descent of a child born of her by saying "This is not my child" and she require him to produce the ground of his accusation, imprecation is incumbent upon him, provided that both parties be competent in giving evidence (that is of sound mind, adults, and Muslims) and that the wife be of a description to subject her slanderer to punishment (that is married).

[29] The Hedaya translated by C. Hamilton, Lahore, 1957 p. 123–126.

(2) On both parties making imprecation, a separation takes place between them but not until the Kazee pronounces a decree to that effect. Ziffer says that separation takes place upon the imprecation, independent of any judicial decree, because a perpetual prohibition is established by it, the Prophet having said. "The two who makes imprecation can never come together" – which proves their separation as the Prophet's forbidding their ever coming together after imprecation expressly declares this. The argument of our doctors is that as in consequence of the establishment of a prohibition between them, the retaining of the woman with humanity is impossible, it is incumbent upon the husband to divorce her on a principle of benevolence; but if he declines so doing, it then behoves the Kazee to issue a decree of divorce as the Kazee is the substitute of the husband in the matter for the purpose of removing injustice and a proof of this is that Aweemar divorced his wife after imprecation in the presence of the Prophet which shows that the marriage still continued and was not virtually dissolved by the imprecation, otherwise the Prophet would have prevented him from pronouncing divorce. The separation is an irreversible divorce according to Hanifa and Mohamed, because the act of the Kazee must be referred to the husband, as in the case of impotence.

(3) If after imprecation the husband should acknowledge that his accusation was false by saying "I falsely laid adultery to her charge" he became privileged with respect to her, that is to say it is lawful for him to marry her as well as any other person. This is according to Hanifa and Mohamed – Abu Yusof says that she is forever prohibited to him and that he cannot marry her – the Prophet having said "two who make imprecation can never come together which shows the separation established between them to be perpetual; wherefor his marriage with her is illegal. The argument of Hanifa and Mohamed is that the husband's acknowledgemnt is a retraction from his evidence (that is from his imprecation) and evidence is by subsequent retraction rendered null and of no effect. As to the saying of the Prophet above cited, it means that the parties can-

not come together as long as they both persevere in their imprecation but after the husband's acknowledgment the imprecation no longer remains either in substance or in effect and consequently they may then come together.

(4) If a husband accuses his wife by denying her child, it is requisite that the Kazee issue a decree denying the descent of the child from him and affixing it upon the mother. If a husband accuses his wife both by bringing a charge of adultery against her and also by denying a child born of her, it is necessary that both these circumstances be mentioned in the imprecation, after which the Kazee is to issue a decree denying the descent of the child for the husband and fixing it upon the mother, because the Prophet once so decreed upon such an occasion, and also became the design of the imprecation in this case to bastardize the child wherefore a decree must be passed agreeably to the design of it.

(5) If a man say to his wife, "You are an adulteress and your pregnancy proceed from adultery" imprecation is incumbent upon both parties, as accusation is here established in the mention of adultery. Yet the Kazee is not in this case to issue any decree affecting the descent of the foetus. Shafii says a decree of bastardy must be pronounced because the Prophet decreed a bastardy in the case of Hillal, who had accused his pregnant wife. The argument of our doctors is that the effect of a decree of bastardy cannot take place until after delivery, since before delivery there is a possibility of doubt respecting the pregnancy. The Kazee therefore is not to decree a bastardy. As to the decree of the Prophet quoted by Shafii it is possible that the Prophet may have been certified of the woman's pregnancy by inspiration.

(6) If a husband deny the descent of the child upon the near approach of birth or at the time when it is usual to receive congratulations and to purchase clothes and make preparations for it, his denial holds good and imprecation is incumbent upon him on account of it; but if he do not deny it until afterwards, although imprecation be here also incumbent, yet the descent of the child remains established in him. This is the doctrine of Hanifa . . the two

> disciples say that the denial is admitted during labour as it is admitted within a little time, but not within a long time and hence a distinction is made between the shorter period and the longer, by the time of labour, as the pains of labour are among the efforts of breeding.

In India it has been held that the Dissolution of Muslim Marriages Act, 1939 does not lay down that a false imputation of unchastity against the wife is a good ground for divorce. The ground falls within the omnibus ground provided in Clause ix of section 2 of the Act. It was also held that although a false imputation of unchastity to a wife is a recognised valid ground under Mohammedan law, the principles of Mohammedan law relating to the right of the wife to get a divorce show that the husband is allowed a locus poenitentiae before the marriage is dissolved and if he avails himself of this locus poenitentiae he may be liable for slander or defamation but the marriage cannot be dissolved. Where therefore the husband retracts an allegation of unchastity made by him against the wife in a suit for divorce filed by the wife against him and there is no suggestion that the retraction was not *bona fide* the retraction is a sufficient ground for non-suiting the plaintiff. *Tufail Ahmad* v. *Jamila Khatun*.[30]

In Pakistan it has been held that a retraction of the charge of lian to be a valid retraction under the Mohammedan law must imply an admission of having made the charge and then acknowledging such a charge as false. Where therefore the person denies having made the charge and says that if such a charge has been made he is prepared to retract, that is not sufficient to constitute a retraction according to the rules of Mohammedan law, for thereby he saves himself from punishment for slander or perjury in the previous trial, if any, and also defeats the wife's suit for dissolution of marriage. *Saleha Khatun* v. *Siddikulla*.[31] See also *Muhammad Shariful Islam*

[30] AIR 1962 All. 570.

[31] P.L.D. 1958 Dac. 62.

*Khan* v. *Mst. Suraya Begun*[32] and *Abdul Aziz* v. *Mst. Basharain Bibi*.[33]

In Syria it is provided that if (a) the minimum period of gestation has expired since the date of marriage; and (b) non-access between the spouses has not been proved, the paternity of a child shall not be questioned except by imprecation *(lian)*.[34]

In Tunisia it is provided that no repudiation of an unborn child or a child shall be effective except by a judgment of a court and all legal means of proof shall be admissible in such cases. Where a repudiation is proved the court shall decree a break in the child's lineage and a perpetual separation between the spouses.[35]

In Indonesia it is enacted that a legitimate child is one who is born from a lawful marriage. A child that is born outside marriage only has civil relationship with its mother and her family. A husband can repudiate a child who is born to his wife, when he has proof that the wife has committed adultery and the child is the result of such adultery. The court can give a decision on the legitimacy or otherwise of the child at the request of the interested party.[36]

It might be noted that a husband cannot invoke the procedure of lian if he has ever expressly or impliedly accepted the child as his. In practical terms this means that he must repudiate the child during the wife's pregnancy or within a short time of his knowledge of the birth.[37]

[32] P.L.D. 1963 Dac. 947.

[33] P.L.D. 1958 Lah. 59.

[34] Syrian Law of Personal Status, 1953, S.129. Tahir Mahmood *op. cit.* footnote 9, p. 97.

[35] Tunisia Law of Personal Status, 1956, S.75–76. Tahir Mahmood op. cit. p. 112.

[36] Indonesian Marriage Law, 1974, Ss. 42–44.

[37] Coulson *op. cit.* p. 25. See Nawawi *op. cit.* p. 362; Hedaya *op. cit.* p. 126.

The subject of lian was discussed in the Pakistani case of *Ghulam Bik* v. *Mst. Hussain Begum.*[38] In that case the wife had applied for dissolution of marriage and one of the grounds was that the defendant had falsely accused her of adultery. Kaikaus J. said: "In order to be able to appreciate the exact question that arise, I will first explain in some detail what is Lian. In accordance with Sura XXIV (An-Nur) Verse 4 of the Holy Quran, a person who accuses a woman of adultery is bound to produce four witnesses in support of his allegation and if he does not do so, he is liable to the punishment for slander which is eighty stripes. I reproduce this Verse below:—

> "But as to those who accuse women of reputation of whoredom, and produce not four witnesses of the fact, scourge them with fourscore stripes, and receive not their testimony for every for such are infamous prevaricators."

One Hilal-Bin-Umaiyyah accused his wife before the Prophet of having committed adultery with one Shirric-Bin-Samhas. For what happened in consequence of this accusation, I reproduce in full the Hadith from Ibn-Abbas:—

> "Verily Hilal-Bin—Umaiyyah, confronted his wife before the Prophet, and accused her of adultery with Shirric-Bin-Samhas. The Prophet said to him, 'Bring witnesses, or take eighty lashes upon your back.' Then Hilal said, 'O Messenger of God, when one of us sees a man upon his wife, must he go away to look for witnesses. The Prophet said, 'Bring witnesses, or receive eighty lashes upon your back.' Then Hilal said, 'I swear by God, who has sent you on earth, verily I am teller of truth, and verily God will quickly send down an order which will save my back from being flogged." Then Gabriel brought a revelation in explanation of Lian. The Hilal gave his oath, and the Phrophet said, 'Verily God knows which of you is the liar; then do either of you repent.' Then the woman stood up, and made her oath; and when she came to 'May the anger of God be upon me if I lie,' the people present forbade her repeating it, and said, 'Verily this fifth asseveration is a cause of punishment,' Ibn—

[38] P.L.D. 1957 Lah. 998.

> Abbas says. 'Then the woman stopped, so that we imagined she would not repeat it; after which she said, 'I will not disgrace my family all my life; and she finished the fifth assaveration; and the Prophet ordered a separation, and said, 'See the woman, if she brings a child with eyes the colour of antimony, large buttocks, and fleshy legs, it is for Shirric-Bin-Samhas (because he was of this description).' Then the woman brought forth such a child; and the Prophet said, 'Verily, had not there been an order about it in the book of God, I would have done with the woman what I would have done."

The Verse referred to in this Hadith which was revealed at that time, and in compliance with which the oaths were taken, is the following:—

> "They who shall accuse their wives of adultery, and shall have no witnesses thereof besides themselves; the testimony which shall be required of one of them shall be that he swear four times by God that he speaketh the truth."

The procedure which is by God that he speaketh the truth." imprecation. The original object of this procedure was not the dissolution of the marriage tie. According to Muslim jurists, Lian was allowed to the husband as a substitute for four witnesses; so that his evidence taken in this manner had the same effect as the testimony of four witnesses; at the same time, Lian was a substitute for the punishment for slander, for the curse of God is regarded as a severer punishment than eighty stripes. The wife was allowed Lian because otherwise, on account of the oath of the husband, the charge of adultery would be established against her and she would be liable to capital punishment. Her oath would save her from that punishment and it would also be a substitute for that punishment for the wrath of God which she invoked is regarded as worse than death. At the end of the proceedings in the Hadith referred to above, the Prophet had, however, ordered separation, and although originally intended for making available to the spouses a special form of testimony so as to save them from punishment for slander and adultery, Lian subsequently came to be utilised by the wife for obtaining divorce in the Courts of Muslim Qazis. When the husband brought a charge of adultery against a wife she would approach the Qazi who would force the husband either to retract the accusation or to take an oath. If he withdrew the accusation he would suffer punishment for

slander. If he chose to take the oath, the procedure for Lian would follow and a dissolution would be granted.

In pre-partition India the doctrine of lian had always been considered as implying that a false charge of adultery brought by the husband against the wife would entitle the wife to a decree for dissolution. The contention of the appellant before us is that the separation of the spouses in the case of lian was the result not of the accusation of adultery but of compliance with the procedure of lian. The Prophet had, it is urged, ordered separation because the husband and the wife having invoked as against each other the curse and wrath of God, it was no longer possible for them to live amicably together as husband and wife; and, as dissolution was the result only of the imprecation, compliance with the procedure of lian would be essential before a dissolution is ordered by the Courts in Pakistan. Lian, it is pointed out, means imprecation and it will be wrong to say, when there is no imprecation, that dissolution is in accordance with the law of lian. It is also contended that apart from lian, an accusation of adultery does not in itself constitute a ground for divorce in Muslim Law.

It will be proper to reproduce at this stage the words which the Prophet had used while ordering separation in the case of a lian. We quote them from a Hadith by Ibn-Omer who said:—

> "Verily the Messenger of God said to a man and woman, that had been confronted. 'Your account is with God; one of you is liar.' Again he said to the man. 'This woman is forbidden you for ever.' The man said, 'O Messenger of God! what is the case with respect to the money I settled upon her? He said, 'It is not yours, if you have said true; it is gone in lieu of the use you have had of her; but if you have lied, then it is much further from you."

It is true no doubt that the order of the Prophet related to the imprecators, but what was the ground on which the order was passed? Learned counsel for the appellant has stated that it was the impossibility of further harmonious marital life. I agree that this was the true ground for dissolution and that this is a correct criterion to adopt for deciding whether a dissolution should be order. But if we apply this criterion what would be the result in case of an accusation of adultery? Can it be said that harmonious marital life is possible even though the husband brings a charge of adultery against his wife and persists in

it while the wife denies that charge? Few things can be more cruel than forcing wife to live with a husband who accuses her of adultery without reasonable grounds. I am unable to see how the difference between the spouses that is created by the bringing of a charge of adultery stands in need of a ceremony of imprecation in order to be of sufficient force to render harmonious conjugal life impossible. And if we examine a little closely the argument of learned counsel we find that he has taken up a position which is untenable. It is not his contention that dissolution occurs because by the oath the accusation of the husband takes a very solemn form. According to him, even after the husband has taken an oath, the wife is not entitled to divorce even though she denies the accusation, because, according to him, it is the procedure of lian which results in the dissolution and that procedure is complied with only when the wife too has taken an oath. The untenability of the position taken up by learned counsel for the appellant would also appear if we consider all its implications. One of the implications would be that if the husband brings a charge and persists in it and yet when he is called upon to take an oath refuses to do so, and the Court finds the charge unproved or even false, the wife would not be entitled to a dissolution. Then, if he brings a charge and instead of taking the oath brings four witnesses to support his statement, and the wife either takes the oath or brings witnesses to prove her innocence, there would be no dissolution.

There is no reason why the bringing of witnesses instead of taking the oath should make any difference to the situation for the oath is only a substitute for the production of witnesses. Another result of the contention of learned counsel would be that in cases where, under the Muslim Law, lian is not possible, there would be no ground for dissolution. Under the Hanafi Law, there is no lian in a case where the wife is a Kitabia, or a slave girl, or a minor, or an insane person. So, in respect of all these, the husband would be able to bring false charges without incurring any liability in respect of the material tie. Then, suppose he brings a false charge but denies when the wife approaches the Court that he ever brought a charge, and it is proved that in fact he did bring a charge and that the charge was false. Should the woman be placed in a worse position just

because he not only brings a false charge but at the same time makes a false statement denying that he brought one? I cannot agree that the intention of the lawgiver of Islam was that in cases which we have illustrated above there should be no right in the wife to get the material tie dissolved. There are no grounds why dissolution should be refused in those cases if it is to follow in a case where the procedure of lian is complied with. Marriage is not, in Islam, an act so irrevocable that one may be forced to say to the wife: "You are unlucky. True you are not to blame, and you are being subjected to an intolerable life, but we cannot help it". The law gives sufficient powers to the Qazis to dissolve it in case married life will be intolerable for the wife. The Hadith of the Prophet, on which the jurisdiction of the Qazis to dissolve a marriage is based, is stated at page 519 of Ameer Ali's Muhammadan Law Volume II. It runs:—

> "If a woman be prejudiced by a marriage, let it be broken off." (Hadith from Sahih-ul-Bukhari).

We are prepared to agree with learned counsel for the appellant that in cases where marriage is dissolved on account of an accusation of adultery by the Courts in Pakistan, it is technically not a case of lian for there has been no imprecation, but lian has always been understood in this sense in pre-Partition India, and it cannot be said that this is an improper use of the term once it is conceded that dissolution is the result in the case of lian, of the accusation. It is because the term was understood in this sense in pre-Partition India that in the Central Shariat Act of 1937 (and after Partition in the Muslim Personal Law (Shariat) Application (Amendment) Act of 1951) lian is referred to as one of the grounds of dissolution for accusation for adultery for the procedure of lian cannot under the existing law, be applied at all. The practical impossibility of the observance of the procedure of lian is one of the arguments against the appelant and there is reference to it later in this judgment.

We are of the opinion that the order of separation which was passed by the Prophet in the case of imprecators was based truly on a charge of adultery being made and persisted in and was not due to the mere compliance with a form of procedure. In this interpretation we are supported not only by cases decided by Courts of pre-Partition India, and by the opinions of

commentators on Muslim Law but even the opinion of at least one ancient Muslim Jurist, Abu-Ubaida, one of the Tabe'in. He was of the opinion (vide page 207 of Sahih Bukhari mae Sharae Fatha-ul-Bari) that the dissolution takes place by the Qasaf, i.e., slander. The Question put to him was as to when dissolution takes place in the case of Lian. Ameer Ali, at page 530 of his Muhammadan Law, Volume II, is of the opinion that an accusation of adultery is by itself sufficient, without a compliance with the procedure of lian, to entitle the wife to a dissolution of marriage, and he cites two cases where Muslim Qazis dissolved marriages on such accusations without regard to the procedure of lian. This is what he says:—

> "It must be added, however that it is not necessary to comply with all the formalities of La'an in order to obtain a valid dissolution of the marriage tie on the ground of the wife's infidelity.
>
> "When a false accusation is preferred against a woman, and the husband is unable to establish the charge, the woman is entitle to claim a divorce from the Court. Two cases are cited by Sautayra on this subject. In the first case Yehia bin Muhammad accused his wife of misconduct. She denied the charge, and cited him before the Kazi to establish it by formal evidence. On failure of the husband to do so, an order was made, at the instance of the wife, dissolving the marriage.
>
> "In the other case, which was decided by the Court of Algiers on the 13th of February 1871, the husband demanded a cancellation of the contract, on the ground that the wife had been guilty of immorality prior to her marriage. The wife denied his allegation and claimed a divorce. The husband failed to establish the accusation, and the Kazi accordingly pronounced a divorce in favour of the wife."

Wilson, in his Muhammadan Law, regards lian apart from that which belongs to the law of evidence, as entitling a wife to dissolution on a charge of adultery, Paragraph 76 of his Muhammadan Law runs:—

> "The fact of a husband having falsely charged his wife with adultery, will entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute, and independently of the result of any such proceedings."

and he adds:—

> "The above appears to be the net result of the Muhammadan rules representing Lian after striking out all that properly belongs to the Law of Evidence on the one hand or to the Criminal Law on the other."

Discussing the position of lian in India, he continues:—

> "Inasmuch as the modern law of British India, provides no punishment for conjugal infidelity on either side, and does not admit of Muhammadans being examined on oath, it may seem at first sight that the whole law of Lian must be considered obsolete; but on the other hand, if we tale the essential principle of the institution to be that an unretracted accusation of this kind renders proper conjugal affection impossible it appears to be a principle which our Courts may very reasonably enforce, as a useful counterpoise to the liberty of divorce allowed to the husband."

In *Mst. Rahiman Bibi* v. *Fazal* AIR 1927 All.56 Sulaiman, J. had to deal directly with the question whether the jurisdiction of the Qazi to dissolve a marriage arises out of the procedure of the accusation. He has not dealt at any length with his question but he did say —

> "The learned counsel for the respondent in supporting the decree has however argued that under the Muhammadan Law the jurisdiction of the Qazi to effect a divorce arose out of the oath taken by the husband and not out of the accusation made by him. It is impossible to accept this contention because the cause of action for the wife to appeal to the Kazi and seek relief for divorce arose out of the accusation of the husband. The procedure as to the taking of the oaths in the course of the trial was a method of proof only and could not confer on the Kazi jurisdiction which existed before the trial began."

In *Zafar Husain* v. *Ummat-ur-Rahman* I.L.P.41 All.278 it was held that:—

(a) Courts in India had taken the place of Muslim Kazis;
(b) the Muslim Law of evidence was imapplicable; and
(c) the wife was entitled to a divorce in case the accusation was proved untrue.

This was followed in *Muhammad Husain* v. *Mst. Begam Jan* AIR 1927 Lah.155. Other cases in support of this proposition are *Mst. Fakhre Jahan Begum* v. *Muhammad Hamidullah Khan*, I.L.R.4 Luck.168, *Kabil Gazi* v. *Madari Bibi* AIR 1933 Cal.630 and *Khatijabibi Umarsaheb* v. *Umarsaheb* AIR 1928 Bom.285.

The contention that the procedure of Lian should be complied with before a decree for dissolution is granted is without force also for the reason that the procedure for Lian was the result of circumstances which no longer exist. This procedure would be wholly out of place in the present state of the

law, and, at the same time, there would be no jurisdiction in the Civil Court to compel compliance with it. The procedure of Lian was the result of the Law of Islam relating to slander and adultery. It was a concession shown to the husband and the wife. Before the Pakistan Courts the husband does not ask for such a concession and the wife does not stand in need of any for adultery of the wife is not punishable at all. Nor has the Civil Court the authority to force any person to take an oath in the form prescribed by Lian and to send him to Jail for refusing to take such oath. This impossibility of compliance with the procedure of Lian is by itself an argument in favour of the contention that an accusation of adultery without recourse to the procedure of Lian is a good ground for dissolution.

One matter requires explanation. The authorities which we have cited above speak of a false charge of adultery. None of them, however, discusses the question of onus as to the falsity of the charge. The correct position appears to us to be that the case of the wife should be that the charge against her is not true but she is not bound to prove the falsity of the charge. It is for the husband to show that the charge is true if that be his case. So a dissolution is to be based on a charge of adultery which is denied and which is not proved to be true.

Kayani, J. said –

> The trouble in this case is that while La'an is a recognised form of divorce, it only means "the invocation of a curse or (La'nat)". It is, therefore, natural to think that divorce in this form must be accompanied by some sort of an imprecation or curse. What we have to decide is whether the cause of the divorce lies in the accusation of adultery or in the curse. A man may invoke on himself the curse of God a thousand times without conferring a title on his wife to claim a divorce. The substance of the claim, therefore, lies in the accusation; the form is in the imprecation.

But this is not an injuction of the Quran. It is only a reported practice or Sunnat of the Prophet based on a Quranic text which was intended for an entirely different situation. We should immediately attend to this text:

**Chapter XXIV – Nur**

*Verse 2.* – As for the adulteress and the adulterer, flog each of them with a hundred stripes; and let not compassion move you

in their case, in a matter prescribed by God, if you believe in God and the Last Day: and let a party of the Believers witness their punishment.

*Verse 3.* – The adulterer shall marry none but the adulteress or the Unbeliever and the adulteress shall marry none but the adulterer or an Unbeliever. To the Believers, such a thing is forbidden.

*Verse 4.* – As for those who bring a false accusation (of adultery) against chaste women and do not bring four witnesses, flog them with eighty stripes; and never again accept their testimony, for such men are the transgressors:–

Verse 5. – Unless they repent thereafter and reform; for Allah is Forgiving and Merciful.

*Verse 6.* – And as for those who falsely accuse their own wives and have in support no evidence but their own, their solitary evidence can be received if they take oath four times on Allah that they are solemnly telling the truth.

*Verse 7.* – And the fifth oath should be that they solemnly invoke the curse of God on themselves if they tell a lie.

*Verse 8.* – But it would avert punishment (for adultery) from the wife if she take oath four times that her husband is telling a lie.

*Verse 9.* – And the fifth oath should be that she solemnly invokes the wrath of God on herself if he is telling the truth.

For those who read the Quran as a new book, this passage prescribes the punishment for adultery. Consequentially it prescribes the punishment for slander, for an accusation of adultery may be false and it was necessary to protect chaste women. That is the intention of the fourth verse, which makes it clear that a person will be punished as a slanderer if he does not produce four good witnesses to support the charge. Then the question arises whether the husband also, who will naturally be without witnesses when he discovers an adulterer in his own house, should be required to adduce the same measure of evidence.

To meet this exceptional situation, the sixth and seventh verses exempt the husband from the general rule and permit him to swear four times and to invoke the curse of God if he be a liar.

This not only saves the husband from the punishment for slander but also makes the wife liable to the punishment for adultery as prescribed by the second verse. The eighth verse rescues her from this situation if she in her turn take the oath four times that her husband is making a false accusation, and the ninth verse requires her to invoke the wrath of God if he be truthful.

If there is any difference between "Laanat" (which the husband is called upon to invoke) and "Ghadhb" (which the wife is called upon to invoke), then it is clear that the procedure of La'an ends with the seventh verse, and ends by saving the husband from the punishment for slander. What follows is not a part of La'an and is intended merely to furnish the wife with a defence against the charge of adultery.

But the story is that Hilal-bin-Umiyyah accused his wife of adultery with Shirric-bin Samhas before the Prophet, and the Prophet said: "Bring witnesses or take eighty stripes upon your back." Then Hilal said: "O Messenger of God, when one of us sees a man upon his wife, must he go away to look for witnesses?" And the Prophet repeated his previous remark, whereupon Hilal protested that he was telling the truth, and said: "Verily God will quickly send down an order which will save my back from being flogged." Thereupon Gabriel brought down a revelation in explanation of La'an. This was apparently in terms of verses 6 to 9. Forthwith the oaths were administered and the Prophet ordered a separation.

Now, although the incident of Hilal is not questioned in substance, — I have seen slightly warying versions of it — if it happened thus, it means that verses 2 to 5 originally existed without verses 6 to 9 until Hilal's wife by her misconduct put her husband and the Prophet in an embarassing position, so that if Hilal failed to produce the four witnesses required by verse 4, he was to take eighty stripes on his back and in addition permit his wife to persist in her misconduct so long as Hilal was not able to procure four witnesses in his own house. Without the story of Hilal, the eight verses of Sura-i-Nur ending with verse 9 furnish a complete code for the punishment of adultery and slander and for enabling the wife and husband to defend themselves in their peculiar circumstances against the two

punishments respectively. It would, therefore, be an unhappy explanation of a Quranic law to say that the Quran would have insisted on a husband being flogged for his failure to produce four witnesses if Hilal's wife had not mercifully committed adultery and saved all future husbands from the drastic consequences of an almost indefensible situation.

But I have digressed here merely to show how a story can be made attractive in detail by weaving it round the person of the Prophet. I do not deny the story of Hilal and the fact that he and his wife were required to take the oaths and were then separated. Nobody says that the separation was a part of the Laanat and nobody can say it was the requirement of the Quran. It is agreed that the Prophet thought it was impossible for them to live together happily thereafter. But did the unhappiness spring from the oaths or from the accusation of adultery? It may be argued that the accusation, bad enough in itself, was made worse by the oaths. This would mean that if an accusation is made without an oath, it is harmless, but if it is made with a formal oath, it causes unhappiness to the parties and makes conjugal life miserable. This will not be accepted as a good argument. But if I am not misled by my inadequate notes, what Mr. Mahmud Ali contended mainly was that 'La'an becomes necessary after the accusation of adultery", or that 'a'an was the prescribed procedure for obtaining a divorce. As regards the first contention, so far as the Quranic text goes, La'an was the prescribed procedure for obtaining a divorce. As eighty good stripes. As regards the second contention, the matter is reduced to the level of procedure, and in the last resort, to the manner of recording evidence. That is not how our Courts in Pakistan record evidence. We do not say an accusation of adultery is proved by the husband taking four oaths and an imprecation. Section 2 of the Evidence Act repealed "all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India", including, obviously, the rules of Muhammadan Law relating to evidence. Mr. Mahmud Ali's contention that section 2 having itself been repealed in 1938 revived the rules of Muhammadan law is without force, because these rules did not exist in 1938 (having been repealed by section 2 in 1872), and nothing can come back to life which does not exist, unless it is revived by a legal

fiction. Far from being revived by an express provision, their continued demise was ensured by a general provision in section 6 of the General Clauses Act that the repeal of the enactment (here section 2 of the Evidence Act) "shall not revive anything not in force or existing at the time at which the repeal takes effect".

Likewise, Mr. Mahmud Ali tried to build an argument on the provisions of the Muslim Personal Law (Shariat) Application Act, 1937, and the Punjab Muslim Personal Law (Shariat) Application Act, 1937, and the Punjab Muslim Personal Law (Shariat) Application (Amendment) Act, 1951. The former provided in section 2 that "notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, . . . . marriage, dissolution of marriage, including talaq, ila, zibar, li'an, khula and mubar' aat, . . . . . the rule of decision . . . shall be the Muslim Personal Law (Shariat)". The latter made the same provision, except that the various forms of divorce, namely, "talaq, ila, zihar, li'an, khula and mubar'aat were not specified. It is obvious that the intention was to switch over from custom to Muslim Law, and that thereafter the decision in the matters specified was to be according to Muslim law. But Mr. Mahmud Ali contends that the express mention of the word 'La'an (here spelt as Li'an) shows that the recognised procedure for La'an was to be adopted as a rule of evidence. Until 1937, he argues, La'an was applied incorrectly because the formality of imprecation was not observed. After 1937, La'an was ineffective without the original procedure. I do not, however, think the intention of the various Shariat Acts was anything but to replace custom by personal law, and nobody has so far thought so. The mention of La'an among the various forms of divorce was by way of greater certainty. Divorce had been effected in British Indian Courts before 1937 according to Muslim law and La'an also was one of the recognized modes of divorce. It was also recognised that an accusation of adultery secured a right to a woman of obtaining a divorce, and the ceremony of imprecation had never been observed. If the intention of the Act of 1937 had been to introduce La'an particularly as a rule of evidence, something more relevant to the purpose would have been said than the mere enumeration of matters to which Muslim law would apply. And I think it was

clear to everybody that the enumeration followed the language of section 5 of the Punjab Laws Act, as far as was convenient.

Left to myself, I would have no hesitation in holding that a procedure whose adaptation has been recognized through the ages and which has become obsolete by our present laws of evidence, should be allowed to remain obsolete because it does not possess any particular merit. The anomalies to which it may lead have been pointed out by my brother Kaikaus. Even if we have become bound by the Muhammadan Law of evidence, we can adapt it to suit modern conditions — and I am not trying to introduce an innovation.

There are four recognized sources of Muhammadan Law, namely (1) of Quran, (2) Hadith (according to some, an interchangeable term with Sunnat,) (3) Qias (Reasoning by Analogy) and (4) Ijma, (Consensus of opinion among doctors of religion at a particular time in respect of some particular matter). So far as the Quran goes, I have no intention of interpreting its provisions, which are accepted generally as immutable, though in some details interpreted differently. The real difficulty comes to be faced with Hadith, which reports the Sunnat or practice of the Prophet. Apart from the fact that the authenticity of a Hadith in respect of a particular matter is seldom free from dispute, even the established practice of the Prophet in certain matters was departed from by some of the Khulafa-e-Rashidin, particularly Umar. Quite a respectable number of such instances have been stated in an excellent treatise in Urdu entitled "The Principle of Law-making in Islam", published by the Idara-e-Tuloo-e-Islam, Karachi, from which I have derived great benefit. The correct attitude towards the interpretation of Muslim law as illustrated by Sunnat, if I may venture to give an opinion, would be to regard it as changeable in detail to suit the requirements of time and place. In fact, I am not giving an opinion, but indicating actual practice. It is not necessary for me to say here that the argument for Sunnat being based on revelation is not well founded. In any event, therefore, I would be inclined to hold that La'an in the present day is a form of obtaining a divorce by the wife if the husband brings a false charge of adultery against her, and that it is not necessary for it to be attended by a formal imprecation".

3. DOCTRINE OF SHUBH

The Holy Quran provides to the effect –

(1) "Prohibited to you for marriage are your mothers (1), daughters (2), sisters (3), father's sisters (4), mother's sisters (5), brother's daughters (6), sister's daughters (7), foster-mothers (8), foster sisters (9), your wives' mothers (10), your step-daughters (11) under your guardianship born of your wives to whom you have gone in – no prohibition if you have not gone in –; those who have been wives of your sons (12) proceeding from your loins; and two sisters (13) in wedlock at one and the same time except for what is past. For Allah is Oft-Forgiving, Most Merciful.[1]

(2) Also prohibited are women already married (14), except those whom your right hands possess.[2]

(3) "Do not marry unbelieving women (15) until they believe. A slave woman who believes is better than an unbelieving woman even though she allures you. Nor marry your girls to unbelievers until they believe".[3]

(4) And marry not women whom your fathers married (16) except what is past.[4]

(5) So if a husband divorces his wife (irrevocably) (17) he cannot after that remarry her until after she has married another husband and he has divorced her.[5]

(6) Divorced women (18) shall wait concerning themselves for three monthly periods.[6]
If any of you die and leave widows behind they shall wait concerning themselves 4 months and 10 days.[7]

[1] Al-Quran, 4:23.

[2] Al-Quran, 4:24.

[3] Al-Quran, 2:221.

[4] Al-Quran, 4:22.

[5] Al-Quran, 2:230.

[6] Al-Quran, 2:228.

[7] Al-Quran, 2:234.

(7) If you fear that you shall not be able to deal justly with the orphans, (19), marry women of your choice, two or three or four, but if you fear that you shall not be able to deal justly with them then only one."[8]

In strict law where the marriage is prohibited, any sexual intercourse under colour of such marriage would be *zina* but in this respect the doctrine of *shubh* has been evolved to avoid the extreme punishment for *zina*.

Shubh according to the Hedaya[9] is of two kinds –

(1) error in respect to the act which is term "shubh ishtibah" or error of misconception or doubt in the act. This arises in those cases in which a man mistakes an illegal carnal connection for a legal one. To constitute this kind of doubt, it is necessary that mistake should have operated on the mind of the accused, who is consequently under such a misapprehension. It is not however in every case that the accused will be allowed to plead this doubt. Examples where it is allowed are (a) a wife repudiated by three divorces who is in her iddat; (b) a wife completely divorced for a compensation and who is in her iddat.

(2) error in respect of the subject which is termed *shubh hukumi* or *shubh milik* – Doubt in the woman. This kind of error arises for example in the case of a wife completely rupudiated by an implied divorce.

The Hedaya states[10] –

"In a case of an error of the second species, the parentage of the child is established in the man who has had such connexion, if he claim such child; but in a case of error of the first species, the parentage of the child is not to be established in the man notwithstanding his claim; because in a case where the error is of the first species the act of generation is positive whoredom although punishment be not incurred on account of a circumstance which has reference to the woman committing the act (normally that of the illegality of the act being

[8] Al-Quran, 4:3

[9] The Hedaya *op. cit.* p. 182f.

[10] Ibid. p. 182.

misconceived by him according to his apprehension of it); but the act of generation in a case of error of the second species, is not positive whoredom."

A marriage of doubt (shubh) is one in which both parties are in bona fide ignorance of the bar to the union. Such ignorance so long as it continues but no longer will be a complete answer to a criminal charge and the children begotten in ignorance will be legitimate.

Under the Hanafi law if the impediment is not permanent but may be removed, then the marriage is *fasid* not *batil*. The issue of a *fasid* marriage are treated as legitimate and are entitled to a share of the inheritance. The Ithna Ashari and Fatimid Schools of Law do not recognise the distinction between void and irregular marriages. A marriage according to those schools, is either valid or void.[11] The position appears to be the same in the Shafii School.

In the Singapore case of *Abdul Razak* v. *Mario Menado*[12] the Shariah Court held that the marriage between the parties solemnised by a Kathi was void, as the woman was a Christian convert at the time of the marriage. The Court however declared the issue of the marriage to be not illegitimate according to the law of Islam as at the time of the marriage both the plaintiff and the defendant honestly and sincerely believed that the marriage which was solemnised according to Muslim rites was valid.

In Jordan it is provided that a marriage parties to which are not competent to contract or which is solemnised without the presence of witnesses or contracted under duress or which violates the rule of "unlawful conjunction" or the female party is observing idda or which is a muta' (temporary marriage) shall be irregular (*fasid*). A marriage within the prohibited degrees of affinity and that of a Muslim woman with a non-Muslim man shall be void (*batil*). It would also appear that a marriage where

[11] Asaf A.A. Fyzee, Outlines of Muhammadan Law, 4th Ed. 1974 p. 113. See also N.U.A. Siddiqui, Studies in Muslim Law Vol. 1 Dacca, 1955.

[12] (1965) 1 MLJ xvi.

one or both of the parties are under the minimum age of marriage is regarded as irregular but in such a case an allegation as to the irregularity of the marriage based on the age of any party thereto cannot be heard by the *qadi* where the wife has already delivered a child or pregnancy has become apparent or if the conditions relating to age have been complied with at the time the action is brought. A void or irregular marriage, if not consummated, shall have no legal effects whatsoever. If an irregular marriage is consummated, rights and obligations as to dower, *iddah*, legitimacy of children and the bar of affinity shall be established but not the other effects of a valid marriage. A void or irregular marriage shall not be allowed to continue and if it is not dissolved by the parties, the Qadi may dissolve it in the interest of morality.[13]

In Syria the law distinguishes between valid, void and irregular marriages. A void marriage shall not have the effects of a valid marriage even if it is consummated. It is expressly enacted that the marriage of a Muslim woman with a non-Muslim man shall be void. An irregular marriage if not consummated shall be like a void marriage. If it is consummated it shall give rise to the following –

(a) the proper or the specified dower, whichever is less;
(b) legitimacy of children;
(c) Bar of affinity and
(d) Iddah of divorce if the husband pronounces a divorce or dies and maintenance during iddah but not mutual rights of inheritance.[14]

In Tunisia it is provided that a marriage which involves a condition contrary to the marriage contract or which is in contravention of Articles 3 (Consent of both parties), 5 (Minimum ages), 15 (Consanguinity), 15 (affinity), 17 (foster-age), 18 (Plurality of wives), 19 (marriage with triply divorced wife) and 20 (marriage with married woman or one observing iddah) shall be invalid. An invalid (*fasid*) marriage shall be

[13] Jordan Law of Family Rights, 1951, Ss.28–39 Tahir Mahmood *op. cit.* p. 81.

[14] Syria Law of Personal Status 1953 Ss. 47)51. Tahir Mahmood *op. cit.* p. 93–94.

compulsorily annulled without a divorce. The marriage contract in itself shall have no legal effect. If such a marriage is consummated the following effects will follow –

(a) the right of the woman to the specified dower
(b) legitimacy of children
(c) obligation of idda from the date of separation
(d) the bar of affinity.[15]

4. Acknowledgement of paternity

In theory an acknowledgment (iqrar) of paternity is not a process of legitimation but the formal recognition of a status of legitimacy which exists in fact. It is evidence which establishes the fact of legitimacy in cases where the legal presumption of legitimacy does not apply. The rule of the Islamic law of evidence is that an acknowledgment by an adult person against his own material interests effectively establishes the facts acknowledged unless and until those who contest the acknowledgment prove it to be false. This rule applies to the acknowledgment of paternity. Accordingly an acknowledged child will be held to be the legitimate child of the acknowledgor unless those who contest the acknowledgment can prove the impossibility of legal paternity. To do this they must show either that the physical fact of paternity itself is impossible (because of the respective ages of acknowledgor and acknowledgee) or that the child cannot be the legitimate child of the acknowledgor (because he is known to be the child, legitimate or otherwise of some one else or because he cannot have been conceived in lawful wedlock between the mother and the acknowledgor).

There are two hadith[16] to the effect –

(1) Amr b. Shuib from his father from his grandfather reported that a man got up and said "O Messenger of Allah so and so is my son. I had illicit intercourse with his

[15] Tunisian Code of Personal Status, 1956, Ss. 21–22. Tahir Mahmood *op. cit.* p. 108–109.

[16] Miskat-ul-Masabih, translated by Maulana Fazlul Karim, Lahore Vol. 2, p. 723.

mother in the days of ignorance. Then the Messenger of Allah said "There is no acknowledgment in Islam. The affairs of the Days of ignorance have gone. The child is for the bed and for the fornicator there is stoning".

(2) Amr b. Shuib reported from his father from his grandfather that the Messenger of Allah gave decision about every child that is ascribed to its father after his death and that is claimed for him and his heirs claim it. He gave decision that he who is born of a slave girl over which his father had ownership on the day he cohabited with her is attached to one for whom he is ascribed; and he will get nothing from the estate which has been partitioned before him. And whatever heritage has devolved on one which has not been partitioned, there is for him its share. and he will have nothing if his father to whom his relationship is ascribed denies him. If he is born of a slave girl whom he had illicit intercourse, relationship cannot be ascribed nor can be inherit though relationship is ascribed to him, even if he himself acknowledges him. He is the child of adultery whether by a free woman or by a slave girl."

The leading case on the subject of acknowledgment of sonship in India is the case of *Muhammad Allahdad* v. *Mohamed Ismail*[17].

Mohamed Ismail Khan and his three sisters for a declaration that he was entitled to certain property left by Ghulam Ghaus Khan, the father of the respondents, on the ground that he was the eldest son of the deceased, having been born prior to the marriage of his mother, Moti Ram to the deceased. Alternatively the appellant had claimed that even if it could not be proved that he was the son of the deceased, the deceased had acknowledged him to be his son. The High Court held that there was insufficient evidence to show that the appellant had been acknowledged as a son by the deceased. The appellant appealed to the Full Bench. Straight J. referred to the authorities on the subject as follows –

[17](1888) 10 All. 289.

BIRJANDI

(i) The book on acknowledgment has been placed next to that of evidence, because an acknowledgment is a kind of information and as such like evidence. The reason why these two subjects precede the subjects of claims is that the ascertainment of evidence and acknowledgment occur in most cases before the claim. As a matter of language the word ikrar is derived either from karar, which means rest and confirmation, as if the acknowledger establishes by his acknowledgment a right against himself, or the word is derived from kurrat-ul-ain, that is, comfort of the eyes, because the person in whose favour an acknowledgment is made receives thereby comfort to his eyes, and thus the acknowledger comforts the eyes of the person in whose favour the acknowledgment is made. An acknowledgment is giving information as to the right of a person enforcible against the acknowledger; that is, the person who gives such information. Some difficulty has arisen (in consequence of this definition) in the case of an acknowledgment by an agent appointed to conduct litigation and also in the case of an executor, inasmuch as in these cases the acknowledgment of these persons amounts to giving information as to the right of another person against the principal in the one case and the ward in the other.

The requirement of acknowledgment is that it should be indicative of that in respect of which the acknowledgment is made, not a mere allusion thereto. This means that it is indispensable that the acknowledgment should expressly state the subject of the acknowledgment as if it already exists, and that by the acknowledgment the proof thereof is expressed. It is not an effect of an acknowledgment that anything is for the first time founded or established, and it is on this account that when the person in whose favour the acknowledgment is made comes to know that the acknowledger was false in his acknowledgment, the subject of the acknowledgment is not lawful to such a person (as a matter between him and his creator, the Almighty), since he would in such a case be taking the subject of acknowledgment without the real willingness of the acknowledger. But if the acknowledger has delivered the subject of acknowledgment willingly, then it is lawful and becomes like an investiture of ownership by the acknowledger, and as such

on the footing of gift. This is so because ownership is established in favour of him for whom the acknowledgment is made, and this without any verification or acceptance on his part; but such ownership is nullified by his rejecting it, so that if he first verifies it and then rejects if, such rejection is not valid. So in the Kafi.

(ii) If a person acknowledges the sonship of a boy whose descent is unknown, and he is such that one like him can be born of one like the acknowledger, and the boy verifies the acknowledgment, his descent is established. This has accidentally been mentioned with reference to the sonship of a boy, because, even if the acknowledgment of a daughterhood is made in respect of a woman, the same rule applies. But it is essential that such sonship (or daughterhood) should be without an intermediary link: so much so that if an acknowledgment is made that the boy is the son's son of the acknowledger, the descent is not established, and this result is similar to that of acknowledging another to be a brother. It is a condition precedent (to the validity of acknowledgment of parentage) that the descent of the acknowledged be unknown, because, if his descent is known, his sonship other than to his parent would be impossible. What is meant by a descent not being known is that it should be unknown in the town in which he resides, and this explanation is contained in the *Kifaya* that the trustworthy reference is to the place of birth. It is stated in the *Kenaya* that when a person regarding one whose descent is known says. "This is my son, and when I die all my estate is his", then according to some of the jurists the acknowledged will be entitled to one-third of the estate by way of legacy, whilst according to other jurists he would not be entitled even to one-third: and this last doctrine seems to be most consistent with right principles. The limitation that the acknowledged might have been born of the acknowledger means that the age of the acknowledger should exceed the age of the acknowledged at least by twelve years, and this because it is the minimum period of puberty for a youth; and this limitation is necessary because if the acknowledger had not attained puberty, the acknowledgment would be falsified obviously. It is also a condition that the acknowledged boy should verify the acknowledgment, because, if he does not verify, an impediment is

created and his descent is not established by the mere acknowledgment, but requires proof. This, however, applies only to cases in which the boy acknowledged is capable of expressing himself; when he is too young to express himself, verification by him is not a condition. It is stated in the chapter on the manumission of slaves in the Fatawa Kazi Khan that some jurists have held that sonship is not established unless it is verified by the person in whose favour it is made. But the correct doctrine is that such a condition is not essential as above stated, and this is in conformity with the doctrine of the Hedaya and many other books.

AINI

In the case of a man in sickness acknowledging a youth of unknown parentage it is a condition that such a youth might have been begotten by such an acknowledger, because, if the acknowledged is older in age, the obvious fact falsifies the acknowledgment. Indeed, Malik has gone the length of holding that even if notoriety contradicts the acknowledger, such as by indicating that he was an Indian whilst the acknowledged boy was a Persian, the latter's decent is not established. The restriction that the acknowledged youth should verify the acknowledger has been imposed because the rule as to a youth who can express himself is applicable owing to his being in his own competency, whilst, on the contrary, an infant is in the power of another, and as such descends to the footing of animals, and no importance is attached to his verification. But according to the three Masters (i.e. Imam Abu Hanifa, Imam Muhammad, and Kazi Abu Yusuf) the descent is established without any such verification if the acknowledged be below the age of discretion. The descent is established because it is one of the necessities of nature, and there can be no objection thereto, even though the acknowledger be in sickness at the time of the acknowledgment. The acknowledged youth will participate with the heirs in the inheritance, because such is one of the consequences of the proof of descent. The acknowledgment by such in respect of a child or parents or wife or a manumitted slave will hold good, because, since it does not involve attribution of descent to anyone else, the acknowledgment must be accepted.

DARRUL MUKHTAR

(i) If a person makes an acknowledgment in favour of a stranger whose parentage is unknown and thereafter acknowledged him to be his son, and the latter verifies it whilst he is one of those who are fit to make such a verification, his descent is established with reference to the time of his being begotten.

(ii) If a person makes an acknowledgment in favour of a youth whose parentage is unknown either at his birthplace or in the town where he is, that the latter is his son, and the acknowledger and the acknowledged are such in age that the latter may be born of the former as a son, and the youth verifies, it, he being capable of discretion (because otherwise his verification is not necessary as already stated), then his descent is established, though the acknowledger be in sickness: and when the descent is so established, the youth will participate with the other heirs.

ASHBAH

When the person in whose favour an acknowledgment is made falsifies the acknowledger, the acknowledgment is nullified, except in the case of acknowledgment as to the freedom of slaves, as to the parentage, and as to the rights arising out of manumission of slaves: so the rule has been laid down in the Sharh-ul-Majma on the ground that such acknowledgments are not susceptible of annulment.

ALAMGIRI, VOL. 1

(i) When a man acknowledges a son expressly or impliedly the negation thereof will not be valid thereafter, whether such acknowledgment is made at the time of the birth or afterwards. Express acknowledgment is when a man says "The child is mine" or says "This is my child"; and implied acknowledgment is that the man should remain silent when he is being congratulated upon the birth of the child, in which case he may be required to take an oath. So in the *Ghayat-ul-Bayan*.

(ii) If the husband is without penis and she is not aware of his condition and gives birth to a child and he claims him, then the Kazi is to hold his descent to be established; and if she thereafter comes to be aware of his condition and therefore claims separation, she is entitled to do so, because the child necessarily becomes his even without proof of sexual intercourse.

(ii) A man says in favour of a boy "There is my son" and then he dies; thereafter the mother of the boy, she being a free woman, comes forth and says "I am the wife of deceased." Thereby she is the wife of the deceased, and both she and the boy inherit from him.

(iv) If a man has illicit intercourse with a woman, who then becomes pregnant, and afterwards marries her and she then gives birth to a child, if such child is born after expiration of six months or more, his descent is established. But if she gives birth within less than six months his descent is not established, unless he claims him and does not say that the child is the result of illicit intercourse. But if he says that the child is born of me by illicit intercourse, the descent is not established and he will not inherit from him. So in the *Yanabi*.

FATWA KAZI KHAN

(i) A man has married a woman by a defective marriage and thereafter he retires with her, and thereafter she gives birth to a child after expiration of six months; his descent is established from him. There is difference of opinion as to the exact fixation of this time, because the question is whether these six months are to be calculated from the date of the marriage or from the time of retirement. Abu Hanifa and Abu Yusuf (on whom be peace!) regard this from date of the marriage; but Muhammad regards the six months from the time of retirement, and this is the accepted doctrine. In the case of a valid marriage all the three Masters are agreed that the period is to be regarded from the time of the marriage. Some of the jurists have said that in the case of the valid marriage retirement is not a condition precedent, but that there must be state of things when they might have had intercourse.

A man has had illicit intercourse with a woman and she is impregnated by him, and during her pregnancy he marries her and has not had sexual intercourse with her till she gives birth to a child; then they (i.e. the three) have held that the marriage is valid, if she was not during her *iddat* in consequence of some one else and penitence is necessary for him; and the jurist Abul Layth holds that if she gives birth to the child after the expiration of six months or more from the time of the marriage, the marriage is lawful and the descent is established. But if she gives

birth to the child in less than six months from the date of the marriage, the marriage is not established and the child will not inherit from him, unless the man says "This is a son from me" and does not say "This is the offspring of illegitimate intercourse."

(ii) A man has married a woman and she gives birth to a child in less than six months. Muhammad maintains that the marriage is defective "according to my views and those of Abu Yusuf".A Majbub has married a woman who lived with him for a time and then gave birth to a child. Abu Yusuf in such a case holds that the son is his son and she is lawful to him.

(iii) A man has married a woman and has then divorced her at the time before intercourse, and she gives birth to a child at the end of six months from the time of the marriage. The child is his child, though Zufar holds a contrary view".

Straight J. then said –

"From these passages it appears to me that the propositions stated by their Lordship of the Privy Council in *Lalli Begum's Case* ILR 8 Cal. 422, as not being questioned before them, but which has been questioned before us in this appeal namely, that the acknowledgment of children by a Muhammadan as his sons gives them the status of sons capable of inheriting as legitimate sons, unless certain conditions exist, is established to be a distinct and specific rule of the substantive Muhammadan law relating to inheritance to which we are bound to give effect. Birth during wedlock, that is to say, legitimate birth, necessarily confers a right to inherit; illegitimate birth, that is, without wedlock subsisting between the father and mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category. In the present case we have the fact that Moti Begam, the undoubted mother of the plaintiff, admittedly at some time or other, when it was we have no reliable proof, became the wife of Ghulam Ghaus Khan, that the plaintiff was acknowledged as a son by Ghulam Ghaus Khan and treated by him as such, and the plaintiff accepted and described himself as holding that position. It seems to me, therefore, that the requirements of the rule of the Muhammadan law have been satisfied, and that the plaintiff has

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established his acknowledgment and recognition by Ghulam Ghaus Khan as a son which gave him the status of a son and title to inherit".

Mahmood J. said –

The right of inheritance under the Muhammadan law is based upon three grounds described by Mr. Baillie to be, '*nusub*, which is *kurabat*, or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void, according to all, and *wula*, which is of two kinds, *wula* of emancipation and *wula* of *moowalat*, or mutual friendship. In this case we are concerned only with *nusub*, that is, relationship by consanguinity of descent, which in Muhammadan law means legitimate descent only, so far as inheritance from or through males is concerned, and marriage between the parents of the inheritor is a condition precedent to his legitimacy. 'The intercourse of a man with a woman who is neither his wife nor his slave is unlawful and prohibited absolutely. When there is neither the validity nor the semblance of either of these relations between the parties, their intercourse is termed *zina* and subjects them both to *hadd* or specific punishment, for vindicating the rights of Almighty God'. (Baillie's Dig., p. 1). "The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed *wulud-ooz-zina*, or child of *zina*, and is necessarily illegitimate" (26, p. 3). The Durrul Mukhtar states the acknowledged general rule that 'an illegitimate child as well as a child of curse or imprecation inherits only from the relations on the mother's side by reason of its being no residuary and have no father' (Tagore Law Lectures, 1873, p. 123). The same is the effect of the rule as stated in Rumsey's Chart of Muhammadan Inheritance (p. 342, 3rd ed.); and it is more fully expressed in Aini, where it is laid down that 'illegitimate children and children of curse do not inherit, except from the mother's side, because their parentage on the father's side is wanting; so they do not inherit from their putative fathers, but as their parentage on the mother's side is established, they, on account of such parentage, inherit only from their mothers and half brothers by the mother's side the legal shares and no more." (Tagore Law Lectures, 1873, p. 123). 'When a man has committed zina with a woman, and she is delivered of a son whom he claims, the descent of the son from the man is not established, but it is established from the woman by the birth' (Baillie's Dig., p. 411).

From these passages two points are perfectly clear, viz., first, that, so far as inheritance from males or through males is concerned, the existence of legitimacy of descent or consanguinity is a condition precedent to the right of inheritance;

and secondly, that such legitimacy depends upon a valid marriage or connection between the parents of the inheritor. Now, the Muhammadan jurists themselves in dealing with the question of parentage, *nusub*, or relationship by consanguinity, recognise a distinction between cases in which inheritance is claimed from or through the father and inheritance claimed from or through the mother. 'Maternity admits of positive proof, because the separation of a child from its mother can be seen. Paternity does not admit of positive proof, because the connection of a child with its father is secret; but it may be established by the word of the father himself or by a subsisting *firash* (bed), that is, a legally constituted relation between him and the mother of the child' (Baillie's Dig., p. 389). And it may be taken as an undoubted proposition of the Muhammadan law of inheritance that in no case can an illegitimate child, that is, the offspring of *zina* or illicit intercourse, be entitled to inheritance from his father or through him, because he is regarded as *nullius filius*, that is, a person whose *nusub* or descent from the father is wanting.

I have already said that in the case of establishing descent from a mother and claiming inheritance from her, legitimacy is not a condition precedent to such right of inheritance; but in the case of inheritance from the father legitimacy is absolutely necessary before any such right can be claimed. The question then is, whether in cases like the present, where the paternity of a child, that is, his legitimate descent from his father, cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammadan law recognises any other method whereby such marriage and legitimate descent can be presumed, inferred, or held to be established as a matter of substantive law for purposes of inheritance.

In dealing with this part of the case much help is rendered by the case-law upon the subject. In *Khajah Hidayat Oolah* v. *Rai Jan Khanum* 3 M.I.A. 295 the principle was laid down by the Lords of the Privy Council 'that, under the Muhammadan law, where a child has been born to a father of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan law, the presumption is in favour of such marriage having taken place';

and their Lorships go on to add, 'that in considering this question of Muhammadan law we must, at least to a certain extent, be governed by the same principles of evidence which the Musalman lawyers themselves would apply to the consideration of such a question'(p. 318).

The general effect of the ruling in that case is that continual cohabitation of the parents and acknowledgment of the child by the father is presumptive evidence of marriage between the parents and of the legitimacy of the offspring. Their Lordships had to deal with a similar question in *Mahomed Bauker Hoossain Khan* v. *Shurf-oon-nissa Begam* 8 M.I.A. 136 in which their Lordships held, that although by the Muhammadan law the legitimacy of a child of Muhammadan parents may be presumed or inferred from circumstances, without any direct proof either of a marriage between the parents or of any formal act of legitimation, in the absence of evidence or circumstances sufficient to found such a presumption or inference, a claim by a party as a legitimate son to share in an intestate's estate should be dismissed. But whilst laying down this rule their Lordships went on to say: 'But in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Muhammadan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation' (p. 159).

The exact effect of these rulings was again considered by their Lordships in the important case of *Ashruf-ood-Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan*, 11 M.I.A. 94 where their Lordships observed –

> The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An ante-nuptial child is illegitimate. A Child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of facts. They are built on the foundations of the law,

> and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive' (pp. 113–14).

This passage, if taken as as abstract enunciation of the law, might lend colour to the contention that even a child whose illegitimacy is proved may be legitimated by an acknowledgment, and indeed it was upon this interpretation fo that passage that a considerable portion of the argument on behalf of the plaintiffs-appellants proceeded. But the Lords of the Privy Council themselves in *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* L.R. 9 I.A. 8 took occasion to explain the exact effect of that passage and went on to say –

> 'These observations must be taken with a reference to the facts of that case, and in that case it appeared that there was a Moottah marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as son and at others not; and indeed by a deed executed by the father for that purpose he was distinctly repudiated by him as his son. In that case it was decided that in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child or of an acknowledgment. The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judge below can only be understood by referring to the question to which they were addressed' (p. 19).

These observations are, in my opinion, an important limitation upon the interpretation of the passage on which so much reliance was placed at the Bar in the argument for the appellants. The general effect of the ruling in the case last cited is that, according to Muhammadan law, the acknowledgment and recognition of children by a father as his sons give them the status of sons capable of inheriting as legitimate sons, and this rule was affirmed again by the Privy Council in *Sadakat Hossein*

v. *Syed Mahomed Yusuf*, L.R. 11 I.A. 31 where their Lordships expressly refrained 'from offering any opinion upon the very important question of law' whether 'the offspring of an adulterous intercourse could be legitimated by any acknowledgment' (p. 36).

This last reservation is to my mind a most significant one, as showing that the passage which I have quoted from their Lordships' judgment in *Asbruf-ood-Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan (supra)* must not be understood loosely in the sense of being an abstract enunciation of the law applicable to all cases; for I cannot help feeling that if that passage were to be interpreted loosely and regardless of the facts of the case in which those observations were made, there would have been no necessity for reservation of opinion by their Lordships in the case of the acknowledgment of an offspring of an adulterous or even of an incestuous intercourse. Illegitimacy under the Muhammadan law, as indeed under other systems, arises from the absence of a lawful matrimonial relation between the parents of the child; and if illegitimacy which is proved and placed beyond doubt were no impediment to an acknowledgment, there would be no logical reason why the offspring of an adulterous or incestuous intercourse should not acquire the status of legitimate children when acknowledged by the father. After having carefully considered the various rulings of the Lords of the Privy Council in the cases to which I have referred, I am of opinion that their Lordships never intended to go the length of laying down the rule that a child who is proved to be illegitimate, either in consequence of marriage between his parents being disproved, or being unlawful, could be legitimated by an acknowledgment. All the cases which their Lordships had before them were cases in which the question of marriage itself was a matter in dispute and involved in obscurity with reference to the legitimacy of the child. In other words, those cases were such as left either the fact or the exact time of the alleged marriage a matter of uncertainty, that is, neither proved nor disproved; and their Lordships in dealing with those cases applied the principles of the Muhammadan law of acknowledgment of parentage with reference to legitimacy for purposes of inheritance. Any other view of those cases would involve the proposition that their Lordships intended to

go far beyond the authority of the Muhammadan law itself as to acknowledgments of parentage and legitimacy for purposes of inheritance. Yet such was the effect of the argument addressed to us in support of the appeal, and indeed that argument went the length of contending that the Muhammadan law as to acknowledgment of parentage was nothing more or less than a substitute for affiliation by adoption as recognised by the Roman or the Hindu law, that is, an affiliation which has no reference either to the consanguinity of descent of the acknowledged child from the acknowledger or to the legitimacy of such descent. I have already said that this contention is not warranted by any of the rulings of the Lords of the Privy Council, and I now proceed to show that it is positively opposed to the rules of the Muhammadan law itself.

Not a single authority of that law has been quoted, and I am not aware of any, which would justify the conclusion that legitimacy of descent from a father is not an absolutely indispensable condition precedent to the very existence of the right of inheritance from the father, and I have already shown that children born of *zina* (which means fornication, adultery, or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a proved and established fact. The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child. This is abundantly clear from the authorities from which my brother Straight has already quoted. Among those

authorities the passages from the first volume of the *Fatawa Alamgiri* may at first sight contradict the view to which I have given expression, and I am therefore anxious to explain that those passages have no such effect. The first of those texts only shows that an acknowledgment of parentage when duly made cannot be negatived. The second text, which relates to the case of a *majbub* acknowledging a child and such acknowledgment taking effect, notwithstanding the acknowledger's mutilated condition, proceeds upon the general principle of Muhammadan law against bastardizing children, and the words 'the child necessarily becomes his even without proof of sexual intercourse' which occur in the text must not be understood to mean anything beyond the rule that even in such a case acknowledgment of parentage obviates the necessity of ascertaining either the time or the extent of the mutilation of the acknowledger's person. The text assumes the existence of a valid marriage and the possibility of the acknowledged child's legitimate descent from the acknowledger, and I have no doubt that it would be misunderstanding the text if it were held to mean that even where there is a physical impossibility of the child's descent from the acknowledger, the child becomes of one who could not be his father. The reason of the rule relates not to any theory of adoption, but to the theory that an acknowledgment of parentage obviates any investigation as to the physical condition of the acknowledger's potency or impotency for procreating the offspring of a valid marriage. The same is the explanation of the latter part of the second text which my brother Straight has quoted from the *Fatawa Kazi Khan*.

The third text from the *Fatawa Alamgiri* requires no explanation, but the fourth text does require reference to show that it does not contradict the view which I have taken as to the assumption of legitimacy being a condition precedent to the validity of an acknowledgment of parentage. Now that text begins by assuming that the offspring was the result of an illicit intercourse, but the birth of the child took place during lawful wedlock, and it was acknowledged by the father. Now, so far as my view that the assumption of a legitimate descent is a condition precedent to the validity of the acknowledgment of parentage is concerned, it is enough to point out that in the text

itself the condition is imposed that the birth of the child should take place after the expiration of six months (the shortest period of gestation under the Muhammadan law) from the date of the marriage – a condition which proceeds upon the theory of the possibility of a legitimate birth. The same is the theory upon which the latter part of the text proceeds, although it relates to birth within six months of the marriage, because the implication there is that the acknowledgment of the father must be taken to involve the possibility of a legitimate intercourse between the parents of the acknowledged child at the time of his being begotten. The text would be misunderstood if not considered in the light of the circumstance that divorce under the Muhammadan law rests entirely with the husband, that it may under certain limitations be retracted by him, and that there may be a remarriage between the parties. It is no doubt in view of this circumstance that the Muhammadan jurists have placed acknowledgment of the parentage of a child by a man upon an exceptionally strong footing, as obviating the necessity of an investigation into facts which would otherwise be necessary to establish the legitimacy of the child, with reference to the marriage of his parents, the period of his conception, and the date of his birth. The principle of the Muhammadan law on this head is much the same as that adopted by the Courts of justice in England, where the rule is represented by the maxim *semper praesumitur pro legitimatione puerorum*, or by a cognate rule *semper praesumitur pro matrimonio*, the authority of which was recognized in *Piers* v. *Piers* 2 H.L.C. 331. And it is important to observe that in the very text with which I am now dealing it is expressly indicated that an acknowledgment of parentage is ineffective if accompanied by an intimation that the acknowledged offspring was the result of an illicit intercourse. The words of the text are: 'if he says that the child is born of me by illicit intercourse, the descent is not established and he will not inherit from him,' and they leave no doubt in my mind that it is only by misapprehension of the principles of Muhammadan law that it can be held that a person proved to be a *walad-ooz-zina*, that is, the offspring of a fornication, adultery, or incest, can ever be legitimated by any kind of acknowledgemnt by the father. It is upon the same principles that the first and third texts from the Fatawa Kazi quoted by

my brother Straight must be explained, and the latter part of the first text, as also the third text, show that the matter as to the effect of acknowledgment of parentage, though a rule of substantive law, proceeds entirely upon an assumption of the possibility of legitimate descent of an acknowledged child from the acknowledger, and that the rule as to the effect of such acknowledgment does not extend to cases where such legitimate descent was impossible owing either to the impossibility of a valid marriage between the parents of the child, or owing to the existence of such a marriage being dispproved by trustworthy evidence. And I have no doubt that I am representing the views of the Muhammadan jurists rightly when I say that there is no warrant in the principles of the Muhammadan law to justify the view that a child proved to be the offspring of fornication, adultery, or incest could be made legitimate by any act of acknowledgment by the father. I repeat that the rule is limited to cases of uncertainty of legitimate descent and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment.

I have dwelt upon this point at such length because the judgement of Petheram, C.J., now under appeal begins by saying:

> "The evidence in this case proves, in my opinion, that the plaintiff-appellant Allahdad was the illegitimate son of Ghulam Ghaus Khan. I also think upon the evidence that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was, in the inception at all events, an illegitimate son of his father."

Similarly, my brother Brodhurst, in summing up the effect of the evidence in this case, went even further than Petheram, C.J. in saying:

> 'The following appear to be the established facts – that Allahdad was not born in wedlock; that he was the son of Moti by an unknown father; that his mother was at the time of his birth and up to the time that she married Ghulam Ghaus a prostitute.'

If I had taken the same view of the evidence as Petheram, C.J., or my brother Brodhurst, as to the parentage or birth of Allahdad, I should have found it impossible to have favoured his claim; but according to the view of the facts which my brother Straight has taken and in which I concur, the date of the marriage of Ghulam Ghaus with Moti Begam with reference to

the birth of Allahdad is wholly uncertain owing to want of trustworthy evidence, and, indeed, it is not even established that he was the natural son of Ghulam Ghaus. But direct evidence of paternity is not to be expected in such a case any more than in a case where the question of alleged illegitimacy does not complicate the facts. Indeed, in the Muhammadan law, as in other systems of jurisprudence, direct proof of paternity is not required, and rules of presumption more or less stringent are adopted by various systems as furnishing the place of absolute proof of paternity which, *ex necessitate rei*, cannot be proved by positive and direct evidence, because, as the *Fatawa Alamgiri* puts it, 'the connection of a child with his father is secret,' as distinguished from 'maternity, which admits of positive proof, because the separation of a child from its mother can be seen'. To sum up the matter, I agree in the views of my brother Straight in holding that the entire question of the descent, birth, and legitimacy of Allahdad is involved in obscurity owing to the exact date of his mother's marriage with Ghulam Ghaus being unascertainable, and that, therefore, this case presents all those conditions to which the Muhammadan law as to the acknowledgment of parentage is most appropriately applicable; and further, as my learned brother has shown here, the requisite acknowledgment in words and by treatment was made by Ghulam Ghaus without any such intimation of Allahdad being the offspring of illicit intercourse as would vitiate the effect of the acknowledgment according to the texts which my learned brother has quoted.

In *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim*[18] the facts were that one Abdul Hadi had lived for some two years with a Burmese lady Mah Thai and a son Abdul Razak was born. The issue that arose was whether Abdul Razak was the legitimate son of Abdul Hadi. On the facts it was held that there had been no marriage between the parties and that the Burmese lady had not been converted to Islam. On the question as to whether the son born to them had been legitimated by the father's ac-

[18](1893) I.L.R. 22 Cal. 668.

knowledgment of him, it was held that under the Mohammedan Law the legitimation of a son, born out of lawful wedlock, may be effected by the force of the father's acknowledgment of his being of legitimate birth; but that a mere recognition of sonship is insufficient to effect it. Acknowledgment in the sense meant by that law is required viz. of antecedent right and not a mere recognition of paternity. On the facts it was held by the Privy Council that the evidence fell short of such an acknowledgment as would confer the status of legitimacy upon an illegitimate child.

In *Musst. Bibee Fazilatunnessa* v. *Msst. Bibee Kamarunnessa*[19] the facts were that the deceased a Muslim had lived with a lady who was originally a Hindu and had five children. There was no clear evidence whether there had been a marriage between the deceased and this lady. The facts showed that the deceased had acknowledged the children as his legitimate children. It was held the children had been acknowledged as legitimate children. In its judgment the Court (Maclean C.J., Bodilly and Mookerjee JJ) said —

> "It is enough for the purpose of the present case to say that all the authorities are agreed in holding that unless there is an absolute bar or impediment to a valid marriage acknowledgment has the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty."

In *Sadik Husain* v. *Hashim Ali*[20] it was alleged that the Nawab Zaighan-ud-Daula, a Shiah, had contracted a marriage in the muta form with an Abyssinian slave girl, Zohra Kainan, and that a son was born of that union. The Privy Council described the son as "the ill-begotten child of a menial servant and a frail negress, never therefore owned as a son of the Nawab and treated by him as such." It was held by the Privy Council that the son was not the legitimate son of the Nawab. Lord Atkinson

[19](1901) 9 Cal. W.N. 352.

[20]AIR 1916 P.C. 27.

said, "No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate but where no proof of that kind has been given such a statement or acknowledgment is substantial evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy is possible."

In the case of *Zakirali and another* v. *Sograbi*[21] the facts showed that a child had been acknowledged by a Muslim father and it was held that the burden of disproving the paternity and legitimacy of the child lay heavily on the person who denies them. Stayen A.J.C. in his judgment said – "The question of law is one of considerable difficulty, and there is unquestionably some variation of opinions upon it in the published decisions and the textbooks. It seems expedient to examine some of the more important cases bearing upon it. In *Ashruffoodowlah Ahmed Hossein* v. *Hyder Hossein Khan* (1867) 11 M.I.A. 94 it was laid down that mere continued cohabitation, without proof of marriage or of acknowledgment, is not sufficient to raise such a legal presumption of marriage as to legitimatise the offspring. Marriage and acknowledgment may be presumed, but the presumption must be one of fact, and, as such, subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from furnishing a ground for presuming a prior marriage, prima facie at least, excludes that presumption. In this case their Lordships regarded acknowledgment of paternity under Mahomedan law as being "a recognition, not merely of sonship but of legitimacy as a son." Their Lordships further remarked that though the general rules of evidence of the Mahomedan law did not prevail in the British Indian Courts, still, in relation to this particular subject of establishment of paternity and legitimacy, so intimately connected with family feelings and usages deference to those rules was recommended if not enjoined: and in this connexion, they quoted a passage from their own decision in *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1841–46) 3 M.I.A. 295 as follows:

[21] AIR 1918 Nag. 32.

> "We apprehend that in considering this question of Mahomedan law we must at least to a certain extent, be governed by the same principle of evidence which the Mussalman lawyers themselves would apply to the consideration of such question."

In the case last quoted, which was decided in 1884 A.D., it was held that under the Mahomedan law continual cohabitation and acknowledgemnt of parentage is presumptive evidence of marriage and legitimacy and that view, at least, is now so firmly established that there can be no question that the lower Court, in this case, wrongly called for proof, when it should have demanded disproof of the legitimacy of Zakir Ali. The same rule was affirmed in *Khajooroonissa* v. *Rowshan Jehan* (1876–77) 13 I.A. 291, another decision by the Supreme Tribunal. In *Mahammad Azmat Ali Khan* v. *Lalli Begun* (1882) 8 Cal. 422 the Judicial Committee laid down that: "the acknowledgment and recognition of children by a Mahomedan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth may without proof of his express acknowledgment of them be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent." In the course of a comprehensive judgment their Lordships ruled that in the face of a proved acknowledgment of his two sons by the father it was not necessary to pronounce a distinct opinion upon the question whether the marriage in fact took place, as the sons were entitled to succeed upon the ground that acknowledgments of them by their father had been proved. But the case does not lay down that an acknowledgment is conclusive on the point of legitimacy. Their Lordships said at p. 432:

> "The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships however are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the Bar, viz., that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case. That rule of the Mahomedan law has not been questioned at the Bar."

As will appear hereafter there has been some diversity of opinion in this country as to the proper interpretation of this ruling; but Mr. Ameer Ali, in his standard work on the Mahomedan Law, Edn. 3, Vol. 2, at p. 258, following the opinion of Mahmood, J., in a case to be presently noticed, considered that their Lordships "never intended to imply that an acknowledgment by a man of his natural-born children – of his offspring by a woman between whom and himself there could not be any valid union, or notoriously there was none – would give the children the status of legitimacy, though the Courts in India have to some extent understood the decision in that sense."

My opinion is that the Judicial Committee left the question undecided because, as they expressly stated, the admission at the Bar relieved them from the necessity of deciding it. A decision which follows an admission or agreement of the parties on a point of personal law cannot be interpreted to represent the judicial opinion of the tribunal on that point, so as to constitute case-law. The uncertainty was however somewhat enhanced by the decision of the Judicial Committee in *Sadakat Hossein* v. *Mahomed Yusuf* (1884) 10 Cal. 663. The placitum in this case reads thus: "The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist. Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question."

The High Court had found that the boy concerned had been begotten by this father upon a woman who had been in an inferior station in his household, and was born out of wedlock; but they relied upon the decision of the Supreme Tribunal in *Ashruffoodowlah Ahmed Hossein* v. *Hyder Hossein Khan (supra)* in ruling that he had been legitimated by his father's acknowledgment, and was entitled to inherit as a legitimate son. The Calcutta Court had further declared that it was not necessary to decide whether the parents had or had not been married. In disposing of the appeal before them their Lordships of the Privy Council said –

> "The real issue in this case, and the only issue upon which their Lordships feel it necessary to decide, is whether Selim – who was beyond question the actual son of Amir Hossein by a woman known

> as Domni – had been so recognized by Amir Hossein as to give him the status of a son capable of inheriting. The suit relates to the property of Amir Hossein. A question of importance was raised by the counsel for the appellant. He contended that Selim could not be treated as having acquired the status of a son capable of inheriting, because he alleged that the intercourse between Amir Hossein and Domni was an adulterous intercourse as she had been previously married to a person then and still living, and that consequently whether her connexion with Amir Hossein was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that according to Mahomedan law, the issue of that adulterous intercourse could not inherit as heir or acquire the status of a son by recognition. It therefore becomes necessary to consider in the first instance whether the alleged marriage of Domni to a man named Jommun has been established by satisfactory proof."

The evidence and probabilities for and against this alleged marriage having been considered, the judgment proceeds: "Their Lordships have then come to the conclusion that the parties fail to establish this marriage between Jummun and Domni. That relieves them from offering an opinion upon the very important question of law which was raised by the counsel for the appellant, namely whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment. The absence of reliable proof, such as their Lordships could act upon, of the marriage of Domni and Jummun, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Mahommad Azmat Ali Khan* v. *Lalli Begum* (1882) 8 Cal. 422."

Their Lordships then cited the rule of Mahomedan law already set out herein, which was admitted by the parties and adopted by the Board in that case, and then proceeded: "Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the primary court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence afrerwards, concur in opinion that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from which an inference is fairly to be deduced that the father intended to recognize him and give him the status of a son

capable of inheriting. Upon that point both the Courts come to one conclusion; and that conclusion their Lordships adopt. They think that the status of Selim as son has been sufficiently established by recognition so as to enable him to claim as heir."

It seems clear from this decision that while the question whether an offspring of an adulterous intercourse – by which is meant offspring begotten on the lawful wife of another man – could be made an heir of the natural father by acknowledgment was left an open question, their Lordships favoured the view that a son begotten on a maid or widow, though born out of wedlock, could be legitimatised by such acknowledgment. But the efforts of Mussalman lawyers in India have consistently and successfully opposed that view, as will hereafter be made apparent.

In *Abdul Razak* v. *Aga Mahomed Joffer Bindanim* their Lordships of the Privy Council ruled that under the Mahomedan law the legitimation of a son born out of legal wedlock, may be effected by the force of his being of legitimate birth, but that a mere recognition of sonship is insufficient to effect it. Acknowledgment, in the sense meant by that law, is required, viz., of antecedent right and not a mere recognition of paternity. This decision purports to explain certain passages in *Ashruf-foodowlah Ahmed Hossein* v. *Hyder Hossein Khan (supra)* already cited above but makes no reference to any of the other cases, though they were all put forward at the Bar. It is undoubtedly difficult to reconcile the later of these two rulings with the clear and correct enunciation of the Mahomedan law contained in the earlier of them that an acknowledgment of sonship is also an acknowledgment of legitimacy. *Abdul Razak* v. *Aga Mohamed Joffer Bindanim* was the case of a child born of a union between a Mussalman and a Burmese woman who had not been converted to Islam. With all respect and due submission, it seems clear that an incontrovertible principle of the Mahomedan law was overlooked, namely that the status of legitimacy is not confined to the offspring of a valid marriage but extends to the offspring of all unions which are not wilfully incestuous, adulterous, or otherwise within the definition of zina.

As pointed out by Mr. Ameer Ali in his Mahomedan Law, Edn. 3, Vol. 2, p. 234, et seq., the presumption of legitimacy is

so strong that only the offspring of a connexion where the man has no right or semblance of right in the woman either by marriage or by the relationship of master and bondswoman, is a 'walad uz zina' or child of fornication. The learned author also mentions the great difference between a marriage which is void ab initio (batil) and one which is merely invalid (fasid) but capable of being validated; and shows that while even the issue of an involuntary batil marriage, i.e., one contracted in error or ignorance of the facts, may be legitimate, the offspring of a fasid union is always legitimate. The marriage of a Mussalman with a heathen woman would only be fasid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. Therefore the children of such a marriage would be legitimate. In this connexion the following commentary of Mr. Ameer Ali on *Abdul Razak* v. *Aga Mohamed Joffer Bindanim* appears in a note under p. 235: "In view of this recognized principle, it seems to me that . . . the real question was missed . . . before the Judicial Committee. For if there was a de facto marriage, the prior conversion of the woman, so far as the legitimacy of the child was concerned was immaterial."

Again a Mussalman may not marry two sisters by the same contract, or one after another whilst the previous marriage with one of them is subsisting. But if he should do so in fact, the later marriage is fasid and not batil, because the prior marriage may become dissolved at any time by death or divorce and automatically validate the second union. Accordingly, although the Qazi may separate the parties on the ground of invalidity of the marriage, and the woman can acquire no right of inheritance thereby unless and until it is validated, nevertheless f it is consummated while fasid the issue would be legitimate: Ameer Ali's Mahomedan Law, Vol. 2, p. 319; Wilson's Digest of Anglo Mahomedan Law, Edn. 4 pp. 118 and 120. It is true that in *Aizunnissa Khatoon* v. *Karimunissa Khatoon* (1896) 23 Cal. 130 such a union was held to be batil, and issue illegitimate. The error of this view is clearly pointed out by Mr. Ameer Ali at pp. 236 and 368 of his above volume, and with due respect for the Calcutta High Court I think that the learned commentator rightly says that some confusion appears to have arisen in that case between the title of the second wife to inheritance and the

status of the children born of her; and at p. 387, of his above volume Mr. Ameer Ali gives good reasons for the view that a passage from the Rudd-ul-Muhtar which refers only to the particular case of a union between a non-Moslem man and a Moslem woman was misapprehended by the learned Judges as being applicable to a contemporaneous marriages with two sisters where all the parties were Moslems. Sir R.K. Wilson in his above Digest has not appreciated these points in discussing the same decision at p. 118, and according to a note at the foot fo that page, he was puzzled by an apparent conflict of authority which has no real existence in Mahomedan law. I now turn to the Indian decisions. In *Oomda Beebee* v. *Syud Shah Jonab Ali* (1866) 5 W.R. 132 it was held that according to Mahomedan law, the acknowledgment of a father renders a son or daughter a legitimate child or an heir, unless it is impossible for the son or daughter to be so. This decision was given by so eminent an authority as Sir Barnes Peacock. In an earlier case, *Rook Begum* v. *Shahzadha Walagowhur Shoh* (1865) 3 W.R. 187 it was ruled, under the same law, by Lock and Glower, JJ., that a public acknowledgment of paternity will of itself raise a presumption of marriage between the person who makes it and the mother of the child, without the father specifically connecting his paternity with any particular woman. To rebut this presumption, the onus of proving the impossibility of the marriage is on the other side.

In *Nujmooddeen Ahmed* v. *Beebee Zuhoorun* (1868) 10 W.R. 45 Macpherson, J., raised the presumption from the position of one that is rebuttable to that of one that is conclusive and absolute, by holding that the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father. This decision was influenced by certain observations of the Privy Council in the case of *Ashruffoodowlah Ahmed Hossein* v. *Hyder Hossein Khan* above quoted. The rule, as to the onus of proof being on the party disputing the legitimacy of an acknowledged son, was again enunciated in *Zulfekar Khan* v. *Golam Murteza Khan* (1872) 18 W.R. 250. In *Nubo Kant Roy* v. *Mahatab Bibee* (1873) 20 W.R. 164 Jackson and Mitter, JJ., described an acknowledgment of sonship made by the father to a third party as "conclusive against all parties," and claimed

authority for that proposition from the decision in *Bibi Najibunnissa, In the matter of the Petition of* (1869) 12 W.R. 497 a case in which Mr. Ameer Ali thinks the Mahomedan law was misapprehended: see p. 255n of the above volume of his Commentary. In *Mt. Butcolun* v. *Mt. Koolsoom* (1876) 25 W.R. 444 Garth, C.J., and Ainslie, J., replaced the presumption from acknowledgment upon its proper footing as one which may be rebutted, and found ample authority for that view in *Mahomed Bauker Hoossain Khan* v. *Shurfoon-nissa Begum (1865) 3 M.I.A. 136.*

The latest decisions of the Privy Council had however left an impression that, in some cases, a child born of an illicit intercourse, which was not incestuous or adulterous, could be legitimatised by the acknowledgment of his sonship by the father, and the Allahabad High Court were called upon to deal with the question in a case which has since become a leading authority on the point. *Mohamed Allahadad Khan* v. *Mohamed* Ismail Khan first came before a division Bench (Petheram, C.J., and Brodhurst, J.), in which the learned Judges were divided in opinion as to the legal effect of an acknowledgment of sonship by the father. In appeal, the case went before a Bench of three Judges, namely, Edge, C.J., Straight and Mahmood. JJ. The dictum of Edge, C.J., and Straight, J., was as follows:

> "The rules of the Mahomedan law relating to acknowledgment by a Mahomedan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him."

In the same case Mahmood, J., decided as follows:

> "Acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence and form a part of the substantive Mahomedan law. So far as inheritance through males is concerned legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy

> cannot be established by direct proof of such a marriage acknowledgment is recognized by the Mahomedan law as a means whereby the marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger and there is nothing in the Mahomedan law similar to adoption as recognised by the Roman and Hindu systems or admitting of an affiliation which has no reference to consanguinity or legitimate descent. *A child whose illegitimacy is proved beyond doubt by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty.*"

Now there can be no doubt that so much of the above view as I have underlined is in apparent disregard of the two Privy Council cases *Mahammad Azmat Ali Khan* v. *Lalli Begum (supra)* and *Sadakat Hussein* v. *Mahomed Yusuf (supra)*, wherein some observations of their Lordships seem to imply that legitimation might be effected by acknowledgment in spite of proof that the mother of the acknowledgee was not the wife of the father at the time of the acknowledgment. But in both these cases Mahmood, J., argued that marriage had been alleged and had simply been held not to be proved (though it is difficult to justify this as a correct interpretation of the later case) and he felt himself still at liberty therefore to maintain p. 337 (of 10 All.) that – "there is no warrant in the principles of the Mahomedan law to justify the view that a child proved to be the offspring of fornication adultery or incest could be made legitimate by an act of acknowledgment."

Whatever may be the value of the learned Judge's interpretation of the Privy Council view in *Sadakat Hossein* v. *Mahomeed Yusuf (supra)*, I am of opinion that his enunciation of the Mahomedan law is unquestionably sound. With all respect to their Lordships of the Privy Council if they intended to lay down that a child born of an intercourse which though amounting to fornication is neither incestuous nor adulterous can be made legitimate by acknowledgemnt it is impossible to find in any known authority on Mahomedan law, any support

for the suggested distinction between the son of a mere fornicatress and the son of an adulteress. As pointed out by Wilson, at p. 172 of his above Digest, such a distinction is wholly foreign to that law which includes all forms of intercourse not legalised by marriage – whether valid or capable of validation – or by proprietorship under the one appellation of zina and subjects all alike to the ban of the criminal law. The dictum of Mahmood, J., on this point though *obiter* has been consistently acknowledged as correct in several subsequent decisions by the High Courts in India. In *Liaqat Ali* v. *Karimunnissa* (1893) 15 All. 396 it was followed, Edge, C.J., and Burkitt, J., held that a Mahomedan cannot be acknowledging him as his son render legitimate a child whose mother at the time of his brith he could not have married by reason of her being the wife of another man. This ruling however was not even in apparent conflict with the Privy Council view in *Sadakat Hossein* v. *Mahomed Yusuf(supra)* because it dealt with the offspring of adultery; and their Lordships had expressly left undecided the question whether the fruit of an adulterous intercourse could be legitimatised by acknowledgment. The Allahabad Bench decided that question against the alleged acknowledgee. But that does not touch the question of the position of an acknowledgee who is the issue of non-adulterous and non-incestuous fornication.

In *Aizunnissa Khatoon* v. *Karimunnissa Khatoon, (supra)* already cited above in connexion with the legitimacy of a child born of a union with the sister of an existing wife – a point with which we are not concerned in this case – the Calcutta High Court expressly followed the above dictum of Mahmood, J., and held that the doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known, and it cannot therefore be called in to legitimatise a child which is illegitimate by reason of the unlawfulness of the marriage of its parents. But, here again, the decision is of no value on the particular question whether the issue of simple fornication cannot be legitimatised by acknowledgment. For it the marriage with the sister was batil – as held by the Calcutta Court – then there was a condition present which rendered legitimacy impossible, namely the impossibliity fo a lawful union between the parents; while, if the marriage was fasid, there was no need

of acknowledgment, the child of such a union being recognized as legitimate by the law.

However, in *Dhan Bibi* v. *Lalon Bibi* (1900) 27 Cal. 801 we have a case directly in point, because the child concerned was neither the child of adultery, as in *Liaqat Ali* v. *Karimunnissa*, nor of incest, as he was considered to be in *Aizunnissa Khatoon* v. *Karimunissa Khatoon*, but the offspring of simple fornication. The Privy Council cases above mentioned were fully considered, and it was held that, under the Mahomedan law, where a child is begotten by a Mahomedan father on a Hindu prostitute living with him, no acknowledgment by the father can confer on the child the status of legitimacy. This view was subsequently distinguished but not dissented from, by three Judges of the same High Court, who decided in *Bibee Fazilatunessa* v. *Bibee Kamarunnessa* (1905) 9 C.W.N. 352, that unless there is an absolute bar or impediment to a valid marriage, acknowledgment has the effect of legitimation according to Mahomedan law, where either the fact of the marriage, or its exact time with reference to the legitimacy of the child's birth, is a matter of uncertainty. It was further held in this case that the doctrine of acknowledgment is an integral portion of the Mahomedan family law, and the conditions under which it will take effect must be determined with reference to Mahomedan jurisprudence, rather than to the Evidence Act. It will thus be seen that the dictum of Mahmood, J., in the leading Allahabad case was again substantially approved and followed.

That was also the course adopted by the Bombay High Court in the very recent case of *Mardansaheb* v. *Rajasaheb* (1909) 34 Bom. 111 where it was ruled that under Mahomedan law a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth, and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of zina (i.e. fornication, adultery, or incest). In this case the learned Judges had before them all the previous decisions above examined, but they confined themselves to an unconditional adoption of the law as laid down by Mahmood, J., in the case of *Muhammad Allahadad* v. *Muhammad Ismail Khan*.

In *Sundari Letani* v. *Pitambari Letani* (1905) 32 Cal. 871, where a Hindu married woman, undivorced from her Hindu

husband, embraced Islam and married a Mahomedan according to the forms of Mahomedan law, and had sons by him during the lifetime of her Hindu husband, it was held that the sons were illegitimate; and *Dhan Bibi* v. *Lalon Bibi* was relied upon as an authority for that view. But the case was decided from the Hindu point of view, and should not, I think, be regarded as laying down what would have been the position of the sons with reference to their right of inheritance from their Mahomedan father, either by virtue of the nikah, or by his acknowledgment of them, if any. There does not appear to be any published decision of this Court upon the legal effect of an acknowledgment of sonship under the Mahomedan law, though the question must frequently have arisen. I have therefore made a full examination of the authorities in this case. I have been unable to find any ruling of the Madras High Court, but it seems to me that there is sufficient case-law available for my guidance. Before summing up the matter, it seems expedient to mention one or two other points which have some bearing on the question.

The decision of Mahmood, J.. above cited lays down the proof or presumption of a valid marriage as a condition precedent to the legitimacy of a son under Mahomedan law. It is somewhat difficult to reconcile this with the very clear enunciation of that law by Mr. Ameer Ali in his above treatise according to which illegitimacy is confined to the offspring of zina, in which is included a union, albeit obtained by going through the ceremony prescribed for lawful marriage, between persons whose lawful marriage is impossible by reason of some absolute and insurmountable barrier so that the attempted marriage is batil. But even where a void marriage of that kind is entered into in error or ignorance as to facts the issue thereof conceived before discovery of the error and nullification of the union by the Judge is held legitimate and in every case the issue of a fasid marriage even though the woman fails to acquire thereby all the status of a wife is declared to be legitimate without acknowledgment and despite subsquent severance of the parents. I must take this to be the law notwithstanding that the dictum of Mahmood, J., suggests that the issue of an invalid marriage is, ipso facto illegitimate.

Again, in considering the absolute bars to legitimacy, we must bear in mind that there can be no legitimation "per subsequens matrimonium" under the Mahomedan law. That law requires that the child should be born not less than six months after the date of marriage proved or presumed; but acknowledgment will secure legitimacy to an earlier child by certain fictions in favour of legitimacy, to which Mr. Ameer Ali refers at pp. 232 and 323 of his said volume. Legitimacy is also presumed in the case of a birth within two years of the termination of a valid marriage. These presumptions being a part of the substantive law of the Mahomedans will not be affected it seems by the rule laid down in S. 112, Evidence Act. Wilson's Digest, p. 169, Ameer Ali's Mahomedan law, Vol. 2, p. 234. It is not enough that the child should be born in wedlock. It must be conceived as the result of a union which is not zina, i.e., an act of fornication.

So far then as the present case is concerned the Mahomedan law applicable may be summarized thus: (1) In all cases in which marriage may be presumed from cohabitation combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity and legitimacy. Paternity is established in the person said to be the father by proof or legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife or was in good faith or reasonably believed by him to be such, or whose marriage being merely irregular (fasid) and not void ab initio (batil) had not at that time been terminated by actual separation. In all such cases the offspring of the union is legitimate. Paternity and legitimacy may also be presumed from acknowledgment by the putative father in every case where it is humanly and legally possible that he might have been the father in the fact, and there might have been a valid marriage between him and the mother of the acknowledged child. This presumption of paternity and legitimacy can be rebutted by – (a) disclaimer on the part of the acknowledgee, he or she being of an age to understand the transactions; (b) such proximity between the ages of acknowledger and acknowledgee as would under the alleged relationship be physically impossible; (c) proof that the acknowledgee is in fact the child of some other

person; or (d) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten, and that such child is therefore *waladuz zina.* A marriage by a Mahomedan with a non-Moslem woman unconverted to Islam, who is not at the time the lawful wife of another man is merely irregular (fasid) and the child born of such a union is legitimate. Where a child has been acknowledged by a Mahomedan father the burden of disproving the paternity and legitimacy of such child lies heavily on the person who denies them. Neither paternity nor legitimacy can be obtained by adoption and a child begotten by zina cannot be made legitimate by the subsequent marriage of its parents before its birth, S.112, Evidence Act, being inapplicable to Mahomedans."

In the result the case was sent back for retrial.

In the case of *Syed Habibur Rahman* v. *Altaf* Ali[22] the facts were that the plaintiff was the natural son of the late Nawab of Bogra, his mother having been a Jewish, Mozelle Cohen, who became a Muslim and cohabited with the Nawab. It was held in the courts in India that there had been no marriage between the Nawab and the Jewish lady. In the Privy Council it was held that even if there had been an acknowledgment of the child, that was of no avail in the face of the fact that there was no marriage. Lord Dunedin said –

> "Before discussing the subject, it is as well at once to lay down with precision the difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mohammedan law. Examples of it may be found in other systems. The adoption of the Roman and the Hindoo law effected legitimacy. The same was done under the Canon Law and the Scotch Law in respect of what is known as legitimation per subsequens matrimonium."
>
> By the Mohammedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of zina, that is, illicit connection,

[22] AIR 1922 P.C. 159.

and cannot be legitimate. 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, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son, but as his legitimate son. It must not be impossible upon the face of it, i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest.

The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage – a presumption which may be taken advantage of either by a wife claimant or a son claimant. Being, however, a presumption of fact, and not juris et de jure, it is, like every other presumption of fact, capable of being set aside by contrary proof.

The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position. The marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact.

A large number of cases were cited to their Lordships which they think it unnecessary to discuss in detail. It is quite true that in the earlier of the series not only is stress laid on the fact that an acknowledgment of legitimacy has more than a mere evidential value, but also there are expressions used such as that by a proper acknowledgment the status of legitimacy is "acquired."

Fastening on such expressions, the learned counsel for the appellants argued that to enter into an enquiry into the fact of marriage when a good acknowledgment had been made out was not only bad law but a sin against the rule of logic.

The simple answer to this is that the phraseology of such expressions, as cited above must not be pressed to disturb what is the ruling principle, and that principle is that in Mohammedan law such an acknowledgment is a declaration of legitimacy and not a legitimation. A declaration, though it cannot be withdrawn, may be

contradicted, for it is only a statement: legitimation is an act, which being done cannot be undone. So the rules of logic remain untouched.

The whole question was thoroughly examined in a very learned judgment by Mahmood, J., in the case of *Muhammad Allahdad Khan* v. *Muhamad Ismail Khan* and finally, in the case of *Sadik Husain Khan* v. *Hashim Ali Khan*. Lord Atkinson, delivering the judgment of the Board, said as follows (p. 234)

"If this be so, the rule of the Mahomedan law applicable to the case is well established. No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible."

That statement is, in their Lordships' view, clear and conclusive and what they have said above is no more than an elaboration of what was there said."

In *Zamin Ali* v. *Aziz un-Nissa*[23] it was held that evidence admissible under the Evidence Act can be used for the purpose of considering whether the fact of marriage or legitimacy is proved, notwithstanding any rule of Mohammadan law to the contrary. In that case Mukhrji A.C.J. and Bennet J. said —

"We conceded that there is no acknowledgment in the present case by the father that his sons were legitimate and therefore therefore the plaintiffs cannot have recourse to that particular proposition of Muhammadan law. But we have not been shown any ruling to the effect that evidence of the kind on the record is not admissible for the purpose of proving the marriage of Mt. Munna with Mukhtar Ali. For example, the statement in the evidence of Ahmad Hussain that he heard Mukhtar Ali saying that he had married the mother of Ghaffar is a statement made by a deceased person Mukhtar Ali to the effect that there was a marriage between him and Mt. Munna. We are of opinion that such a statement by a deceased person is admissible in evidence for the purpose in question under the provisions of Section 32(5) of the Indian Evidence Act as a statement as to marriage. We do not think that the doctrines of Muhammadan Law can be held to exclude evidence of

[23] I.L.R. (1932) 55 All 139.

this nature and we consider that the Indian Evidence Act does apply in this case. Section 2 of the Indian Evidence Act states "On and from that date the following laws shall be repealed (1) all laws of evidence that contained in any statute, act or regulation in force in any part of British India." We might further refer to the definition of "Evidence" and of "Proved" in section 3 of the Indian Evidence Act and it is clear that evidence permitted by the Indian Evidence Act is evidence which can be used for the purpose of considering whether a fact is proved under the definition."

In the Pakistan case of *Bibi Amu* v. *Mst. Asiat*[24] Wahiddud-din J. dealt with the burden of proof in such cases. He said –

"The learned Subordinate Judge has not appreciated the principles of Muhammadan Law applicable to such cases. According to well established principles of Muslim jurisprudence a valid marriage may be proved by direct evidence or presumptive proof. The continual cohabitation of the alleged parents and acknowledgment of the child by the father is presumptive evidence of marriage between the parents and of the legitimacy of the offspring. So far as legitimacy of a child is concerned it may be presumed or inferred from circumstances without any direct proof either of the marriage or any formal act of legitimation."

Their Lordships of the Privy Council in *Mahomed Baukar Hoossain Khan Bahadoor* v. *Shurfoon Nisa Begum* 8 M.I.A 136 observed –

"But in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation."

It has also been accepted that the determination of such questions, will to a certain extent, be governed by the same principle of evidence as the Muslim lawyers would apply in such cases. Their Lordships of the Privy Council in *Khajah Hidayut Oollah* v. *Rai Jan Khanum* 3 M.I.A. 295 at p. 318 observed –

[24] P.L.D. 1958 Kar. 420.

[25] (1952) S.C.R. 1133.

"We apprehend that in considering this question of Mahomedan law we must, at least to a certain extent, be governed by the same principle of evidence which Mussulman lawyers themselves would apply to the consideration of such a question."

Now what are the principles of evidence which are applied by Muslim jurists in such cases? According to them it is not permissible for a witness to testify no anything that he has not seen except in case of nusub, death, and marriage. Baillie in his book "A Digest of Mohammadan Law", (Second Edition, 1875) at page 428 has discussed this subject in detail and observed –

"It is not lawful for a witness to testify to anything that he has not seen, except nusub, death, marriage, consummation, and the authority of a Judge; and it is competent to him to testify to these matters, when informed of them by a person in whom he has confidence. This is on a favourable construction, for by analogy it would be unlawful, since Shuhadut (testimony) is derived from 'mooshahudut, which signifies being present; but a more favourable construction has been adopted in these cases, because the causes of them can be seen by only a few special witnesses, and rights of great importance, which are dependent on them might otherwise be injured or delayed; and it is lawful to the witness to testify to them on continuous notoriety, or information that can be confided in, it being a condition that the information shall be received from two just men, or one man and two women, in order that a kind of knowledge may be obtained thereby."

The learned author at page 430 observed –

"When witnesses have testified to a matter which may be lawfully attested by hearing, and said, "We have not seen it, but is notorious to us," their testimony is lawful. Notoriety in nusub, etc., is of two kinds: Hukeekee, or actual, and Hookmee, or in effect. Actual is when a fact is publicly known and has been heard of from so many persons, that it is not conceivable they should all agree in a lie: and in this kind the justice of the persons, and their use of testifying language to the witnesses, are not conditions; all that is required being that the report should be continuous or unbroken. Hookmee is when a fact is testified to the witness by two just men, or one just man and two just women in words of testimony; that is, when they have borne testimony without having been called upon to testify by the man in whose favour the testimony is given; for Moohummud has stated in the book of Shuhadut, that when one has met two just persons who testify to the nusub of a particular individual, and know his condition, it is competent to him to bear witness to the fact, but if the individual have set up the two witnesses to testify to his nusub, it is not competent to the first persons to testify to it; and if a man should come to the Zukuranee tribe, and

should say to them (they not knowing him). 'I am such an one, the son of such an one', it is not competent to them (said Moohummud) to testify to his nusub, until they meet two just men of his city who testify the fact to them and Jussas in his comment on the book, has said that this is correct. It is said with regard to death, that information by one man or one woman is enough, and this is correct; and all are agreed that words of attestation are not a condition. When a person has been present at the burying of another, or has prayed over his body, this is seeing his death, so that, though he should explain, his testimony is to be received. If news should arrive of the death of a person, and what is usual on occasions of death should be done, it is not competent to give information of the death, until you are informed confidently by one who saw his death."

Even under the Indian Evidence Act in some cases evidence of general repute on a question of relationship has been held admissible. In *Maharaja of Kolhapur v. S. Sundram Ayyar and others* AIR 1925 Mad. 497 at p.513 it was observed –

"Much may be gathered from the treatment accorded to them by the Raja, so far as the records are available of such treatment and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under S.50 of the Evidence Act (See illustration (b), as it shows the repute in which sword marriage was held in this family."

It will be thus observed that in these cases where the marriage is not capable of being easily proved, the status of the children is generally presumed either from express acknowledgment by the father or from a course of treatment by the father to the mother and the child or from the evidence of repute and notoriety amongst the member of the family, community and respectable members of the locality. But in the absence of such evidence or circumstances sufficient to found such a presumption of inference claim by a party as a legitimate son and to the share in the estate of a Mohammedan father is bound to fail. It is unfortunate that the learned Subordinate Judge failed to approach the present case in the light of these principles".

In *Mohd. Amin and others* v. *Vakil Ahmad and others* (1952) S.C.R.1133 a question arose as to the lawful wedlock between plaintiff No. 5 and Haji and the legitimacy of the palintiffs Nos. 1–4. Bhagwati J. in giving the judgment of the Supreme Court said–

> "Both the courts found the factum of the marriage not proved and the plaintiffs had therefore of necessity to fall back upon the presumption of marriage arising in Mohammedan law. If that presump-

tion of marriage arose, there would be no difficulty in establishing the status of the plaintiffs 1–4 as the legitimate children of Haji because they were admittedly born by the plaintiff 5 to Haji. The presumption of marriage arises in Mohammedan law in the absence of direct proof from a prolonged and continual cohabitation as husband and wife."

It will be appropriate in this connection to refer to a passage from the judgment of their Lordships of the Privy Council in *Khajah Hidayat Oolah* v. *Rai Jan Khanum* (1844) 3 Moore's Indian Appeals 295. Their Lordships there quoted a passage from Macnaghten's Principles of the Mohammedan law:

"The Mohammedan lawyers carry this disinclination (that is against bastardising) much further: they consider it legitimate of reasoning to infer the existence of marriage from the proof of cohabitation – None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would in other cases, be considered incompetent witnesses is admitted to prove wedlock and in short, where by any possibility a marriage may be presumed the law will rather do so than bastardize the issue and whether a marriage be simply voidable or void *ab initio* the offspring of it will be deemed legitimate. . . .

This I apprehend with all due deference is carrying the doctrine to an extent unwarranted by law; for where children are not born of women proved to be married to their father or of female slaves to their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony. The mere fact of casual concubinage is not sufficient to establish legitimacy; and if there be proved to have existed any unsurmountable obstacle to the marriage of their putative father with their mother, the children though not born of common women, will be considered bastards to all intents and pruposes".

Their Lordships deduced from this passage the principle that where a child had been born to a father, of a mother where there had not been a mere casual concubinage, but a more permanent connection, and where there was no insurmountable obstacle to such a marriage, then according to the Mohammedan law, the presumption was in favour of such marriage having taken place.

The presumption in favour of a lawful marriage would thus arise where there was prolonged and continued cohabitation as husband and wife and where there was no insurmountable obstacle to such a marriage e.g. prohibited relationship between the parties, the woman being an undivorced wife of a husband who was alive and the like.

Further illustrations are to be found in the decisions of their Lordships of the Privy Council in 21 Indian Appeals 56 and 37 Indian Appeals 105 where it was laid down that the presumption does not apply if the conduct of the jprties was incompatible with the

apply if the conduct of the parties was incompatible with the existence of the relation of husband and wife nor did it apply if the woman was admittedly a prostitute before she was brought to the woman's house (see Mulla's Mohammedan law p. 238, section 268).

If therefore there was no insurmountable obstacle to such a marriage and the man and woman had cohabited with each other continuously and for a prolonged period the presumption of lawful marriage would arise and it would be sufficient to establish that there was a lawful marriage between them.

The plaintiff 5 and Haji had been living as man and wife for 23 to 24 years openly and to the knowledge of all their relations and friends. The plaintiffs 1—4 were the children born to them. The plaintiff 5, Haji and the children were all staying in the family house and all the relations including the defendant 1 himself treated the plaintiff 5 as the wife of Haji and plaintiffs 1—4 as his children. There was thus sufficient evidence of habit and repute".

### *6. Adoption*

Muslim Law does not recognise adoption as giving any rights of filiation or inheritance. In the Holy Quran it is stated to the following effect —

"Allah has not made for any man two hearts in his one body; nor has he made your wives whom you divorce by *zihar* your mothers; nor has he made your adopted sons your sons. Such is only your manner of speech by your mouths. But Allah tells you the truth and He shows you the right way".[26]

"Behold! you did say to one who received the grace of Allah and your favour — "Retain in wedlock your wife and fear Allah". But you did hide in your heart that which Allah was about to make manifest; you feared the people but it is more fitting that you should fear Allah. Then when Zaid had dissolved his marriage with her with the necessary formality We joined her in marriage to you in order that in future there

[26] The Holy Quran 23:4.

> may be no difficulty to the believers in the matter of marriage with the wives of their adopted sons, when the latter have dissolved with the necessary formality their marriage with them. And Allah's command must be fulfilled."[27]

In Peninsular Malaysia although adoption is practised among Muslims it does not, except in the parts of Negri Sembilan and Malacca which follow the adat perpateh, create any legal family relationship. In *Jainab* v. *Mansor*[28] the plaintiff and her husband Jalil had adopted the infant daughter of Jalil's brother and brought her up from birth to the age of eleven years. The adoptive father died and shortly afterwards the natural father took the child by force and strategem away from the adoptive mother. The child thereafter lived in her paternal grandfather's house. The plaintiff claimed the custody of the child on the ground of adoption. It was held that adoption is a recognised part of the personal law of the Pahang Malays and that the plaintiff as the adoptive mother was entitled to the custody of the child.

In the parts of Negri Sembilan and Malacca which followed the adat perpateh adoption was recognised under the adat as creating family relationships. Full adoption (kadim adat dan pesaka) gave a woman (and her children whether born before or after the adoption) all rights of inheritance and all the responsibilities belonging to the natural daughters and grand-daughters of her adopter. A man, if fully adopted, becomes eligible for office in his adopting tribe. Limited adoption (kadim adat pada lembaga) of a girl, of the same tribe or sub-tribe gave her a right only as to property declared and bestowed during the life of the adopting mother. The practice of adoption by kadim rites appears to be dying out and it was abolished in Rembau in 1940.[29]

[27] The Holy Quran 23:37.

[28] [1951] M.L.J. 62

[29] E.N. Taylor, Customary Law of Rembau, (1929) J.M.B.R.A.S. Part I p. 39f; Lokman Musa, Custom as seen in Land Inheritance, Intisari Vol. 1 No. 4 p. 17f.

In Peninsular Malaysia the Adoption Ordinance, 1952[30] does not apply to Muslims, so that a Muslim cannot adopt a child nor can a Muslim child be adopted under the provisions of the Ordinance. The Registration of Adoption Ordinance 1952[31] provides for the registration of de *facto* adoptions but it is provided that the registration shall not affect the validity of the adoption.

In Sarawak the Adoption Ordinance[32] applies to Muslims and it is provided in the Undang-Undang Mahkamah Melayu Sarawak that a child adopted and registered under the Adoption Ordinance shall be deemed to be the legitimate child of the adopted father and mother and shall be entitled to share in their estate. In the case of *Sheripah Unei and another* v. *Mas Poeti and another*[33] it was held that adoption is recognised by Malay custom in Sarawak and if registered in accordance with the laws of Sarawak, the effect of such adoption is that the adopted child stands in the same relation to the adopting parent or parents as would a child born in lawful wedlock, even though this is not in accordance with the Hukum Shara.

In Sabah the Civil Law Ordinance, 1938[34] provided that any person who has been legally adopted according to the law to which he is subject shall be treated as being or as having been the legitimate offspring of his adopters. In *Matusin* v. *Kawang*[35] it was held that this applies to Muslims and that the adopted children of a Muslim in Sabah shall be treated as legitimate children for all purposes. The Civil Law Ordinance was repealed by the Application of Law Ordinance, 1951 but the position continued to be the same by reason of the application of the English law. The Adoption Ordinance, 1960,[36] law regulates all

[30] No. 41 of 1952.

[31] No. 54 of 1952.

[32] Cap. 91 of the Revised Edition.

[33] [1949] S.C.R. 5.

[34] No. 2 of 1938.

[35] [1953] S.C.R. 106.

[36] No. 23 of 1960.

adoptions in Sabah including adoption by Muslims and under its provisions the adopted child is placed in the same position as the legitimate children of the adopter.

It is reported that Tunisia has enacted a law on law on adoption, the Law of Guardianship and Adoption 1958. In India an Adoption of Children Bill 1972 was introduced in Parliament but has not yet been enacted. Adopted children have no right to inheritance but it is suggested that the device of the compulsory bequest might be adopted to give them a share in the one-third of the estate which can be bequeathed by will.

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# ROLE OF THE JUDICIARY IN A DEMOCRACY

## I

In democratic countries, the judiciary is given a place of pride, honour and dignity. The role of the judiciary in a democracy is that of multi-faced activism and creativeness. A democratic society lives and swears by certain values – individual liberty, human dignity, rule of law,[1] constitutionalism,[2] limited government etc. A well organised, strong and impartial judiciary is most essential to achieve these values on which a democratic system thrives. It is the function of the courts to infuse these basic values in the country's legal and constitutional system. Form this point of view, the role of the judiciary in a democracy becomes crucial and significant.

Primarily, the courts constitute a disputes-resolving mechanism. The primary function of the courts is to settle disputes, and dispense justice between one citizen and another. Another function, and perhaps even more significant in the modern administrative age, is to settle disputes and dispense justice between a citizen and a state organ. Further, the courts may have to decide disputes amongst the organs of the state itself, e.g., in a federation, disputes between the centre and the states, or between the states, *inter se,* fall to the courts for adjudication.[3] In the area of criminal law, the courts legitimize the application of the community's coercive force to the wrong doer. In discharging these functions, the courts interpret and apply the law, and the constitution if the country has a written

[1]This article is based on a paper presented at the Fifth Malaysia Law Conference, 1979.

[1a]Dynamic Aspects of the Rule of Law in the Modern Age, Conclusions and Resolutions made at the South-East Asian and Pacific Conference of Jurists in Bangkok, Thailand, Feb. 15–19, 1965, (1965) *Jl. of the Int'l Comm. of Jurists.*

[2]Giovanni Sartori, Constitutionalism: A Preliminary Discussion, (1962) 56 *Am. Pol. Sc. Rev.,* 853. Also see, Sec. VI of this paper, *infra.*

[3]Freund, Umpiring the Federal System, 54 *Col. L.R.* 561, 574.