

as such because, as here, the other judge in the Court of Appeal does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them.

The senior counsel for the appellants was unable to deny that there were concurrent findings as to the non-existence of the marriage. His argument was directed to this, that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter into any enquiry as to the fact of marriage.

The case might be disposed of by holding, as the majority of the learned judges of the Court of Appeal did, that there was no proper acknowledgment of legitimacy. There is not, however, as to this a "concurrent finding," for the learned trial judge thought otherwise, and it would be necessary to examine the evidence before coming to the above conclusion. Their Lordships do not think it necessary to embark on this enquiry. They will, without deciding, assume that there was a proper acknowledgment, for, as is to be presently explained, they are of opinion that such acknowledgment, in face of the fact that there was no marriage, is of no avail. Their Lordships consider that this result is reached on principle, and is concluded by authority.

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, 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 a 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 rules 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. Muhammad Ismail Khan* (I.L.R. 10 All. 289); and finally, in the case of *Sadik Husain Khan v. Hashim Ali Khan and others* (L.R. 43 I.A. 212), 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.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.



In the Privy Council.



SYED HABIBUR RAHMAN CHOWDHURY AND
ANOTHER

v.

SYED ALTAF ALI CHOWDHURY AND OTHERS.



DELIVERED BY LORD DUNEDIN.

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