INTRODUCTION

This paper titled “Section 112 of the Indian Evidence Act and Contrary Scientific Evidence” tries to focus on contrary scientific evidence as a possible exception to Sec. 112 of the Indian Evidence Act, 1872. Sec. 112 prescribes conclusive proof of legitimacy to a child born within the wedlock or within 280 days after its dissolution. The only exception prescribed under the section being non access of the parties. The objective of the section has been to protect the interests of the child. In this paper it is argued that the presumption of legitimacy should not be conclusive when there is contrary scientific evidence to that effect.

The main argument is that the presumption of legitimacy should be altered in case of contrary scientific evidence like DNA and Blood tests, to meet the ends of justice and to uphold the principles of natural justice. The husband cannot be burdened with the parenthood in order to ensure the legitimacy of the child, thereby violating his own right to be heard. Case laws supporting the view that scientific evidence should be relied upon have been used in support of the arguments.

The paper has been divided into 2 parts, the first part tries to understand the section and highlights the problems with the same. The second part deals with how contrary scientific evidence could be a possible exception to rebut the presumption of legitimacy under Sec. 112. The paper has been written in an analytical manner and follows article format. The researcher has entirely relied upon secondary sources.

UNDERSTANDING SECTION 112

Sec. 112 deals with presumption of legitimacy of the child born within wedlock. Here the legal presumption is that if a child is born during the continuance of a valid wedlock or within two hundred and eighty days after its dissolution, the mother remaining unmarried, the child shall be the legitimate son of that man. Sec. 112 is based on the maxim *pater est quem nuptiae*

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2 Sec. 112, The Indian Evidence Act, 1872.
**demonstrant**, which essentially means ‘he is the father of whom the marriage indicates’.³ The explanation for this is traced back to times when marriage could be the proof for the determination of the heir.⁴ The objective of the section was to protect the child born, from the social stigma of being illegitimate and to prevent the loss of legal rights, the child would have.⁵ The legislative intent of the provision is to protect the rights and interests of the child and to ensure that the child does not become the sufferer.

Reading Sec.112 with conclusive proof as defined under Sec.4, the inference drawn would be that when one fact, such as any person being born during the continuance of a valid wedlock or within 280 days after its dissolution is proved, it shall be conclusive proof that the child born shall be legitimate.⁶ Under such circumstances the court shall not allow evidence to rebut this conclusive proof except when there is proof of non-access.

Stephen talks about 4 kinds of presumptions: Conclusive presumptions; presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove; presumptions which, though liable to be rebutted, are regarded by English law as being more than maxims; and bare presumptions of fact.⁷ Sec. 112 refers to conclusive presumption and is considered by Stephen to be rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction.⁸

Sec.112 mentions only one particular exception to the presumption of legitimacy i.e. non access of the parties at the time when the child could have been begotten,⁹ however if it shown that the circumstance of their access were such as to render it highly improb able that a sexual intercourse took place between them, the presumption as to legitimacy could be rebutted.¹⁰ A plain reading of the section indicates that DNA as evidence cannot be used to rebut the presumption of legitimacy, however upon conjoint reading with Sec.14 of the Family courts act, it can be stated that despite Sec.112 rendering the results of DNA tests futile, it cannot be disregarded as Sec.14 makes relevant, the evidence which is otherwise not relevant under the evidence act, if it assists

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⁴ Id.
⁶ Sec. 4, The Indian Evidence Act, 1872.
⁸ Id.
⁹ Sec. 112, The Indian Evidence Act, 1872.
the court.\textsuperscript{11} However, this would be limited to matters covered under the Family courts act. Another problem with Sec. 112 is that it presumes that a child born within 280 days after dissolution, is legitimate.\textsuperscript{12} Medical jurisprudence indicates that although the average duration of pregnancy is 280 days, the actual duration of pregnancy is not known and the gestation period may get prolonged.\textsuperscript{13} There is no rationale behind keeping the limit to 280 days, as it is not a settled position in science that the maximum duration of pregnancy would be 280 days. Such a limit on the number of days, would not serve the purpose of protecting the interest of the child. Strictly reading Sec. 112, a child born before the 280\textsuperscript{th} day would be legitimate and a child born on the 281\textsuperscript{st} day becomes illegitimate.

**CONTRARY SCIENTIFIC EVIDENCE AS AN EXCEPTION TO SEC. 112**

DNA is a powerful tool used commonly for parental testing and forensic testing, which is highly accurate with chances of error being one in one billion.\textsuperscript{14} The reason for contrary scientific evidence not being one of the exceptions to the presumption of legitimacy of the child might be that, DNA as a science had not developed at the time the evidence act was enacted. Another possible reason could be that the child’s status would be trifled with and be branded as an illegitimate: \textit{“The stigma of illegitimacy is very severe and we have not enacted any of the protective legislations as in England to protect illegitimate children”}.\textsuperscript{15} However, recently the Supreme Court has also held that where there is a conflict between the contrary scientific evidence and Sec. 112, scientific evidence would prevail.\textsuperscript{16}

With the development of DNA as forensic science with 99.85% certainty,\textsuperscript{17} it is time that the presumption of legitimacy be altered in cases of DNA test showing that the man is not the father of the child, although a reading of the section does not indicate any other exception except non access of the parties. The reliability of the DNA test has been endorsed by the Supreme Court which considers it to be the most legitimate and scientifically perfect means of ascertaining the

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  \item \textsuperscript{11} Sec. 14, The Family Courts Act, 1984.
  \item \textsuperscript{12} Sec. 112, The Indian Evidence Act, 1872.
  \item \textsuperscript{13} Jaising P. Modi, \textit{MEDICAL JURISPRUDENCE AND TOXICOLOGY FOR INDIA}, 234 (1920).
  \item \textsuperscript{14} Available at http://www.bbc.co.uk/science/0/20205874, (Last visited on July 31, 2017).
  \item \textsuperscript{15} Vasu v. Santha, 1975 Ker LT 533, (High Court of Kerala).
  \item \textsuperscript{16} Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576, (Supreme Court of India).
  \item \textsuperscript{17} Diane S. Kaplan, \textit{Why Truth is Not a Defense in Paternity Actions}, 10(1) TEXAS JOURNAL OF WOMEN AND THE LAW 69, 72 (2000).
\end{itemize}
paternity.\textsuperscript{18} Although Sec. 112 raises a presumption, there is no need for such a presumption, when the truth or fact is known.\textsuperscript{19}

Apart from DNA, there are blood tests that can be ascertained fairly easily and the blood types are inherited according to well defined laws which make them highly suitable as evidence.\textsuperscript{20} The test technique used in blood tests can only be used to exclude an alleged paternity and not determine the exact parent,\textsuperscript{21} due to which the evidentiary value of the blood tests are lesser compared to DNA tests. However, they are scientifically proven and the chances of fault tests are remote.\textsuperscript{22} Having regard to the above position, the author is of the view that blood tests too yield definite results and can be used as scientific evidence to rebut the presumption of legitimacy with certainty. There are differing opinions on the acceptance of DNA tests to rebut the presumption of legitimacy. While an argument is made that it should not be accepted as it forces one to submit himself to medical examination and as such violates right to privacy and personal liberty, the court clearly indicated that it has the power to order a medical test which would not violate the personal liberty and the relevance of the same cannot be disputed.\textsuperscript{23} Although scientific evidence to rebut the presumption of legitimacy was not contemplated at the time of enactment of the evidence act, the field of forensic science has developed to become more accurate and it is time for an amendment to be brought about to Sec. 112. The law Commission in its 185\textsuperscript{th} report has suggested that scientific evidence including blood tests and DNA tests be included in Sec. 112 as exceptions, highlighting the importance of such an amendment.\textsuperscript{24} Such an amendment would necessarily ensure certainty in the law. Therefore, the author opines that the presumption of legitimacy is to be altered in cases of contrary scientific evidence to that effect as it would serve as a better conclusive proof. Both DNA and blood tests have very remote chances of arriving at wrong results, which gives them the “conclusive” character as compared to non-access which does not lead to definite conclusions. Now, an argument is made that the child would become illegitimate for no reason even when the wife and the husband were living together.\textsuperscript{25} The protection of the child’s legitimacy cannot be a

\textsuperscript{18} Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418, (Supreme Court of India). [“Roy Case”]
\textsuperscript{19} Roy Case, AIR 2015 SC 418.
\textsuperscript{21} Id.
\textsuperscript{22} Ross, \textit{supra} note 19, at 467.
\textsuperscript{23} Sharda v. Dharmal, AIR 2003 SC 3450, (Supreme Court of India).
\textsuperscript{25} Roy Case, AIR 2015 SC 418.
sufficient reason to violate the husband’s right to be heard, which is a principle of natural justice. Non access of the parties, as an exception to rebut the presumption is not conclusive and is not sound enough. On the other hand, access does not necessarily mean that the child born is theirs. Mere access does not mean actual cohabitation.26 Such an argument would be hard on the husband and would compel him to be the father of the child and pay maintenance, which would be an unnecessary burden on him. Such an interpretation would also be disadvantageous to the husband, as he would have no other way of rebutting the presumption of legitimacy. To this effect, the section is to be amended to include scientific evidence to rebut the presumption of legitimacy. The interest of justice would be best served by ascertaining the truth and not by banking upon presumptions.27 The court may not presume the fact of legitimacy except when science has no answer.28

CONCLUSION
The objective of enacting Sec. 112 was to protect the interests of the child. However, it disregards the burden on the husband to maintain the child, of whom he is not the biological father. The section currently has only one exception i.e. non access, if the husband fails to prove that, he would have no other way to prove his parenthood. The section by presuming the parenthood of the husband without giving him sufficient opportunity to speak violates the rule for fair hearing under the principles of natural justice.

The paper starts of with giving a brief understanding the section and the principle behind it. The problems with the section have been clearly indicated. Despite the medical jurisprudence stating otherwise, the section considers 280 days before dissolution to be conclusive. This would be problematic as the medical jurisprudence indicates that the child may be born after 280 days, and the section differentiates between the child born on the 280th day and child born on the 281st day. Thus, the section is to be expanded and given a wider interpretation.

The second part of the paper talks about why contrary scientific evidence is to be considered as an exception. DNA technology conclusively establishes the truth in disputes of paternity and should be resorted to. Although, tools such as DNA and blood tests were not in practice in 1872 and it

26 Goutam Kundu v. State of West Bengal, AIR 1993 SC 2295, (Supreme Court of India).
27 Roy Case, AIR 2015 SC 418.
28 Roy Case, AIR 2015 SC 418.
was not contemplated while enacting the evidence act, the justice administration system needs to incorporate the emerging scientific practices of DNA for in order to resolve the judicial challenges. The current wording of the section is vague and considers access of parties to necessarily mean that they have engaged in marital intercourse, which is not conclusive.

In view of the detailed arguments made in the paper, the author would like to conclude that it is essential to bring about an amendment to Sec. 112 to include contrary scientific evidence as an exception considering the accuracy of the tests and the idea of meeting the ends of justice. The ends of justice would not be met by burdening the husband with parenthood, just for living with the wife.