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STUDENT'S HANDBOOK

OF

MAHOMMEDAN LAW

BY

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PREFACE TO THE FIRST EDITION.

THE purpose which this little work is intended to serve is sufficiently indicated by its title Hitherto Macnaghten's compilation, made nearly half a century ago, has formed the *vade mecum* of students in this country as well as in England. In the absence of any better elementary treatise, Macnaghten's synopsis answered its purpose. It seems to me, however, that the principles of Mahommedan Law, carefully collected from the original authorities, should now be placed in the hands of students, arranged in a more systematic and connected form. The present work was undertaken at the request of friends interested in legal education, and my endeavour has been to give the recognised principles with a few references to important decided cases, in order to make it useful not only to the student but also to the ordinary practitioner.

I have added in an appendix certain principles perhaps important to practitioners but unnecessary for students.

CALCUTTA,
December, 1891.

AMEER ALI.

PREFACE TO THE FIFTH EDITION.

This concise treatise on Mahommedan Law, which was originally undertaken at the suggestion of the Faculty of Law of the Calcutta University and the request of friends interested in legal education, embodies within a short compass arranged in a systematic form on a scientific basis, all the leading principles that are to be found dispersed in a mass of authorities more or less inaccessible to the ordinary practitioner or student. In this new edition I have supplied the want of an introduction indicating briefly the applicability of Mahommedan Law in British India Many of the chapters have been re-written and amplified to elucidate and explain more clearly the principles The references to the decisions of the High Courts in India and the Judicial Committee of the Privy Council, which have either affirmed, explained or varied the rules of Mahommedan Law, have been brought up to date, and an endeavour has been made not to omit any case of importance. I venture to hope that the additional matter in the book will enhance its usefulness to the two classes for whom it is designed—the practical lawyer, who requires a handy book of reference, and the student, who needs a compact treatise embodying the general principles

From Calcutta,
London, S, W.,
Oct. 1906.

AMEER ALI.

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INTRODUCTION.

The introduction of Mahommedan Law in India—The introduction of Mahommedan Law in India is co-eval with the establishment as the Mahommedan power, but it made no chaange in the enjoyment by the Hindu inhabitants of their religion, law, or ancient usages and institutions. At the present moment nearly seventy millions of the population profess the religion of Islam, and the followers of the Arabian Prophet are to be found in every part of the Indian Continent As the devolution of property among Mahommedans, wherever located, and dispositions made by them are governed by their personal law, it is important to have some idea of the exact applicability of the Mahommedan Civil Law and of the rules under which it is administered in British India.

Validity of custom—Mahommedan Law *per se* does not admit the validity of any custom which is contrary to, or in conflict with, its prescriptions [1]

In some parts of the country, however, custom are found to exist which are not in conformity with the general Mahommedan Law. In these parts, the Courts, under their constitution, have to give effect to customs unless they are opposed to "justice, equity and good conscience," or to any express enactment of the Legislature

In dealing with the maintenance of old usages by people converted from one faith to another especially Islam, it is desirable to bear in mind the following passage from the judgment of the Judicial Committee in *Abraham* v *Abraham* [2] "Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily so they may be changed or lost

1 *Jowala Buksh* v *Dharum Singh* [1866], 10 Moo I A, 511, 538, and *Hakim Khan* v *Gul Khan* [1882], I L, 8 Cal, 823, s c, 10 C. L R. 603

2 [1863], 9 Moo I. A, 199, 247

by desuetude. . . . If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their decendants change things in their very nature variable as dependent on the changeful inclinations, feelings and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject from conscience customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family?"

Preservation of Mahommedan Law under British rule—I shall now consider how far the Mahommedan Law has been preserved to the Mahommedan inhabitants of India subject to British rule. The British Government at the commencement of its ascendancy in India assured to the people by a solemn Act of Parliament the full enjoyment of their laws and customs. Section 17, 21 Geo. III c. 70, enacted that in all suits and actions before the Supreme Court of Judicature at Fort William in Bengal, inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined in the case of Mahommedans by the laws and usages of the Mahommedans, and in the case of Hindus by the laws and usages of the Hindus, and where only one of the parties was a Hindu or a Mahommedan "by the laws and usages of the defendant."

Section 13, 37 Geo. III c. 142, made a similar provision in respect of the Supreme Courts of Madras and Bombay. The present High Courts of Judicature in the several Presidencies which, in the exercise of their ordinary original civil jurisdiction, have succeeded to the powers of the old Supreme Courts are subject to the same rule.[1]

For the Moffussil, or the area outside the ordinary original civil jurisdiction of the Supreme Court of Fort William, Section 15 of Regulation IV of 1793 provided that

1 The provisions in the Charters of the Supreme Courts guaranteeing the administration of Hindu and Mahommedan law have formed the subject of judicial decision in the case of *H. H. Azimunnissa Begum* v. *Clement Dale* [1868], 6 Mad. H. Court Rep., 458.

"in all suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Mahommedan Laws with respect to Mahommedans are to be considered as the general rules by which the judges are to form their decision"

Similar laws were enacted soon after for the Moffusil of Madras and Bombay.

The law now in force regulating the powers and jurisdiction of the Civil Courts in Bengal, the North-Western Provinces and Assam is Act XII of 1887 Section 37, subsection 1, enacts that in the matters specified therein, the Mahommedan or Hindu Law "shall from the rule of decision, except in so far as such law has by legislative enactment been altered or abolished."

Sub-section (2) declares that "in cases not provided for by sub-section (1)[1] or any other law for the time being, the Court shall act according to justice, equity and good conscience"

Sub-section (1) is by no means exhaustive To give one example, it makes no mention of "gifts" or voluntary donations as one of the subjects in which the Hindu or Mahommedan Law, as the case may be, should furnish the rule of decision The Courts, therefore, have proceeded on the principle that it was not the intention of the Legislature to confine the application of the Hindu or Mahommedan Law to the subjects specifically mentioned, and that the law of the parties should, under the rule of "justice, equity and good conscience," be applied to other matters, unless such law is opposed to any substantive enactment. Thus, it has been held that it is in conformity with equity and good conscience, that all questions relating to gifts should be governed by the Mahommedan Law[2] It has also been held that the Mahommedan Law applies not only to the parties to a transaction, but extends to persons although of different creeds, deriving title from one or other of them[3]

1 "Succession, inheritance, marriage, caste or any religious usage or institution." These subjects are the same as in s 15 Reg IV of 1793

2 *Zohoroodeen Sirdar* v *Baharoollah Sirdar* [1864], Gap No W R. 187; *Yusu Ali* v *Collector of Tipperá*, [1882], I L., 9 Cal., 138.

3 *Azimunnissa Begum* v *Clement Dale*, supra.

In Section 37, Act XII of 1887, there is no reservation in favour of customs *dehors* the general Mahommedan Law. Nor did the older acts, which it has replaced, contain any provision in that behalf. The Courts in the Bengal Presidency have accordingly not given effect to customs in variation of that law [1]

In the Bombay Regulation IV of 1872,[2] the Punjab Laws Act (IV of 1872) relating to the jurisdiction of the Punjab Civil Courts, the Madras Courts' Act (III of 1873), the Central Provinces Act (XX of 1875), the Burmah Courts' Act (XI of 1887), and the Oude Act (XVIII of 1876), the Legislature has expressly provided that subject to certain conditions, customs prevailing among "any body or class or persons" should form the rule of decision by the Court [3]

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1 *Surmust Khan* v *Kadirdad Khan* [1866], Agra N. W. F B. Rulings, Ed 1867, 38 [Judgment of Full Bench based on Reg IV of 1793, s 15, and Reg III of 1803, s 16 (1)], *Hakim Khan* v *Gul Khan*, supra, *Jammya* v *Diwan* [1900], I L, 23 All, 20

2 Not repealed by Act XIV of 1869

3 S 26 of Reg IV of 1827 provides as follows —'The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case, in the absence of such Acts and Regulations the usage of the country in which the suit arose, if none such appears the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone" The importance that has been attached to customs in the Bombay decisions is due to the special provisions of this regulation

S 5 of Act IV of 1872 provides—"In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition or any religious usage or institution, the rule of decision shall be—

1 Any custom or any body or class of persons, which is not contrary to justice, equity and good conscience and has not been declared to be void by any competent authority

2 The Mahommedan Law, in cases where the parties are Mahommedans . . . except in so far as such law has been altered or abolished by legislative enactment or is opposed to the provisions of this Act or has been modified by any such customs as is referred to in the proceeding clause of this section."

S. 6 declares that "in cases not otherwise specially provided for the judges shall decide according to justice, equity and good conscience"

S. 5 of Act XX of 1875 provides that in questions "regarding inheritance, special property of females, betrothal, marriage dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be the Mahommedan Law in cases where the parties are Mahommedans

It will be noticed that in all these Acts the Legislature expressly declares that in the absence of any specific provision for any particular case, the Courts shall decide according to "justice, equity and good conscience."

The application of Mussulman Law—It must be remembered that the Mahommedan Law applies to all Mussulmans whether they are so by birth or by conversion [1] In this connection it is necessary to bear in mind the distinction between *Islam* and *Iman* (faith) Any person who professes the religion of Islâm, in other words, accepts the Unity of God and the prophetic character of Mohammed, is a Moslem and is subject to the Mussulman Law. So long as the individual pronounces the *Kalma-i-Tauhid*,[2] the *Credo* of Islam, it is not necessary for him or her to observe any of the rites and ceremonies, or to believe in particular doctrines which imply *Iman* or belief This distinction has often been lost sight of by the British Indian Courts which have, in dealing with Mahommedan cases, assumed the position and function of Courts of Conscience [3]

The observance of rites and ceremonies, apart from the religious aspect, are useful only as pieces of testimony regarding the communion to which a person belongs and the school of law to which he or she is consequently subject.

. . . except in so far as it is opposed to the provisions of this Code, *provided* that when among any class or body of persons or among the members or any family any custom prevails which is inconsistent with the law applicable between such persons under this section and which, if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to."

S. 6 declares that "in cases not provided for by s 5 or any other law for the time being in force, the Courts shall act according to justice, equity and good conscience"

1. See the remarks of Lord Kingsdown in *Abraham* v. *Abraham*, supra, p 243

2 *i e* Confession of Unity

3 In the case of *Raj Bahadur* v *Bishen Dyal* [1882], I L , 4 All , 343, the learned judges were in error, it is respectfully submitted in holding that "in determining whether parties are Hindus or Mahommedans within the meaning of s 24 of Act VI of 1871 [now replaced by s 37 of Act XII of 1887], we must apply its terms strictly, and confine their operation to those who may properly be regarded as orthodox believers in the one religon or the other"

A *sui juris* Mahommedan, male or female, can, at any time, go over from one sect to another.[1] No formality is required for that purpose. A slight variation in the performance of prayers, the addition of a sentence in "the Confession of Faith[2]" effectuates the change

Sunnis and Shiahs may validly intermarry

Sunnis and Shiahs may validly intermarry without any change of sect or communion And a woman of the Sunni sect, married to a Shiah husband, is entitled to the privileges secured to her married position by the law of her sect.[3] The performance by her of ceremonies usually observed in Shiah families on the anniversary of the martyrdom of Hussain[4] would be no evidence of a change of sect That can be effectuated only by her offering her prayers (*namaz*) according to the Shiah ritual or by pronouncing the Shiah "Confession ? Faith"

In one case the Calcutta High Court has laid down somewhat broadly that "the great majority of Mahommedans in this country being Sunnis the presumption will be that the parties to a suit or proceeding are Sunnis unless it is shown that they belong to the Shiah sect".[5] This *dictum* must be accepted with some degree of reservation In some parts of the country the Shiahs preponderate in numbers, it would be difficult in those districts to make any such presumption. It is submitted that in every proceeding involving a question of Mahommedan Law, the Court should require the parties to state to which school of law they are subject, and, in case of difference, to adduce evidence in support of their respective allegations, and then decide by what law the question at issue is to be determined.

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1 *Mohammed Ibrahim* v *Ghulam Ahmed* [1864], 1 Bom H C R, 236; *Hayat un Nissa* v. *Muhammed Ali Khan* [1890], L R, 17 I A., 73, s c. I. L., 12 All, 290

2 The *Kalma i Shahadat* is in these words, "I testify that there is no God but God, and I testify that Mahammed is the Prophet of God." To which the Shiah adds "and I testify that Ali is the Commander of the Faithful, Imam of the Pious and Successor of the Prophet."

3 *Nasrat Husain* v *Hamidan* [1882] I. L, 4 All, 205; *Hayat-un-Nissa* v. *Muhammed Ali Khan*, supra

4 In the month of Mohurram

5 *Bafatun* v. *Bilaiti Khanum* [1903], I L., 30 Cal., 683, 686.

Presumption of Islam.—When either of the parents is a Moslem, the Mussulman Law presumes the child to be a Moslem until it is able to make a choice, (in other words, attains majority) and the right to its succession is regulated by the laws of Islâm, and of the school or sect to which the parents conform.

Moslems inherit from each other though they may belong to different sects, but the succession is regulated by the rules of the school to which the deceased belonged or conformed during his lifetime [1].

Renunciation of the right of inheritance.—According to the Mahommedan Law the right to inherit may be renounced and "such renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another" [2].

But can a person who would succeed to another if he survives the latter, renounce the inchoate right of inheritance or expectancy before it has become an absolute right? In the case of *Khanum Jan* v *Jan Bibi* [3] two of the heirs of a deceased Mahommedan executed for a consideration a deed in favour of the other heirs, renouncing their right of inheritance to the ancestor's property, and for a period of nearly twelve years after her death they advanced no claim, but ultimately sued for their legal shares in the deceased's estate The Law Officers of the Patna Provincial Court, on being questioned regarding the validity of the renunciation, answered as follows .—

"Renunciation implies the yielding up of a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident that during the lifetime of the mother the daughters had no right of inheritance and their claim on that account is not maintainable against any person during her lifetime It follows therefore that this renunciation during the mother's

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1 See *Hayat un-Nissa* v *Muhammed Ali Khan*, supra.

2 *Hurmoot-ool-Nissa Begum* v *Allahadia Khan* [1871] 17 W. R P. C. 108 ; s. c , 2 Sutherland's P. C. Judgments, 525.

3 [1827], 4 S. D. A. Reps., 210 ; *Sumsuddin* v. *Abdul Husein* I. L. 31 Bom., 155.

lifetime of the daughters' shares is null and void, it being, in point of fact, giving up that which had no existence Such act cannot consequently invalidate the right of inheritance supervenient on the mother's death, or be any bar to their claim of the estate left by her. The omission to advance a claim for twelve years is no legal bar to the ultimate admission of the claim." The opinion of the Law Officers of the Provincial Court which was confirmed by the Law Officers of the Sudder Court, was followed by both Courts In the case of *Kunhi Mamod* v *Kunhi Moidin*,[1] the Madras High Cout has held that an agreement renouncing the prospective right for a consideration is valid and binding.

Even if the view taken by the learned judges be unsustainable on the basis of the Mahommedan Law, the person who renounces his right on bringing a suit to recover his share should be called upon to refund the consideration received.

1 [1896], I L, 19 Mad, 176.

PRINCIPLES OF
MAHOMMEDAN LAW.

PART I.

The Law Relating to Succession

CHAPTER I

GENERAL OBSERVATIONS

SECTION I

Sunnis and Shiahs

THE Mahommedan world is divided into two sects, viz. the Sunnis and the Shiahs. The question of the Imâmate, or the title to the spiritual and temporal headship of Islâm, forms the chief point of difference between them. The Sunnis are the advocates of the principle of election, the Shiahs, of apostolical descent by appointment and succession. This difference has given birth to two distinct systems or schools of law, both founded on the Koranic regulations but diverging upon the supplementary principles derived from the oral precepts of the Prophet and of his immediate descendants and disciples.

Sources of Mahommedan Law.

The Shiahs derive their law from the Koran and from the traditional sayings of the Prophet handed down by his descendants, and repudiate the validity of all decisions not passed by their own spiritual leaders and Imâms.

The Sunnis derive their law from the following sources —

(1) the Koran, (2) the *Hadîs* or *Sunnat* (traditions handed down from the Prophet by any person who saw or heard him), (3) the *Ijmâa-ul-Ummat* (concordance among the followers), including all the explanations, glosses, and decisions of the leading disciples, especially of the first four Caliphs, (4) *Kiyâs*, the exercise of private judgment based on analogy

The Shiah School was founded by the apostolical Imâm Jaafar as-Sâdik[1] in the second century of the Hegira The principles of the Sunni system were not put into shape and regularly formulated until some time later

The Shiah system represents the reforms introduced by the Arabian Prophet in the customary rules relating to inheritance prevalent among the Arabs, whilst the Sunni School retains largely the old Arabian customs by which "cognates" were excluded by "agnates" In fact until the time of the Caliph Mutazid bi'llâh in the year 896 A C, "uterine relations" or "cognates" took no share in the inheritance of a deceased person On failure of agnatic relations the property of the deceased escheated to the Caliph Mutazid abolished the Escheat Office and directed that when there were neither sharers nor agnatic relations the property should go to the cognates instead of the Caliph

Sunni sub-sects

The Sunnis are divided into four sub-sects, *viz*, the Hanafîs Shâfeis, Mâlikîs, and Hanbalîs differing from each other not only on points of ritual and religious doctrine but also on legal questions and the interpretation of legal principles They thus form four sub-schools of law

The Hanafîs are the followers of Imâm Abû Hanîfa, who had studied jurisprudence under the Imâm Jaafar as-Sâdik. Practically, they follow Abû Hanîfa's disciples, Abû Yusuf and Mohammed in preference to Abû Hanîfa Abû Yusuf was the Chief Kâzi of Bagdad in the time of the Caliph Hârûn ar-Rashîd, and as he was a practical lawyer, his views are recognised as binding on most questions relat-

1 The sixth Imâm of the Shiahs. He died in 148 A. H (765 A C.)

ing to dispositions of property The Sunni Mahommedans of India are chiefly Hanafîs Shâfeism, however, has made great progress in the country within the last few years

The Shâfeis are the followers of Imâm Shâfei, who died in Egypt in 819 A C, and are chiefly to be found in Arabia, Egypt Northern Africa, among a part of the Borahs of Bombay and the Malayans

The Mâlikis are the followers of Imâm Mâlik bin Ans who died in the year 179 A H, and they are to be found in Arabia and Northern Africa

The Hanbalîs, the followers of Imâm Ahmed bin Hanbal, though few in number, exist chiefly in parts of Hazramaut (Hadramaut) and Oman

Shiah sub-sects.

The Shiahs are divided into several sub-sects but the word *Shiah* is now-a-days applied exclusively to the Asnâ Aasharias[1] or the followers of the twelve Imâms The Asna-Aasharias are again divided into two sub-sects, viz, the Usûlis and the Akhbaris, who form separate schools of law The Usûlis accept only such traditions as are found to be genuine upon a most critical exegesis, and allow the full exercise of private judgment in the application and interpretation of legal principles The Akhbâris are guided entirely by the expositions of their *mujtahids* or "expounders of law"

Mutazala,

Another important sect is that of the Mutazalas, who in some of their interpretations of the law, differ completely from the other schools, this school was founded by Wâsil bin Aatâ in the eighth century of the Christian era

The Khojahs, who are to be found in the Bombay Presidency, belong, like many of the Borahs to a Shiah sect called Ismailia, but on questions of inheritance they are governed chiefly by Hindu customs On questions relating to dispositions of property, they are generally subject to the Shiah Law

A majority of the Borahs are Ismailias They do not, however, follow the Imâm of the Khojahs Their spiritual

1 Duo decemians, generally called in India, *Imâmias* or followers of the Imâms

preceptor is said to be in Yemen They are divided into two groups, *viz*, *Sulaimâni* and *Dâûdi* They are governed by the general principles of the Mahommedan Law [1]

Connection of law and religion in Islam

In the Islâmic system, the different schools and sub-schools are so intimately connected with the different persuasions, sects or communions to which they appertain, that when a person belonging to one communion or sect or sub-sect goes over to another, his status and the dispositions made by him, as well as the succession to his inheritance, are thenceforward governed by the rules of the school to which he belongs For example, a Shiah, on adopting the Sunni persuasion, would subject himself to the Sunni Law So a Hanafî becoming a Shâfeite, or an Akhbâri becoming an Usûli would be governed by the Shâfei or Usûli principles as the case may be and *vice versâ* From this point of view it may be said that the entire Mussulman Law is a personal law

Outward distinction between Shiahs and Sunnis

One great outward distinction between the Shiahs and the Sunnis is, that whilst the former pray with their hands held straight down by their side, the latter offer their prayers with hands folded in front Between the Hanafîs and the Shâfeis, the difference consists in the former pronouncing the word *âmîn* (amen) in their prayers in a low voice, whilst the latter pronounce it loudly

Within recent years a new sect has sprung up among the Sunnis of India, the members of which call themselves *Ghair-mukalliddîn or Non-conformists* Their opponents sometimes designate them *Wahâbis*, which is neither correct nor just The *Ghair-mukallid* does not conform to any particular sect but approaches most closely the Shâfeis Like them he pronounces the *âmîn* in a loud voice (which is technically called *âmîn bi'l-jahr*) and makes the ceremonial gesture of raising the hands *above* the ears at a particular point of the service (*rafaa-eddain*) These have been held to be "merely minor matters of difference not

1 These remarks do not apply to the "Sunni Borah" of Taluka Dhanduka in Gujarat who were originally Rajputs, see *post*

affecting the essentials of the service"[1] Apart from doctrinal differences, a *Ghair-mukallid* is generally subject to the Hanafi school of law

A Sunni Mahommedan belonging to any of these sects may validly perform his devotions under the leadership of a member of another sect[2]

SECTION II.

No distinction between ancestral and self acquired property

Under the Mahommedan Law there is no distinction between ancestral and self-acquired property The owner for the time being has absolute dominion over all property in his possession, whether he has acquired it himself or whether it has devolved upon him by inheritance. He can sell or dispose of it in any way he likes, provided operation is given to the transaction during his lifetime It is only with regard to dispositions intended to take effect after the donor's death or made *in extremis* that his power of disposition is limited by the right of his heirs

Females co-existing with males of the same degree (or of a lower degree, but entitled to succeed with them) take a smaller share than the males, but as regards dominion over property and the power of disposition and the *quantum* of interest derived by inheritance, they stand on the same footing as the men So also a widow taking a share in her husbands's estate acquires an absolute and indefeasible interest therein

Nor, so far as succession is concerned, is there any distinction between real and personal property, excepting in one case under the Shiah Law[3]

No presumption of jointness

Among the Mahommedans, there is no presumption of jointness[4] In some parts of India, however, Mahommedan families have adopted

1 *Fazl Karim* v *Haji Moula Bukhsh* [1891], L R., 18 I A, 59, s c, I L, 18 Cal 418.

2 *Ibid*

3 See *post*, p 46

4 *Hakim Khan* v *Gul Khan* [1882],I L, 8 Cal, 823, s c, 10 Cal L R, 603, *Jawala Bukhsh* v *Dharam Sing* [1866], 10 Moo Ind App, 511; see also *Abraham* v *Abraham* [1863], 9 Moo Ind App, 195, and *Jaker Ali Chowdhury* v *Rajchunder Sen* [1882], I L, 8 Cal., 831, note.

the Hindu joint-family system. In many instances, Hindu families converted to Islâm have adhered to the old custom and continued to live jointly

In such cases, the legal rights of the parties have been held to be subject to the same principles as are applicable to members of a Hindu joint-family [1] Where Mahommedan families have adopted Hindu customs or Hindu families converted to Islâm have adhered to old customs, they have frequently done so subject to such modifications as they considered desirable A Judge, therefore, is not bound nor would he be justified, as a matter of law, to apply to a Mahommedan family all the rules and presumptions which have been held to apply to a joint Hindu family [2]

The mere fact that members of a Mahommedan family are living in commensality and holding their properties jointly is not sufficient to raise the presumptions which, under the Hindu Law, arise from jointness [3]

But where members of a Mahommedan family are living joint, and it is found that they are jointly in enjoyment of their shares in the properties which have decended to them from a common ancestor, the managing member cannot claim an exclusive right to those properties or assert that the rights of the other members have become barred under the Statute of Limitation [4]

When a family converted from Hinduism has professed the Mahommedan religion for successive generations, and a claim to succession is put forward by a female which is opposed on the ground of usage, the Courts of Justice are bound to dispose of the case under the Mahommedan Law and cannot recognise a plea of usage opposed to that Law [5]

In another case the Madras High Court held that when a custom is put forward for excluding females from succession, it must be shown that it was consciously accepted as

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1 See *Achina Bibee* v *Ajeejannissa Bibee* [1869], 11 Weekly Rep , 45

2 *Suddurtonessa* v *Munda Khatun* [1878], I. L , 3 Cal , 694 s c , 2 Cal , L. R , 308

3 *Abdool Adood* v *Mahommud Mahmd* [1884], I L., 10 Cal., 562.

4 *Achina Bibee* v *Ajeejannissa Bibee*, supra

5 *Surmust Khan* v. *Kadirdad Khan* [1866], 1 Agra (N W. P.) F B.R. 39, Ed 1874, 29 , *Jammaya* v *Diwan* [1900], I L , 23 All., 20.

having the force of law, and fulfils all the requirements by which a valid custom is established [1]

Customs dehors the Mahommedan Law

But where large sections of people converted from Hinduism to the Mahommedan faith have continued to be governed by the Hindu Law of Inheritance, the converse proposition has been maintained For example, the Bombay High Court, following the decision in the well-known *Khojas' and Memons' Case* in the Supreme Court of Bombay, has held in the case of these two communities that in the absence of satisfactory proof of custom differing from the Hindu Law, the Courts will apply to them the Hindu Law of inheritance and succession [2] /

The same principle has been applied to the Sunni Borahs of the Dhanduka Taluka in Gujarat and the Molesalam Ghasias in the Broach District, both of whom were originally Hindu Rajputs and were converted to Islâm several centuries ago [3]

Claims of inheritance based on alleged customs which are immoral in their tendency and are reprobated or prohibited by the Mahommedan Law are not valid.[4]

Principle of differentiation

In order to distinguish between the inheriting and non-inheriting kinsmen of the *propositus*, it is recognised, as a general rule by both the schools, that when a deceased Mussulman leaves behind him two relations, one of whom is connected with him through the other, the former shall not succeed whilst the intermediate person is alive For example, if a person on his death leaves behind him a son and *that son's* son, this latter will not succeed to his grandfather's estate

1 *Mira Bibi* v *Villayana* [1885], I L , 8 Mad , 464

2 See *Hirbai* v *Sonabai*, [1845], Perry s *Oriental Cases*, 110 ; *Hirbai* v. *Gorbai* [1875], 12 Bom H C R , 294 , *Rahmatbai* v *Hirbai* [1877], I L , 3 Bom , 34 , *Ashabai* v *Haji Tyeb* [1882], I L , 9 Bom , 115 , *Mahomed Sidick* v *Haji Ahmed* [1885], I L., 10 Bom , 1.

3 *Bai Baiji* v *Bai Santok* [1894], I L., 20 Bom , 53 , *Fatesangji Jasvatsangji* v *Harisangji Fatesangji* [1894], I L , 20 Bom , 181

4 *Ghasiti* v. *Umrao Jan* [1885], I L , 21 Cal , 149 , *Ghasiti* v. *Jaggu* [1893], L. R., 20 I. A , 193

while the father is alive But this rule is subject to one exception Under the Sunni Law, the mother does not exclude brothers and sisters, either full or uterine, from succession

Another rule framed also with the same object is, that the *nearer in degree* excludes *the more remote* This rule, though really covered by the former, is recognised by both the schools, but there is great divergence as to the mode of its application in consequence of the difference in the classification of heirs For example, the Sunnis group the heirs under two heads, *viz*, *agnates* and *cognates*, and the agnates and cognates are respectively sub-divided into descendants, ascendants, and collaterals. The object of this division as well as sub-division is to indicate the order of succession, and the rule applies to each class of heirs, but not to the heirs of the different classes For instance, a son will take in preference to a son's son, both being in the first class of heirs but a son's son will take the *residue* in preference to the father, although the latter is nearer than the former, because the father is included in the second class of heirs

Shiah Law, agnacy not recognised

Similarly, the Shiahs divide the heirs into three classes but without any distinction between agnates and cognates Each of these classes is sub-divided into two branches, the above rule applies to the heirs of the different classes but not to heirs of the two branches of the same class For instance the parents and the descendants form the first class, and are its two branches, accordingly a great-grandson, although he will not exclude the father, will take in preference to the grandfather or brother notwithstanding that these are nearer in kinship, for they belong to different classes Similarly, a grandfather cannot exclude a brother's grandson, for they belong to different branches of the same class Thus the rule must be understood to be subject in its application to the classification of heirs, in which respect only is there a distinction between the two schools It will be seen by and by that the Sunnis prefer the *nearer in degree* to the more remote in the succession of *male agnates*

pinquity to all cases without distinction of class or sex If a person die leaving behind him a brother's son and a brother's grandson, and his own daughter's son—among the Sunnis, the brother's son being a male agnate and nearer to the deceased than the brother's grandson, takes the inheritance in preference to the others, whilst among the Shiahs, the daughter's son, being nearer in blood, would exclude the others

Practical difference

Thus the right of succession of the different relations who may survive a deceased person varies according to circumstances Some of them are absolutely excluded by the operation of the principles referred to above, whilst others have their shares reduced by the fact of their coexisting with certain relations who may or may not participate in the inheritance But both among the Sunnis and the Shiahs there is one class of heirs who are never excluded from succession, however much their respective shares may vary *This class of heirs comprises the father, the mother, the son, the daughter, the husband or wife*

As a general rule neither the Sunnis nor the Shiahs recognise the principle of representation For example, if A had two sons, one of whom died during his lifetime leaving several children, these children do not possess the right of representing their father on the decease of A, but are "excluded" from the inheritance by their uncle Similarly, if there be two sons of one son or brother and three of another (and no son or brother, as the case may be, living at the time), the five grandsons or brother's sons will take the inheritance *per capita* and not *per stirpes* But the right of representation is recognised to a limited extent in the succession of the *cognates* For example, half-sisters on the mother's side when they do succeed, take the mother's share There are some other instances of the same kind

Principle of representation not recognised.

The rule of primogeniture is recognised in a qualified form among the Shiahs, the Shâfeis, and the Mâlikîs, who give to the eldest son the horse, the arms, the mantle, and the Koran of the father, thus, allowing him a pre-eminent position among the children of the deceased The Hanafîs, on

Right of primogeniture

the other hand, do not observe it at all In certain families, however, in India as elsewhere, the entire estate descends by custom to the eldest son

Among the Ismailias, the rule of primogeniture is generally recognised and acted upon

Renunciation of a vested right of inheritance

A right of inheritance vests by operation of law and, consequently, although a relinquishment of the right after it has vested may be binding on the person actually renouncing, it does not affect anyone else Thus an heir, who refuses to take the share in a deceased person's estate to which he is entitled, cannot deprive his own heirs of its benefit, and, accordingly, upon his death his right would devolve upon them and they would be entitled to claim his share (subject, of course, to any bar resulting from the Statute of Limitation) If the renunciation, however, is for a consideration, it may amount to a transfer of his interest and be binding on his heirs

Vested estates in remainder not recognised

The Mahommedan Law, pure and simple, does not recognise vested estates in remainder In other words, whilst the property is in the hands of the owner, his heirs have no vested reversionary interest in it such as would be assignable by them, or in respect of which they could create an interest in another [1]

But there is nothing in the Mahommedan Law to prevent an arrangement to the effect that *A* should have a life-interest in a particular property which would descend to *A's* heirs or to some other person on his death.

Section III.

Funeral expenses

Under the Mahommedan Law, funeral expenses form the first charge on the estate of a deceased person and must be disbursed before payment of debts or legacies After such expenses have been paid, the debts must be discharged and then any valid bequests left by him. It is only after these legal duties have

1 *Abdul Wahid Khan* v. *Mussamat Nuran Bibi* [1885], L R., 12 I A., 91, see also *Hasan Ali* v *Najo* [1889], I. L , 11 All , 456, 458

been discharged that the inheritance becomes divisible among the heirs

Under the head of funeral expenses are included all legitimate death-bed charges, whilst debts cover the wages due to servants and others.

The provisions of ss 101 to 105 of the (Indian) Probate and Administration Act (V of 1881), which now govern the application of a deceased person's property, have amplified the prescriptions of the Mahommedan Law

A Mahommedan cannot dispose of by will more than one-third of his property[1]; bequests, therefore, must not exceed altogether one-third of the estate and, consequently, even where the deceased has made testamentary dispositions, the remaining two-thirds will be subject to the rules of intestate succession

Devolution of the right of Inheritance

The estate of a deceased Mahommedan devolves upon his heirs immediately on his decease, and they acquire an absolute interest in their specific shares even before distribution or partition The devolution of that interest is not dependent either on the division of the property among them or the payment of the debts left by the deceased [2]

Right of the heir to deal with his share

Unless it is found at the time of administration that the debts left by the deceased absorb the whole estate, and there is nothing in fact for the heirs to take, each heir has the right to deal with his share by sale or mortgage and pass a good title to the alienee notwithstanding any debts which might be due from the ancestor [3] The creditor of the deceased, whether in respect of dower or otherwise, cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir-at-law by sale or mortgage [4]

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1 See *post*, chap on Wills

2 *Jafri Begum* v *Amir Muhammed Khan* [1885], I L , 7 All , 822, see pp 838, 839

3 Ibid , *Bussunteram Marwary* v *Kamaluddin* [1885], I L , 11 Cal , 421, 428

4 *Bazayet Hossain* v. *Dooli Chand* [1878], L R , 5 I A , 211; *Mussumat Wahidunissa* v *Mussumat Shubrattun* [1870], 6 B L R 54, *Campbell* v *Delaney*, Marshall Rep [1863], p 509

If the creditor, however, has brought a suit, and the alienation is made during the pendency of that suit the alienee would be bound by any decree charging the estate [1] The doctrine of *lis pendens* applies only to immoveable property.

Suit by creditors

Under the Mahommedan law one heir is not entitled to represent his co-heirs in a suit by a creditor of the deceased, so as to make a decree binding against them even though he is found to be in possession of the entire estate, unless such possession is with the consent of the other heirs and he is acting as their representative and manager

This principle has been adopted and followed by the High Court of Allahabad which has laid down that "a decree relative to the debts of a deceased Mahommedan passed in a contentious or non-contentious suit, against only such of the heirs as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests of those heirs who were not parties to the decree But such heirs will not be entitled to recover from the auction-purchaser in execution of the decree, possession of their shares in the property sold, without such recovery of possession being rendered contingent upon payment by them of their proportionate share of the ancestor's debt for which the decree was passed and in satisfaction whereof the sale had taken place" [2]

The Calcutta High Court, on the other hand, proceeding on the analogy of the English law, has regarded an action against one or more heirs in possession of the whole estate or that part of the estate which it was sought to charge, as an administration-suit, and the decree as binding against the

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1 *Bazayet Hossain* v *Dooli Chand* supra, *Yasin Khan* v *Muhammed Yar Khan* [1897], I L, 19 All, 504 *Cf* S 54 of the Transfer of Property Act (IV of 1882), see *Bholanath* v *Mahbulunnissa* [1903], I L, 26 All, 28

2 *Jafri Begam* v *Amir Mahammed Khan*, supra, followed in *Muhammad Awais* v *Har Sahai* [1885], I L, 7 All, 716, and *Dallomal* v. *Hari Das* [1901], I L, 23 All, 263

absent heirs in respect of the whole or the part, as the case may be, unless such decree was obtained by fraud or collusion [1] The Bombay High Court on the analogy of the Mitakshara Law has held to the like effect [2] The Madras High Court seems inclined to take the same view as the Bombay High Court [3]

After the estate has been divided among the heirs, they are liable for the debts of the deceased only to the extent of the shares received by them respectively A creditor, therefore, suing some of the heirs will be entitled to a decree for a share of the debt proportionate to the shares received by them [4]

The divergence referred to above arises only when there is no executor of the deceased, or administrator appointed by the court For when there is an executor or administrator legally representing the estate, the creditor must sue him and not the heirs

The executor of a deceased Mahommedan may *sue* to recover the assets due to the estate without proving the will *but he cannot recover a decree until he has obtained probate.*[5]

Similarly, although Mahommedan heirs may prefer a claim to "debts" due to the ancestor and even bring a suit therefor without letters of administration there can be no decree in their favour unless they have obtained a certificate under the provisions of the Succession Certificate Act (VII of 1889) [6]

1 *Muttyran* v *Ahmedi Ally* [1882], I L , 8 Cal , 370 , *Amir Dulhin* v *Baijnath Sing* [1894], I L , 21 Cal , 311

2 *Khurshetbhi* v *Keso Venayek* [1887], I L , 12 Bom , 101 , *Davalava* v *Bhimaji Dhond* [1895], I L , 20 Bom , 338

3 *Pathummabi* v *Vitil Ummachabi* [1902], I L , 26 Mad, 734

4 *Partbi Pal Singh* v *Husaini Jan* [1882], I L , 4 All , 361

5 Act V of 1881 (the Probate and Administration Act)

6 This Act has superseded Act XXVII of 1860 In Bombay, Reg VIII of 1827 is in force and has the same object Under the Regulation it has been held that a "certificate of heirship" cannot be granted to a minor , *Bai Barba* v *Bai Daguba* [1882], I L 6 Bom , 728 For the meaning of the words in section 4 of Act VII of 1889, see *Kanchan Modi* v *Baij Nath Singh*, [1892], I L., 19 Cal 336.

CHAPTER II.

HANAFI LAW OF SUCCESSION

SECTION I —CLASSIFICATION OF HEIRS

THE Sunnis recognise three classes of heirs —

(1) The *Zav-il-furûz* (the "Sharers," persons whose shares are specified in the Koran)

(2) The *Asabâh* [1] (the "Agnates")

(3) The *Zav-il-arhâm* [2] ("Cognates" or "Uterine Relations"), All relations by blood who are neither Sharers nor Agnates are included in this category [3]

(4) *The Sharers*—The "Sharers" take their specific portions, and the residue is then divided among the agnates

Should there be no agnates, the residue would revert or "return" to the "Sharers" *by blood, viz*, "Sharers" *other than the husband or wife* [4]

If it happen to be neither such sharers nor agnates, then the estate is divided among the *uterine relations*

The Sharers

The "Sharers," or *Zav-il-furûz*, are twelve in number, four males and eight females Their shares are liable to variation according to circumstances, and some of them are subject also to entire exclusion, owing to the operation of the two principles of elimination specified in Chapter I, Section II [5]

The four males are (1) the father, (2) the grandfather or *lineal male ascendant* (when not excluded), (3) the *uterine* brothers, and (4) the husband

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1 Called by English writers "Residuaries"

2 Called by English writers "the Distant Kindred The word literally means "uterine relations" and signifies, generally speaking, relations connected with the deceased through females It is equivalent to the word *bandhu* in Hindu law

3 See *Abdul Serang* v *Putee Bibi* [1902], I L , 29 Cal , 738

4 For the doctrine of Return, see p 31.

5 See *ante* p 7.

The females are (1) wife (2) daughter, (3) son's daughter, or the daughter of a *lineal male descendant* how low soever, (4) mother (5) *true* grandmother, (6) full sister, (7) consanguine sister (*i. e.*, half-sister on the father's side), and (8) uterine sisters (*i. e.*, half-sisters on the mother's side)

1 *The Father*.—The Sunni lawyers attribute to the father three characters—(*a*) the character of a simple sharer when the deceased happens to leave a lineal male descendant, (*b*) the character of a simple residuary when he co-exists with a person who is only a sharer—as a husband or a wife, a mother or a grandmother—when he takes the residue, of the estate after the allotment of the share or shares, and (*c*) the character of both a sharer and a residuary, as when he co-exists with a daughter, or a son's[1] daughter In this case he takes first his share and then becomes entitled to any residue after allotment of the daughter's or the son's daughter's share.

The father's share

A father's share when the deceased leaves a son or son's son or any other lineal male descendant, like a son's son's son, is $\frac{1}{6}$

The father's father—his share

2 The father's father or any other lineal male ascendant, (who is not excluded by the father or a nearer ascendant), takes the same share as the father, *viz*, $\frac{1}{6}$.

[The Sunnis or rather the Hanafîs divide the ascendants for purposes of succession into two classes, *viz*, *true* and *false*

The true grandfather

A *true* grandfather is an ascendant in whose line of relationship to the deceased no female intervenes For example, a father's father is a *true* grandfather, whereas a mother's father is a *false* grandfather

A *true* grandmother is a female ancestor in whose line of relationship with the deceased no *false grandfather* intervenes, thus a mother's mother or a father's mother or father's father's mother are *true* grandmothers, whereas mother's father's mother is a *false* grandmother None of these distinctions exists in the Shiah Law] *II. 3. 3 D.*

1 The word "Son" here, and in the following passages, includes any *lineal* male descendant.

Uterine brother

3 Uterine brother (when only one, and no child, the child of a son how low soever, father, or *true* grandfather), $\frac{1}{6}$

When two or more, and no child or the child of a son, how low soever, or father, or a true grandfather, $\frac{1}{3}$

Husband.

4 Husband (when the deceased leaves a child or the child of a son how low soever), $\frac{1}{4}$

Without them, $\frac{1}{2}$

Widow

5 Widow (when the deceased has left no child, or the child of a son how low soever), $\frac{1}{8}$.

[A husband or widow co-existing with a daughter's child (who is a *distant kindred*), takes his or her full share.]

Co-existing with a child or the child of a son how low soever, $\frac{1}{8}$

In consequence of the limited and qualified recognition of polygamy, or, more properly speaking, polygyny, by some of the schools, it sometimes happens, among these Mussulmans, that the deceased leaves him surviving more than one widow. In such an event, the widows will take the $\frac{1}{4}$ or $\frac{1}{8}$, as the case may be, between them.]

Daughter

6 Daughter (when only one and no son, so as to render her a residuary), $\frac{1}{2}$

Two or more (and no son), $\frac{2}{3}$

Son's daughter

7 *Sons daughter* (or son's son's daughter, how low soever)—

When only one and no child or son's son, or other lineal male descendant, $\frac{1}{2}$

When two or more and no child or son's son or other lineal male descendant, $\frac{2}{3}$

When co-existing with *one* daughter and no son, or son's son, or other lineal male descendant, $(\frac{2}{3}-\frac{1}{2})=\frac{1}{6}$

When there are two daughters, the son's daughters are excluded, unless there happen to be with them a lineal male descendant *of the same or lower degree.* The son's daughters or the daughters of any lineal male descendant are excluded by a son or by a lineal male descendant nearer in degree than themselves.

Mother

8 *Mother* (when co-existing with a child of the *propositus*, or a child of his or her son, how low soever, or two or more brothers and sisters, whether consanguine or uterine), $\frac{1}{6}$

When not, $\frac{1}{3}$

But, $\frac{1}{3}$ of *remainder* after deducting husband's or wife's share, when with *father*, $\frac{1}{3}$ of *whole* when with *grandfather*.

True grandmother

9 *A true grandmother*, how high soever, (when not excluded by a nearer *true* female ancestor), $\frac{1}{6}$

Full sister

10 *Full sister* (when only one, and no son or son's son how low soever, *true* grandfather, daughter, son's daughter, or brother), $\frac{1}{2}$

When two or more and no such excluder, $\frac{2}{3}$

Consanguine sister

11 *Consanguine sister*, (when only one, and no excluder as above or full sister), $\frac{1}{2}$

When one, and co-existing with one full sister, $\frac{1}{6}$

When two or more and no such excluder, $\frac{1}{3}$.

When there are two full sisters, the consanguine sister takes nothing unless there is a consanguine brother with her.

Uterine sister

12. *Uterine sister takes like uterine brother* [1]

These represent the Sharers, persons whose shares are specified in the Koran, and with reference to whose shares therefore, there is, substantially, little or no difference between the Sunnis and the Shiahs.

Section II.

Asabáh or Residuaries.

The residuaries are divided into three classes :—

(1) Residuaries in their own right,
(2) Residuaries in another's right, and
(3) Residuaries together with another.

1 For some examples of Sharers see Appendix

The first class includes all agnatic male relations, that is, those in whose line of relationship to the deceased no female enters—for if a female were to come in, the male would not be a residuary, he would belong to the category either of Sharers or Distant Kindred These are the *Asabâh proprio jure (Asabâh-be-nafsihî)* [1]

Residuaries in their own right

(1) *Residuaries in their own right* are divided into four sub-classes —

(*a*) The "offspring" of the deceased, meaning thereby the deceased's sons or lineal male descendants,

(*b*) His "root," *viz*, the ascendants, in other words, his father and *true* grandfather, how high soever,

(*c*) The "offspring" of his father, *viz*, full brothers and consanguine brothers and their lineal male descendants,

(*d*) The "offspring" of the *true* grandfather, *how high soever*, in other words, lineal male descendants, however remote, of lineal male ascendants however removed.

It must be remarked that in the succession of Residuaries in their own right, when the relations are of the same degree of affinity, preference is given to the strength of blood or consanguinity For example, when the deceased leaves a full brother and a half-brother by the same father only, though the degree of affinity is the same, yet the tie of blood being stronger in the case of a full brother than in that of the half-brother preference is given to him In the same way, the son of a full brother is preferred to the son of a half-brother on the father's side So also when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance Lineal male descendants exclude all agnates in the ascending as well as collateral lines

Residuaries in another's right

(2) *Residuaries in another's right* are those females, who become residuaries only when they co-exist with certain males, that is, when there happen to be males of the same degree or who would take as such, though of a lower degree. These are four in number *viz.* —

(*a*) Daughters (with sons)

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1 See Appendix.

(*b*) Son's daughters (*with a son's son or a male descendant still further removed in the direct line*)

This applies to the daughters of all lineal male descendants *however low* For example, when there is a son's son's daughter co-existing with a son's daughter, the latter takes her half (like the daughter of the deceased), and the one-sixth goes to the son's son's daughter and so on *If there are two son's daughters, the son's son's daughter will take nothing unless she has a lineal male descendant of the same or lower degree co-existing, such as a brother or a nephew.*

(*c*) The full sister (*with her own or full brother*).

(*d*) The sister by the same father, or, in other words, a consanguine sister (*with her brother*).

When the females are of the same degree as the males (or, as in the case of son's daughters or the daughters of a son's son how low soever,—when they co-exist with lineal male descendants though of a lower degree),—each female takes half the share of a male For example, where there are two sons and three daughters or two brothers and three sisters, each daughter or sister as the case may be, will take one-seventh and each son or brother two-sevenths

It must be remembered, however, that many males may, in certain contingencies, become residuaries, but it does not follow that in all cases their sisters would become residuaries *with* them *It is only when the female is a sharer herself that, instead of taking a share, she takes as a residuary when co-existing with a male residuary* For example, if a man dies leaving behind him *a wife, a paternal uncle and an aunt*, "be the latter by the same father and mother, or by the same father only," the aunt, not being *a sharer*, according to law, is not entitled to any share in the inheritance of her deceased nephew, and her brother (the uncle) takes the entire estate after allotment of the widow's share.

When there is one sister of the whole blood, and con-sanguine brothers and sisters, the full sister will take her half, and the residue will be divided among the half brothers and sisters in the proportion of two to one.

When there are several full sisters they will take their two-thirds, and the remainder will be divided as above.

When the deceased leaves only a full sister and a consanguine sister, they take a moiety and one-sixth respectively, and the residue is divided among them *pro rata*

When there are two or more full sisters and several consanguine sisters, but no (consanguine) half-brother, the full sisters take the whole, the consanguine sisters take nothing.

(3) *Residuaries with others are*—

(*a*) Full sisters, *with daughters or son's daughters*

(*b*) Consanguine sisters, *with daughters or son's daughters*

Residuaries with others

When there is one daughter or son's daughter with a full or consanguine sister, the daughter or son's daughter takes her moiety, *and the remainder goes to the sister*

Examples

When there are several daughters or son's daughters, they take two-thirds, and the residue appertains to the sister

When there are several daughters and full sisters with son's daughters, the daughters and full sisters exhaust the inheritance.

If there are two daughters, a son's daughter, and a lineal male descendant such as a son's son or a son's grandson, the two daughters take two-thirds between them, the son's son takes two-ninths being two-thirds of the residue, and the son's daughter takes the remaining one-ninth

When the deceased leaves a daughter and several daughters of a pre-deceased son, the daughter takes her half and the son's daughters one-sixth, and the residue is divided among the daughter and son's daughters *pro rata*, but if there are two or more daughters they take two-thirds as their share and the remainder by return and "there is nothing for the son's daughters," but if there is a male among them, he makes the females (whether they be his sisters or cousins) residuaries with him, so that if there were two daughters or more, they would have two-thirds between them, and the remainder would pass to the children of the son, in the proportion of two parts to the male and one part to the female The male may be of a lower degree, still he would make them residuaries

with him, so that the remainder would be between him and them in the same proportion, or two parts to the male, and one to each female

Preference to propinquity

When a person dies leaving behind him several relations who may be classed as residuaries of the different kinds mentioned, preference is given to propinquity to the deceased, so that the residuary with another, when nearer to the deceased than the residuary in himself, would come first

Example

Thus, when a man has died leaving a daughter, a full sister, and the son of a half brother by the father—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son In the same way, a sister by the same father and mother (co-existing with a daughter) is preferred to a brother by the same father only, that is, the daughter will take her half share, and the remainder will be given to the full sister [1]

Section III

Uterine Relations or Distant Kindred

Uterine relations

When there are no consanguineous sharers or residuaries, the uterine relations succeed to the inheritance of the deceased according to the class to which they belong, and to their respective "rights"

A husband or a widow, though a Sharer does not exclude the "Uterine Relations" from taking a share in the estate of the deceased

Four classes

The uterine relations, "as in the case of the *Asabáh proprio jure*" are divided into four classes —

Class (I)

(1) The "offspring" of the deceased, *viz.*—

(*a*) The *children* of daughters and their descendants how low soever

1 For some examples, see Appendix.

(*b*) The *children* of son's daughters and their descendants how low soever

Class (2). (2) The "root" of the deceased or his ascendants, *viz* —

(*a*) Male ancestors however remote in whose line of relation to the deceased there occurs a female and who are therefore called "false grandfathers"[1]

e g, deceased's mother's father, father's mother's father, mother's mother's father, etc

(*b*) Female ancestors technically called "false grandmothers."

e g., mother's father's mother

Class (3) (3) The "offspring" of his parents, *viz.*—

(*a*) The daughters of full brothers and of full brother's sons, and their descendants

(*b*) of consanguine brothers (*i e*, by the same father only), and of consanguine brother's sons and their descendants

(*c*) The *children* of half brothers by the same mother only and their descendants.

(*d*) The *children* of all sisters and their descendants

Class (4) (4) The offspring of grandparents and other ascendants however removed

(*a*) The daughters of full paternal uncles and of their sons,

(*b*) . of half paternal uncles by the father (*i.e.*, father's consanguine brothers) and of their sons,

(*c*) Paternal aunts, full, consanguine or uterine and *their children*,

(*d*) Maternal uncles and aunts and *their children*,

(*e*) Paternal uncles by the mother, that is, the father's half brothers by the same mother only and their *children*, and their respective descendants however removed. 113.3.3

The enumeration is by no means exhaustive According to the most approved definition all persons connected with the deceased through the persons mentioned are his "Uterine Relations" or Distant kindred.

The enumeration not exhaustive

The general order of succession is according to their classification, the first class succeeding first, and so on.

Among the individuals of the various classes, succession is regulated by proximity to the deceased, the nearer in degree always excluding the more remote

Accordingly, among the individuals of the first class of uterine relations or distant kindred,—which comprises the children of daughters and the children of son's daughters,—(*a*) the *nearest in degree* to the deceased is the person preferably entitled to the succession.

First class of uterine relations Rules regarding their succession

Thus the daughter of a daughter will take in preference to the daughter of a son's daughter

(*b*) If the claimants be equal *in degree*, that is, if all be related to the deceased in the second, third or fourth degree, as the case may be,—in such a case, the child of a *sharer* or a *residuary* is preferred to the child of an *uterine relation, e g, the son's* daughter's daughter will take in preference to *daughter's* daughter's son It will be remembered that a son's daughter is a sharer, whilst the daughter's daughter is an uterine relation

(*c*) *If the claimants be equal in degree and there be not among them the child of a sharer or a residuary*, or *if they all be related through a sharer or a residuary*, then the shares would be regulated by the number and sex of the persons existing at the time the inheritance opens, *provided the persons through whom the claimants are connected with the deceased are of the same sex*, or, as it is technically said, "provided the sex of the roots agree"

Imam Mohammed's rule followed by the Indian Hanafis

For example, if a man were to die leaving a daughter's son and a daughter's daughter, it will be noticed that the two claimants are not only equal in degree to the *propositus*, but that there is no difference in the sex of the persons

through whom they are connected with the deceased Accordingly, the daughter's son takes $\frac{2}{3}$rds, whilst the daughter's daughter gets $\frac{1}{3}$rd Similarly if there were two sons of a daughter and two daughters of another daughter, the two grandsons would take $\frac{2}{3}$rds between them, and the two grand-daughters $\frac{1}{3}$rd between them

(*d*) But if "the sex of the roots" differ, or, *in other words, if the persons through whom the claimants happen to be connected with the deceased differ in their sex*, then, according to Imâm Mohammed, whose opinion on this point is followed by the Indian Hanafis, the shares are not regulated by the number and sex of the claimants, but "by the roots," in other words, they take *per stirpes*

Abu Yusuf's rule

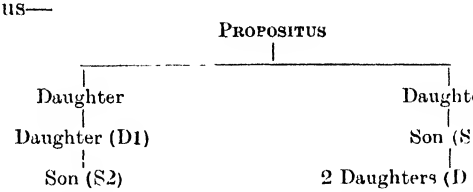
According to the rule of Abú Yusuf which, being simpler and more intelligible, is followed throughout Western Asia, in every case where the claimants are of an equal degree and *there is not among them the child of a sharer or a residuary*, the property is divided with reference to the sex and number of the claimants

A few examples may be of assistance to the student in understanding these divergent views —

Suppose a man were to leave him surviving a daughter's son's daughter, and a daughter's daughter's son, thus—

In that case according to Abu Yusuf, the distribution would be made according to the number and sex of the claimants, and the son (S) would get $\frac{2}{3}$rds and the daughter (D) $\frac{1}{3}$rd. According to Mohammed the distribution would be made according to the sex of the "roots," *viz*, of the intermediate ancestors Thus the daughter's son being entitled to double the share of the daughter's daughter, would pass his $\frac{2}{3}$rds to his daughter (D), and the daughter's daughter would pass her $\frac{1}{3}$rd to her son (S).

Take another case A man dies leaving one son of a daughter's daughter, and two daughters of a daughter's son, thus—

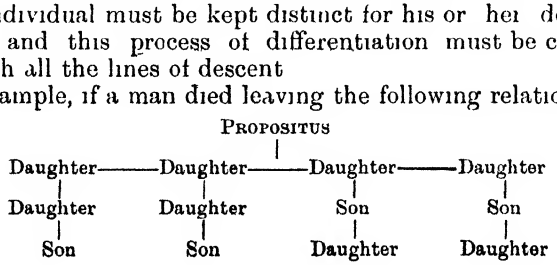


According to Mohammed S1 takes $\frac{2}{3}$rds and passes it on to his two daughters—(D2 and D3), whilst D1 takes $\frac{1}{3}$rd and passes it on to her son (S2)

According to Abu Yusuf the property is divided into four shares of which S 2 takes 2, or half of the whole, and D 2 and D 3 the remaining half equally between them

(*c*) When the claimants are more than two in number and although equal in degree derive their descent from separate ancestors, differing in sex, the distribution according to Mohammed, will be made with regard to the sex of the ancestors in the first line of descent (from the deceased), when the difference in sex occurs After which the males will be grouped in one class and the females in another class, and the shares of the males will be passed down in the aggregate to their descendants to be divided according to the usual rule, and the shares of the females similarly to their descendants After the intermediate ancestors have been thus grouped the aggregate shares of the two classes must be kept distinct through all the lines of descent If there is one individual of one sex, and several of the other in the line where the difference first occurs—the share of that individual must be kept distinct for his or her descendant, and this process of differentiation must be carried through all the lines of descent

For example, if a man died leaving the following relations —



According to Mohammed the distribution would take place in the second line where the difference in sex first appears—the two sons are allotted $\frac{4}{6}$ths and the two daughters $\frac{2}{6}$ths The $\frac{4}{6}$ths of the son are passed down to their daughters in equal shares and the $\frac{2}{6}$ths of the two daughters to their sons in equal shares. If instead of the two sons leaving daughters they had left a son and a daughter respectively, the son would have taken $\frac{2}{3}$rds of $\frac{4}{6}$ths $= \frac{8}{18}$ths, whilst the daughter would have taken $\frac{1}{3}$rd of $\frac{4}{6}$ths $= \frac{4}{18}$ths. According to Abu Yusuf the two male claimants would take $\frac{1}{3}$rd each and the two female claimants $\frac{1}{6}$th each

Or take another instance —a man dies leaving five descendants, three of whom are females and two males, *viz*, *two* daughters of a daughter's son's daughter, *one* daughter of a daughter's daughters son, and *two* sons of a daughter's daughter's daughter, as in the following table —

Daughter	Daughter	Daughter
Daughter (D 1)	Daughter (D 2)	Son (S 1)
Daughter (D 3)	Son (S 2)	Daughter
2 Sons	Daughter	2 Daughters

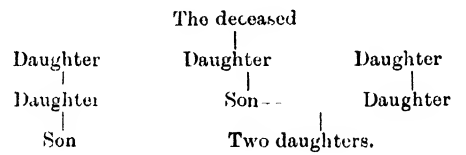
According to Abu Yusuf, the property of the deceased will be divided into seven shares, out of which two shares will be given to each of the males and one share to each of the females

According to Mohammed the property will be divided into 28 shares, out of which eight shares will be given to each of the daughters of the daughter's son's daughter, six shares to the daughter of the daughter daughter's son, and 3shares each of the sons of the daughter's daughter's daughter. The reason of this division is thus stated —

Here the sexes differ first in the second line. As S I (the son in the second line on the right hand side) has two descendants among the claimants,—by the strength of his sex, he will be treated as two males (equivalent to four females) , D I (the daughter on the left hand side) having two descendants among the claimants will on account of her sex, be treated as two females , and D 2 (the daughter

in the middle), having one descendant among the claimants, will be treated as one female—the property will therefore be divided into seven shares, of which four shares or $\frac{4}{7}$ will be allotted to S1, who being by himself will be isolated, and *his* share will descend to his descendants (his two granddaughters) in equal moieties, *i e* $\frac{4}{14}$ each The share of D1 and D2 formed into a group will be dealt with in the aggregate and will descend to their immediate descendants (S2 and D3) in equal moieties, because S2 is a male and is equal to two females and D3 represents two females (her descendants). These must now remain apart or isolated, and thus the two sons of D3 get $\frac{3}{14}$ equally between themselves and the daughter of S2 gets $\frac{3}{14}$ for herself In other words the descendants of S1 get 16 shares and the descendants of D1 and D2 *six* shares respectively.

Another example is as follows —



According to Abu Yusuf, the male descendant takes one-third, whilst the female descendants take two-thirds between them

According to Mohammed, the estate will be divided into 28 parts, out of which the females take 22 shares (16 in right of their father and 6 in right of their mother), whilst the male descendant takes only 6 shares in right of his mother

(2) In the succession of the distant kindred of the second class the same rules are to be observed, *viz* —

(*a*) Proximity to the deceased

(*b*) The condition and sex of the person through whom the claimants are connected to the deceased, *viz*, whether or not he or she is a sharer or a residuary, provided the sides are equal, *with this addition that*—

(*c*) *If the claimants are related through different sides, two-thirds would go to the paternal, and one-third to the maternal side without regard to the sex of the claimants, e g*

Father's mother's father takes $\frac{2}{3}$, whilst

Mother's mother's father takes $\frac{1}{3}$

(3) In the succession of members of the third class the same rules are applicable,[1] for instance the brother's son's daughter and the sister's daughter's son are equally distant from the ancestor, but as the brother's son is a residuary, his daughter is "preferred" to the son of the sister's daughter

With regard to the succession of this class it must be noted that—

(*a*) When the claimants are equal in degree, the descendants of full brothers exclude those of half blood by the father (consanguine brothers), but not those of uterine brothers and sisters

(*b*) But the descendants of full sisters do not exclude the descendants of consanguine brothers and sisters

(*c*) The descendants of uterine brothers and sisters take the share of their ancestors (*viz*, $\frac{1}{3}$)

(4) *Among the individuals of the fourth class, if the sides are equal, preference is given to propinquity, but if the sides of consanguinity differ, then no regard is shown to the strength of relation*

Those who are related both by the father and mother are preferred to those who are related by the father only, and they who are related by the father are preferred to those who are related by the mother only, whether they be males or females, and, if there be males and females and their relation be equal, then the male has the allotment of two females

For example, "if there be a paternal uncle and aunt, both by one mother, or a maternal uncle and aunt, both by the same father and mother, or by the same father or by the same mother only, and if the sides of their consanguinity be different, then no regard is shown to the

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1 *Ante* p. 23

strength of relation, as, if there be a paternal aunt by the same father and mother, and a maternal aunt by the same mother or a maternal aunt by the same father and mother, and a paternal aunt by the same mother only, then two-thirds go to the kindred of the father, for that is the father's share, and one-third to the kindred of the mother, for that is the mother's share, then what is allotted to each set is divided among them, as if the place of their relationship were the same" Thus a full paternal aunt excludes father's uterine brother and half sisters, but not mother's half brothers and half sisters, and a mother's brother or sister does not exclude father's uterine brother and half sister. Those on the father's side take two-thirds, while those related on the mother's side divide one-third among themselves 17.

SECTION IV.

THE DOCTRINE OF *Walâ*.

Right of inheritance based on *Wala*

Besides the heirs specified above, the Sunni Law recognises the right of succession based on the relationship of *walâ* Among the Hanafis, *walâ* is of two descriptions, *viz*, *walâ-ul-itq*, "the right of inheritance acquired by emancipation," and the *walâ-ul-mawâlât*, "the right of inheritance by clientage" "Clientage" implies a responsibility on the part of the "patron" for the delicts of the *mawla* or "client"

The Shiahs recognise three kinds of *walâ*, two of which are analogous to those recognised by the Sunnis, but whilst the Shiahs postpone the right of succession of the emancipator until after the blood relations are all exhausted, the Sunnis give the preference to the emancipator over the uterine relations of the deceased For example, if a man were to enfranchise his slave, and that slave were to die subsequently, leaving certain heirs belonging to the class of "uterine relations," the emancipator would exclude such relations under the Sunni Law "By the *walâ* of manumission," says the *Hedâya*, "*asûbat* is established, in other words, when a person emancipates his slave he is *asabâh* to such slave, and is entitled to inherit of him in preference to his maternal uncles and aunts or other uterine kindred.

Right of the manumittor

The emancipator is, accordingly styled, in Sunni Law "a residuary for special cause." In the absence of the manumittor, his male, but not the female, residuary heir succeeds to the deceased freedman Females succeed, however, when they themselves have manumitted the slave If the deceased freedman were to leave no sharer or residuary by blood, his entire estate would go to the *asabah* by *walâ* (the emancipator or his male residuary heirs), to the absolute exclusion of the deceased's uterine relations If he were to leave a sharer, then the specified share would be allotted to such sharer, and the residue would go to the residuary by *walâ*, but if he were to leave a residuary by blood, then the residuary by *walâ* would take nothing

Variation in the recognised order of succession

But in the succession *to the emancipated slave* of the manumittor and his male residuaries a variation is made by the Sunnis in the recognised order of succession For example, in ordinary cases, when a man dies leaving behind him a son and a father, the father takes his specified share, *viz*, one-sixth, and the son takes the residue, but if a freedman were to die leaving behind no *asabah* by blood, but only his manumittor's son and father, the son of the emancipator would take the whole inheritance *to the exclusion of the father* So also in the case of the manumittor's son co-existing with a grand-father The general principle is that in the succession of "residuaries for special cause," the nearest takes the whole in preference to the one more remote (as an agnate).

General Principle

S. 3, Act V of 1843.

The subject of *walâ*, however, has now only an antiquarian interest, for section 3 of Act V of 1843 has removed all bar to the succession of the natural heirs of an emancipated slave to his or her inheritance And in the case of *Syad Mir Ujmudin Khan* v *Zia-ul Nissa Begam* the Privy Council declared in effect,

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1 [1879] L. R, 6 I. A., p. 137.

that the right of inheritance created by the relationship of *walá* to the exclusion of the emancipated slave's natural heirs was done away with by that Act The result of that statute is that the distant kindred (cognates) of a person, who was a slave at one time but was emancipated afterwards, take their natural place in the order of succession

When the deceased leaves no relation by blood, but leaves him or her surviving a husband or a widow, as the case may be, *such husband or widow takes the entire inheritance* [1] *ʃg. 3 30*

In the absence of the heirs mentioned above, the succession devolves upon the person who has made himself responsible for the delicts of the deceased As the peculiar relationship of clientage is unknown in India, this provision of the Sunni Law does not need discussion

Heir by acknowledgment.

Next comes the heir by acknowledgment *An heir by acknowledgment is one in respect of whom the deceased (both the acknowledgor and acknowledged being persons of unknown descent) has admitted a tie of blood other than that of paternity* For example, if two persons of unknown parentage call themselves brothers, and one of them dies without leaving any *known* heirs, the other person would be entitled to the deceased's inheritance

Then comes the universal legatee or the person in whose favour the deceased had made a general devise [2]

And lastly, the Public Treasury (*for the benefit of all the Mussalmans*) [3]

SECTION V

THE DOCTRINE OF *Return*

When there are sharers and no residuaries, the residue of the property after the allotment of the shares is divided

1 *Mahomed Arshad Chowdhry* v *Sajida Bano* [1878], I L, 3 Cal., 702, *Bafatun* v *Bilaiti Khanum* [1904], I L., 30 Cal, 683

2 This is due to the provision that a man cannot devise away the whole of his property from his heirs.

3 Under the Mahommedan Law the property of a person dying without leaving *any heir* goes to the State to be applied for the benefit of the general body of Moslems.

among the sharers by the principle of *Return* in the proportion of their shares

Return—Husband or widow entitled to

The early lawyers were of opinion that a husband or a wife was not entitled to take by *Return* but later jurists have held that when the deceased leaves no other heir, *belonging either to the category of residuaries or distant kindred*, the husband or widow takes by *Return* And this rule has been recognised and enforced by the British Indian Courts.[1]

Persons taking by return

The persons to whom there may be a *Return* are ordinarily speaking eight in number (1) mother, (2) grandmother, (3) daughter, (4) son's daughter, (5) full sister, (6) half-sister by the father, (7) half-brother, and (8) sister, by the mother *And a Return may take place to one, two, or three classes at the same time But no more than three can take by Return at one and the same time*

The residue after allotment of shares is apportioned among the parties indicated, in proportion to their shares, *e g*,—

When there is a grandmother with a sister by the same mother of the deceased, the shares are $\frac{1}{6}$ each, therefore the residue is divided among them equally.

When there is a daughter with the mother, the shares are $\frac{1}{2}$ and $\frac{1}{6}$, therefore the residue is divided among them in proportion to their shares, which will be $\frac{3}{12}$ and $\frac{1}{12}$.

When there are two wives, a mother, and three daughters, the wives takes between them $\frac{1}{8}$.

Mother, $\frac{1}{5}$ of $\frac{7}{8} = \frac{7}{40}$

1 *Mahomed Arshad Chowdhry* v *Sayida Bano*, supra ; *Bafatun* v. *Balasti Khanum*, supra.

3 daughters, $\frac{4}{5}$ of $\frac{7}{8}=\frac{7}{10}$, each $=\frac{7}{30}$

L C D $=240$

each wife$=15$, 2 wives $= 30$

Mother $= 42$

Each daughter$=56$, 3 daughters$=\frac{168}{240}$

Or—Mother daughter$=\frac{1}{6}$ $\frac{1}{2}=1$ 3

Mother — $\left(\frac{1}{6}+\frac{1}{12}=\frac{2+1}{12}\right)=\frac{1}{4}$

Daughter—$\left(\frac{1}{2}+\frac{3}{12}=\frac{6+3}{12}\right)=\frac{3}{4}$

Or—Wife, mother, and daughter

Wife$=\frac{1}{8}$

Mother daughter$=\frac{1}{6}$ $\frac{1}{2}=1$ 3

Mother $=\frac{1}{4}$ of $\frac{7}{8}=\frac{7}{32}$

Daughter$=\frac{3}{4}$ of $\frac{7}{8}=\frac{21}{32}$

Wife, 4, mother, 7, daughter, 21

Or—2 wives, one mother, and 3 daughters

2 wives $=\frac{1}{8}$, 1 wife$=\frac{1}{16}$

Mother 3 daughters$=\frac{1}{6}$ $\frac{2}{3}=1$ 4

When there happen to be a mother, a daughter, and son's daughter, the shares are respectively $\frac{1}{6}$, $\frac{1}{2}$, and $\frac{1}{6}=\frac{5}{6}$, the residue is divided then among them in proportion to their shares, that is, $\frac{1}{30}$ to the mother, $\frac{1}{30}$ to the son's daughter, and $\frac{3}{30}$ to the daughter.

Or—Mother and son's daughter together take $\frac{2}{6}$, daughter $= \frac{3}{6}$.

Mother and son's daughter daughter $= \frac{2}{6} \quad \frac{3}{6} =$ 2 3

Daughter takes $\frac{3}{5}$

Mother and son's daughter $\frac{2}{5}$ And so when there is a daughter with a son's daughter

Double inheritance

Where a deceased leaves a certain number of heirs and one of them dies before distribution leaving heirs, such heirs take under both the deceased, if they are heirs of both, or, under the latter, if not entitled to succeed to the inheritance of the first deceased For example, a man dies leaving a son, a daughter and a half-brother by the father In this case, the son excludes the half-brother, but before distribution the son dies, leaving only the sister and his half-paternal uncle as his heirs In this case the son's $\frac{2}{3}$ is divided equally between his sister and his uncle, the former getting half of $\frac{2}{3}$, *viz*, $\frac{1}{3}$, and the latter the remaining $\frac{1}{3}$ This is called taking a "double inheritance."

Section VI.

The Doctrine of Increase

Sunni rule

It sometimes happens in practice that when there are several sharers co-existing, their fractional shares when added up amount to a great deal more than the integral quantity. In order to meet

the difficulty thus arising, the Sunni lawyers make a proportionate abatement in *all* the shares by increasing the common divisor This is called *Aul.* "Increase" or *Aul* is thus a technical expression used by Sunni lawyers to signify *a proportionate increase in the common divisor for the purpose of yielding the requisite number of shares* For example, if a woman leave behind her a husband, two daughters, and a mother, their respective shares would be one-fourth, two-thirds, and one-sixth The common divisor in this case is twelve, which represents the shares into which the estate will have to be divided, three being the husband's share, eight the daughter's, and two the mother's But three, two and eight make thirteen The Sunnis, accordingly, in order to give the exact number of shares to each heir divide the property into thirteen shares.

Shiah rule

Among the Shiahs, on the contrary, when they find that the property falls short in distribution of all the appointed shares, the deficiency falls upon the heir or heirs whose share or right is liable to fluctuation or variation For example, in the above case the mother and husband would get, among the Shiahs, their full shares, without any abatement, and the remainder, *viz*, seven-twelfths, would be given to the daughters in equal proportions

Section VII

Posthumous Children, etc.

Probation of widowhood

When a person dies leaving a widow, she is prohibited from marrying before the expiration of four months and ten days This is called the *iddat* or probation of widowhood, and is prescribed for discovering whether she is *enceinte* or not. If she is, her probation will not terminate until she is delivered If a child is born within the ordinary period of gestation,[1] it succeeds to its father. Where a child

[1] See *post*, p. 51.

is born after the decease of any *other* relation to whose inheritance it would have been entitled had it been in existence at the time of such relation's death, it succeeds only if born within six months from such death.

Persons dying in a common calamity.

Persons dying in a sudden calamity are presumed to have died together, so that they do not inherit to each other, but the property of each goes to his or her respective heirs.

Missing persons, Mâliki doctrine

Under the old Hanafî Law, missing persons were supposed to be alive for 90 years But the more reasonable principle of the Mâlikî Law is now in force among the Hanafîs, *viz*, that if a person be unheard of for four years he is to be presumed to be dead

Shiah doctrine, Shâfei doctrine

Among the Shiahs the lapse of ten years gives rise to that presumption, whilst among the Shâfeis the recognised period is seven years, which is the same as in the Indian Evidence Act.

Indian Evidence Act, S 107

Section 107 of the Indian Evidence Act runs as follows —"When the question is whether a man is alive or dead, and it is shewn that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it"

Section 108

Section 108 then provides "that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

The intention of the Legislature

A Full Bench of the Allahabad High Court has held that the old Hanafî doctrine is a rule of evidence and not a part of the Mahommedan Law which the Courts are bound to administer.[1] It is submitted, however, that it could hardly have been the intention of the Legislature to vary

1 *Mazhar Ali* v *Budh Sing* [1884], 1. L., 7 All , 297.

the substantive rules of the different schools of Mahommedan Law For example, if a Hanafî wife whose husband has been missing for four years, were to re-marry after the lapse of that period, it would be impossible to hold, in my opinion, that such marriage is invalid owing to the provisions of s. 108.

CHAPTER III.

THE SHIAH LAW OF SUCCESSION

SECTION I.—CLASSIFICATION OF HEIRS

THE great distinction between the Shiah and the Sunni Law of Inheritance consists in the doctrine of agnacy The Shiahs repudiate *in toto* the doctrine of *Taasîb* or agnacy, consequently the paternal relations of the male sex, or what are called *Asabâh proper* in Sunni Jurisprudence, have no special privilege, nor are they preferred to the relations connected with the deceased through females

Right of inheritance under the Shiah Law

According to the Shiahs, there are two causes which give rise to the right of inheritance (1) *nasab* (consanguinity), and (2) *sabab* (special cause) Consanguinity implies simply the tie of blood All relations, therefore, connected with the deceased by the tie of blood are entitled to share in his inheritance unless excluded by the operation of the rules which we shall presently define

Relations by *nasab*—three classes

The relations who are entitled to succession by virtue of consanguinity (*nasab*) are divided into three classes or groups, and each class again into two sections The members belonging to the first class of heirs exclude from succession those belonging to the second, whilst these, in their turn, exclude all members belonging to the third class

But the heirs of the two sections of each class succeed together For example—

(1) The first class of heirs, entitled by *nasab* to inherit from the deceased, consists (*a*) of the ascendants of the first degree, *viz*, the parents, and (*b*) of the children and their offspring, including all descendants of the deceased

(2) The second class consists (*a*) of the ascendants of all degrees, and (*b*) brothers and sisters and their descendants.

(3) The third class consists of the collaterals (*a*) on the father's and (*b*) on the mother's sides, being descendants however low in the collateral lines, of the ascendants however high, such as uncles, aunts, grand-uncles, grand-aunts, etc, however high, and their descendants however low.

Order of succession

Whilst there is a single member of the first class existing, those who belong to the second and the third class are absolutely excluded from the succession In the same way, if there be any relation of the second class co-existing with relations of the third class, the latter take nothing

But the members of the two sections of each class succeed together For example, parents take a share in the inheritance of the deceased with the children of the deceased, grandparents with the brothers and sisters, maternal uncles and aunts with the paternal uncles and aunts A child or child's child entirely excludes the brothers and sisters and their descendants And so brothers and sisters and their descendants exclude the uncles and aunts, but they inherit together with ascendants of the higher degree.

Distinction between the Sunni and Shiah rules

When a Sunni Mussulman dies, leaving behind him a daughter's daughter with a brother's son, the brother's son, as an *Asabâh*, takes the entire inheritance to the exclusion of the deceased's own grandchild Among the Shiahs, the granddaughter of the deceased, as a lineal descendant, takes the whole property to the exclusion of the brother's son

When a Sunni Mussulman dies, leaving behind him a daughter and a brother, the daughter takes her specified share, *viz*, a moiety, and the rest goes to the brother as a Residuary or *Asabâh* Under the Shiah Law, she takes the whole, one-half as her specified share, and the other by the doctrine of *Return*

Relationship by special cause

The right of succession for special cause or *sabab* is divided under two heads —

(1) The right of inheritance by virtue of matrimony (*zoujiyat*), and

(2) The right of inheritance by virtue of *walâ* or special relationship

(1) The right of inheritance by virtue of *zouǵiyat* appertains to the individual heir under all circumstances. The husband or the wife, accordingly, are never excluded from succession If the deceased leave behind him a child and a widow, the latter takes her specified share, and the residue goes to the child In the same way a wife, coexisting with the parents or grandparents or brothers and sisters of the deceased is entitled to her specific share before the property is divided among the heirs who succeed by virtue of *nasab*

(2) The right of inheritance by *walâ* is divided under three heads, *viz* —

(*a*) *Walâ-ul-itq*, "The right of inheritance possessed by the emancipator"

(*b*) *Walâ-'z-zâmin-ul-jarîrah*, "The right of inheritance for obligation of delicts committed by the deceased"

(*c*) *Walâ-ul-Imâmate*, "The right of inheritance possessed by the Imâm by virtue of the *walâ* of Imâmate or spiritual headship

Synoptical Table of Shiah Inheritance

SECTION II

CATEGORIES OF CONSANGUINEOUS RELATIONS

Three categories of consanguineous relations

Under the Shiah Law, heirs, to whichever class they may belong among the consanguineous relations, are divided into three categories in respect of the right which entitles them to participate in the inheritance of the deceased, *viz* —

(1) *Those whose heritable right is acquired by virtue of the shares assigned to them in the Koran, and who are, therefore, designated zû-farz*, they are the same as in the Sunni Law,

(2) *those who inherit sometimes as zû-farz and sometimes by virtue of their relationship* (*karâbat*) *to the deceased*,

(3) *those who take only by virtue of their relationship, and are, therefore, called the zû-karâbat*

The heirs who are entitled to appointed shares (the *zû-farz*) are—

(1) A daughter or daughters, when without (the deceased's) father, and her or their own brother or brothers

(2) A full sister or sisters, or a consanguine sister or sisters existing without a grandfather, and brother or brothers of the same degree as themselves

(3) The father, with a child or children of the deceased

(4) The mother

(5) The husband, or the

(6) Wife

(7) The person or persons related by the same mother only

When there is only one heir, whether a *zû-farz* or *zû-karâbat*, or one entitled by virtue of the special relationship of *sabab*, *such heir takes the entire inheritance.*

For example, an only daughter takes her appointed share, *viz*, one-half, and the remainder goes to her by *Return* (*radd*)

An only son takes the entire inheritance by right of *karâbat*, there being no specific share assigned to him by the law

When the deceased leaves behind him or her no relation excepting a husband or a wife, who is entitled to succeed by virtue of the *sabab-i-zouqiyat* (matrimony), he or she, as the case may be, takes the entire inheritance, first his or her specific share, and the remainder by *Return*

Share of males and females—general rule

When there are male and female heirs of the same degree in the order of relationship, belonging to the same class, and connected equally by the tie of blood, the male takes double the share of a female For example, a son takes double the share of a daughter, a grandson double the share of a granddaughter, and so on

In the case, however, of heirs related on the mother's side alone, an exception is made to the above rule For example, uterine brothers and sisters divide the share allotted to them, *viz*, one-third, equally without distinction of sex

When there are two or more heirs who inherit, not as sharers, but by *karâbat* or *sabab*, they take the estate in proportion to their respective rights For example, when there are two sons, they divide the estate equally when there are only a son and a daughter, the son takes two-thirds and the daughter one-third

Persons connected through father and mother respectively

When there are several heirs, some connected with the deceased through the father and others through the mother, then each set take the portion of the person through whom they are related For example, when there are paternal, as well as maternal, uncles and aunts, then those connected on the father's side take two-thirds, and one-third goes to those who are connected on the mother's side *When the individuals so related to the deceased are themselves of different descriptions, then the share allotted to the group is divided according to their sex or respective individual rights* For example, if the deceased leaves behind him several paternal uncles and aunts, they

take two-thirds among them as a body, but the two-thirds is divided among them in the proportion of two to one, so as to give the males double the share of the females

The children of consanguineous heirs, if not in any way excluded, take the place of their deceased or disqualified parents, and receive proportionately the shares of their parents For example, if a man die, leaving the children of a son and the children of a daughter, the first take two-thirds of the estate and divide it proportionately among themselves according to their respective rights, whilst the children of the daughter take one-third (to which their mother was entitled) and divide it in the same way.

When there are two or more heirs, one or more of whom are entitled as sharers or *Zû-furz* and the others as *Zû-karâbat* (consanguinity), the *Zû-furz* take their respective shares before the residue is divided among the latter

Relations of the half-blood

When there are several relations some of the full and others of the half-blood, those connected on the mother's side take only one-third, which is divided among them equally without distinction of sex, and the residue is divided among the relations of the full-blood in the usual proportion, *relations on the father's side being entirely excluded*

For example, if the deceased leave some full-brothers and sisters and some half-brothers and sisters, both on the father's and the mother's side, *the uterine brothers and sisters take one-third of the inheritance among them, and divide it equally without distinction of sex* If there be only one such uterine brother or sister, he or she takes one-sixth The residue is then divided among the full-brothers and sisters in the proportion of two to one, the brothers of the half-blood on the father's side being entirely excluded

It is only in default of relations of the full-blood that those connected on the father's side participate in the inheritance For example, if a person were to die leaving a brother of the half-blood on the father's side, and a sister by the same father and mother, the latter would exclude the brother *in toto* This rule applies to all such cases

Husband or widow never excluded from succession.

The husband or widow is never excluded from succession In ancient times the widow did not take by *Return*, but modern lawyers hold, and it has been decided, that she takes by *Return* in the absence of all natural heirs [1]

When there are relations connected with the deceased on the father's side only, and others who are connected on the mother's side only, and both sets of relations are equal in degree and class, the two sets take their respective shares and divide the residue among themselves pro rata

For example, if the deceased leave behind him a sister of the half-blood on the father's side and a sister of the half-blood on the mother's side both of them take their respective shares, *viz*, one-half and one-sixth, and the remainder, *viz*, one-third, is divided among them in the ratio of three to one

As far as the shares are concerned, they are six in number, *viz*, a moiety, a fourth, an eighth, a third, two-thirds and one-sixth

(1) A moiety is taken by—

- (*a*) The husband, when there are no children
- (*b*) The full sister, in default of other heirs
- (*c*) The daughter, when only one

(2) The fourth is taken by—

- (*a*) The husband, when with children
- (*b*) The widow, when there are no children

(3) The eighth is taken by the widow with children or children's children, how low soever

(4) The third is taken by—

- (*a*) The uterine brothers and sisters, when two or more in number
- (*b*) The mother, when the deceased has left no children, or two or more brothers or one brother and two sisters

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[1] See *ante*, p 31

(5) Two-thirds are taken by—

(*a*) Two or more daughters, when there are no son or sons

(*b*) Two or more full-sisters, when there are no full-brothers or brothers of the half-blood on the father's side only

(6) A sixth share is taken by—

(*a*) The father and the mother, when the deceased has left lineal descendants.

(*b*) The mother, when there exist with her two or more brothers of the full-blood or one brother and several sisters of the full-blood (or by the same father only, the father himself being in existence).

(*c*) The single child by the same mother only, whether such child be male or female, *viz.* a uterine sister or brother

Under the Shiah Law, a childless widow or one who has no issue surviving at the time of her husband's death is not entitled to a share in immoveable property or lands, but only to a share in *moveable* property, and in the value of houses, buildings, etc [1]

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1 *Toonanyan* v *Mehndee Begum* [1861] 3 Agra 13, *Asloo* v *Umdatoonnissa* [1873,] 20 W R, 297, *Umardaraz Ali Khan* v *Wilayet Ali Khan* [1896] I L, 19 All 169, *Ali Hussain* v *Sajuda Begum* [1897], I L, 21 Mad 27, *Aga Mahomed Jaffer Binclamin* v *Koolsoom Beebee* [1897], I. L, 25 Cal., 9; *Muzzaffar Ali Khan* v *Parvati* [1907] I L, 29 All 640

CHAPTER IV.

CAUSES OF EXCLUSION FROM INHERITANCE

UNDER the Mussulman Law several causes debar a person from succeeding to the estate of the *propositus*, notwithstanding that he may stand to the deceased in the relation of an inheriting relative

(1) The first is difference of faith technically called *Kufr* (infidelity) *Kufr* means the denial of the Unity of God (*wahdânièt*), and of Mohammed's Messengership (*risâlat*), the two cardinal principles on which Islâm is founded Every person who acknowledges the Divine Unity and the Messengership of Mohammed is regarded as within the pale of Islâm, nothing more is required [1] Those, however, who "deny" those cardinal principles are considered beyond the benefit of its rules Accordingly, when a person dies leaving an heir who by birth or apostacy is a "denier," *i e*, repudiates God's Unity and Mohammed's Ministry, such heir would be excluded from succession in preference to another who does accept those doctrines [2]

Infidelity—its meaning

The Indian Act, XXI of 1850, has made a variation in the Mahommedan Law of inheritance. The principle by which "deniers" or "infidels" were excluded from the inheritance applied

Act XXI of 1850

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1 See Appendix

2 A believer in God or a theist, who, although he does not call himself a Mussulman, yet accepts Mohammed as one of the veritable "Messengers of God," can hardly be designated a *Kâfir* Many Moslem divines regarded Raja Ram Mohun Roy as a Moslem—certainly not a *Kafir* Islâm depends on the acceptance of the two doctrines mentioned in the text. The recognition of sectarian dogmas is a matter of detail. And, hence, whilst the ultra Sunni regards a Shiah as a Moslem, he does not consider him a *Momin* (one having *Imân* or *faith*), and *vice versâ*: *Imân*, which originally meant a belief in the cardinal principles, is now applied to the acceptance of sectarian dogmas.

equally to those who were born in a different faith and those who had abjured Islâm For example, an apostate from Islâm and an original non-Moslem came equally within the purview of this rule, so that, if a deceased Moslem left behind him three heirs, one of whom was a non-Moslem, the other an apostate, and the third a Moslem, the first two, under the Mahommedan Law, would be absolutely excluded from the succession, and the inheritance would go entirely to the Moslem heir though he may be remotest of all of them in proximity to the deceased.

Rule relating to "apostates" abolished

The change effected by Act XXI of 1850 is most important This Act consists of only one section, but its operation has, in many cases, had the effect of entirely diverting the course of succession from the channel into which it would have otherwise run It enacts that "so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories"

The effect of the enactment has been to do away with the provision of the Mahommedan Law by which "*apostates*" were excluded from the inheritance of deceased Moslems

But if the person renouncing the Mussulman religion were to predecease the ancestor, leaving heirs belonging to his or her new creed, would they be entitled to succeed to their Moslem relations under this Act? The question is not free from difficulty In one case, a member of a Hindu family who had renounced Hinduism and had adopted the Mahommedan faith, died leaving a son born in the Mussulman religion. On a claim by the latter to a share of the inheritance of his Hindu grandfather, the Allahabad High Court held that the relief granted by the Act

to the person renouncing his former faith extended to his issue.[1]

Homicide — Sunni doctrine.

(2) A person who causes the death of another cannot succeed to the latter

Under the Sunni Law, if one person were to kill another either intentionally or accidentally, he would be excluded from inheriting from the person killed

Shiah doctrine

Under the Shiah Law, the homicide must be *intentional* and *unjustifiable* to be a bar to succession

Slavery

(3) The status of slavery is also treated as a bar to succession under the Shiah as well as the Sunni Law.

If a person were to die, leaving one heir free and another a slave, the whole inheritance would go to the one who is free, though the other may be nearer to the deceased

If the slave has a child who is free, it would inherit in preference to its parents

As the status of slavery does not exist in India, this rule of Mahommedan Law has only an antiquarian interest

(4) Under the Sunni Law an illegitimate child ("a child of fornication")[2] cannot inherit to his father or relations on the father's side, although in the absence of legitimate issue he is entitled to inherit from his mother and relations on the mother's side [3]

Under the Shiah Law a child of fornication is "nullus filius" and cannot inherit to either of its parents [4]

The Mahommedan Law does not recognise any physical defect as forming an impediment to succession, and

1 *Bhagwant Singh* v *Kallu* [1888], I. L 11 All , 100

2 See *post*, p 56.

3 *Bafatun* v *Bilasi Khanum* [1903], I. L , 30 Cal , 683 In this case a Mahommedan female died leaving a husband and an illegitimate son of a sister. The husband became entitled to half of the deceased's property, whilst the other half was taken by the sister's son as a distant kindred of the third class.

4 *Sahebzadee Begum* v. *Himmut Bahadoor* [1869], 12 W. R., 512 on review [1870], 14 W. R , 125.

consequently a person who happens to be insane is not excluded from inheritance [1]

Similarly, want of chastity in a daughter, before or after the death of her father, or whether before or after her marriage, is no bar to succession [2] Nor does a widow lose her right to a share in her husband's estate by reason of unchastity in her husband's lifetime This rule, however, is based on the assumption that the status of marriage subsists to the end

According to custom in certain families or communities females are excluded from inheritance [3]

1 *Meher Ali* v *Amani* [1869] 2 B L R , A C , 306, S C. 11 W R 262
2 *Noronaram Roy* v *Nomalchand Neogy* [1866], 6 W R , 303.
3 See *Mahammad Kamil* v *Imtiaz Fatima* [1908] I L , 31 All , 557

PART II.

The Law Relating to Status.

CHAPTER I.

THE STATUS OF LEGITIMACY.

SECTION I.—GENERAL OBSERVATIONS.

Presumption of legitimacy

UNDER the Mahommedan, as in all civilised systems of law, the "child follows the bed" that is, *the paternity of a child born in lawful wedlock is presumed to be in the husband of the mother without any acknowledgment or affirmation of parentage on his part*, and such child follows the status of the father

Shortest period of gestation

According to all the schools the shortest period of gestation is six months. But there is great difference as to the maximum. The Sunni legists hold two years to be the longest period According to the Shiah school, ten months is the maximum limit, which, in exceptional cases, may extend to twelve months

In Algeria, the Sunni doctors have adopted ten months as the longest period of gestation, and it may be regarded as furnishing the modern rule.

According to the Sunni schools, *where a child is born six months from the date of marriage, and within ten months 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 does not take away the status of legitimacy from the child[1]

Husband's right of disavowal

A child therefore, born within the period indicated is affiliated without any express acknowledgment on the part of the father But a husband can disclaim a child born in wedlock and within the period recognised by law if cohabitation was impossible, whether the impossibility arose from disease, physical incapacity, or want of access

This right of disavowal is a terminable right It ceases on the occurrence of certain contingencies which the law always keeps in view, *e g*, if the father has taken part in the customary ceremonies which in a Mussulman family attend a birth, or has, by his conduct, led people to believe that he considers the child his legitimate offspring, or has accepted their formal congratulations, then his right to deny its legitimacy falls to the ground

Proceeding by *laan*.

In the case of disclaimer the wife has the right of challenging the husband to establish the charge of infidelity formally before the Judge. Such a proceeding is called *laan* in Mahommedan Law.[2]

Presumption of legitimacy under the English and Mahommedan Law

Under the English Law, a child born in wedlock is legitimate, though conception may have taken place before the actual marriage The Mahommedan Law, on the contrary insists that conception, in order to render the child legitimate, should take place *after* the marriage, actual or *constructive* The Shiah Law goes further than the Sunni Law and requires that the birth of the child should be six months from the *consummation* of the marriage; whilst the latter is satisfied if the birth takes place six months from the *marriage*

Section 112 of the Indian Evidence Act embodies the English rule of law and cannot be held to vary or supersede by implication the rules of Mahommedan Law.

1 See Appendix.

2 See *post*, p. 56.

When a woman is divorced *after consummation* of the marriage, and she is subsequently delivered of a child, its descent according to modern views is established up to ten months In other words, if the child is born within ten months from the date of the divorce, it would be affiliated to the husband The old view was two years, but it has now been abandoned

Ashrufooddowla Ahmad Hossain Khan v *Hyder Hossain Khan*

In *Ashrufooddowla Ahmad Hossain Khan* v *Hyder Hossain Khan*,[1] the Judicial Committee of the Privy Council expressly laid down the principle that under the Mahommedan Law "the presumption of legitimacy from marriage follows the bed and is not ante-dated by relationship"

The presumption of legitimacy is so strong in the Mahommedan system that, according to the *Fatāwai-Alamgiri*, "only the offspring of a connection where the man has no right or *semblance* of right in the woman, either by marriage or by the relationship of master and bonds-woman, is a *walad-uz-zina* or a 'child of fornication" As regards the children born of slaves, the Mahommedan system is far more humane than any other older system In the Southern States of North America, until the abolition of slavery, the child of a slave-woman, begotten by her master, was always a slave and could be and was, in fact, sold as a part of his property

How the presumption of legitimacy arises

According to Abu Hanifa, legitimacy is established by a valid marriage or an *invalid* contract of marriage whether the connection be radically illegal or not Abu Yusuf and Mohammed differ from him, and their opinion, which is given in this work, is recognised as law by the Hanafis. According to them, *nasab* is established (1) by a *valid* marriage, (2) by an *invalid* marriage, and (3) by the status of slavery. A marriage without witnesses, a marriage with an idolatress or fire-worshipper or with the wife's sister, are examples of invalid marriages. J 26.3.30.

1 (1866) 11 Moo. I.A., 94, 113.

Difference between an invalid marriage and a marriage void *ab initio*.

There is great difference between a marriage which is void *ab initio* (*bâtil*) and one which is *invalid* (*fâsid*). If a man were to contract a marriage with a woman related to him within the prohibited degrees, the marriage would be void *ab initio*. Under the Hanafi Law, the children of such an union would not have the status of legitimacy, however unknowingly the marriage might have been contracted, unless there has been *ghuroor* or *deception* on the side of the woman For example, if a man were to marry a woman related to him within the prohibited degrees, *on the representation that she was a stranger, and the marriage was consummated*, the issue of such an union would be legitimate

But it is different in the case of an invalid marriage An invalid marriage is one where the parties do not labour under an inherent incapacity or absolute bar, or where the disability is such as can be removed at any time For example, if a man were to marry two sisters, the second marriage is only invalid, for it might at any time be validated by the death or divorce of the first wife So if a man married a non-Scriptural woman,[1] the marriage is only invalid, for she might at any time become a Moslem, Christian or Jew The issue of such unions are legitimate[2]

According to the *Muntaka*, if a Moslemah were to marry a non-Moslem, the marriage would be invalid, for the unlawfulness is founded on the accident of the man being an "unbeliever," which may cease at any time The issue of such marriage born before it is cancelled, would, therefore, be legitimate[3]

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1 A woman not belonging to the revealed Faiths, in other words, an idolatress

2 In view of this recognised principle, it seems to me that in the case of *Abdul Razak* v *Aga Mahomed Jaffer Bindanim* [1893], I L , 21 Cal , 866 ; S C , L. R,, 21 I A , 56, the real question for determination was missed both in the Recorder's Court as well as before the Judicial Committee For, if there was *de facto* marriage, the prior conversion of the woman, so far as the legitimacy of the child was concerned, was immaterial As regards conversion to Mehommedanism also, there seems to have been some misapprehension , for all that is required under the Mahommedan Law is *profession* and not *conviction*.

3 See *post*, p. 72.

"An invalid marriage," says the *Fatawai-Alamgiri*, "is like a valid marriage in some of its effects, one of which is the establishment of parentage"

Azizzunnissa Khatoon v *Karimunnissa Khatoon*

In *Azizzunnissa Khatoon* v *Karimunnissa Khatoon*,[1] the learned Judges have, it is respectfully submitted, under some misconception of the Mahommedan Law, held that where a man marries two sisters, the children of the second union are illegitimate This enunciation which is opposed to the recognised rule, is evidently due to mixing up two questions, *viz*, *the title of the second wife to dower* and *the status of the children born of her* There is no question that she is not entitled to dower, but there is equally no question that the children are legitimate

A marriage contracted in the *bona fide* belief on the part of the husband that the woman was a widow or the divorcée of another man (when, as a matter of fact, the former husband of the woman was not dead, or had not divorced her, as the case may be) gives rise to the same consequences as an *invalid* marriage The man is not subject to *hadd* or the punishment for fornication, and the issue of the union are held to be his legitimate offspring. A *fortiori* when both parties enter into the contract *bona fide* believing that the first husband is either dead or has divorced the woman, the children are affiliated to the second husband

The issue of an invalid marriage have a right to inherit

Though the issue of an invalid marriage are legitimate and have a right to the inheritance of the father, *the mother has no such right* Again, an invalid marriage has no legal effect before consummation, so that if the parties are separated by the Judge before consummation, the woman has no right to dower, *but after consummation she is entitled to her proper dower or the specified dower whichever is less.*

There is no divorce in such a marriage, but after consummation the husband may relinquish his marital right, provided it is done in *express* terms The woman is not bound to observe the *iddat* in an invalid marriage

1 [1895,] I. L, 23 Cal., 130

Shiah Law—legitimacy how established

According to the Shiah jurists, legitimacy is established by a valid marriage or by a *invalid* contract of marriage If a man should enter in *good faith* into a contract of marriage which turns out to be invalid, the offspring of such marriage would be legitimate in the eye of the law. Similarly *nasab* would be established though the union was *ab initio* null and void. For example if a man married a woman who was forbidden to him, or with whom marriage was unlawful, either radically, that is, from the relationship of blood existing between the parties, or by some incidental circumstance—such as fosterage, matrimonial affinity, or any other cause,—the issue of such an union would be legitimate, *if the marriage was contracted in error or the parties were not aware of the hurmat* (*illegality*) If a man married by a pure mistake a woman within the prohibited degrees of consanguinity, such marriage would be radically illegal, but *the issue of the union would not be illegitimate*.

Illegitimate child—Sunni Law.

Under the Sunni Law, an illegitimate child "owns a *nasab*" to its mother and the mother's relations and can inherit from them, and they can inherit from him or her.

Shiah Law

Under the Shiah Law, "a child of fornication" (*walad-uz-zina*) owns no descent to either of its parents It is regarded as *nullus filius*, "so neither the man who has unlawfully begotten, nor the woman who has unlawfully borne the child, nor any of their relations, can inherit from such child, nor has the child any title to inherit from them"[1]

Child bastardised by a judicial proceeding.

But when a child is bastardised by a judicial proceeding (which is known as a proceeding by a *laan* or imprecation, when the parties are put on their oaths), it inherits from its mother and maternal relations, and *vice versâ* Such a child is called *walad-ul.malâinah*. As regards the status of such a child there is an agreement between the Sunnis and the Shiahs.

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1 See *ante*, p. 49.

When the parties are married, and the marriage is a matter of notoriety and capable of distinct proof, any dispute as to the status of the children resolves itself into a mere question, *whether the children were conceived and born in lawful wedlock or not* But there may be cases in which the marriage is not capable of being easily proved. It may have been contracted in a distant country or under circumtances which preclude the possibility of securing documentary or oral testimony as to the factum of the marriage *In these cases, the Mahommedan Law presumes a legal marriage from continued cohabitation and the acknowledged position of the parties as husband and wife,* provided there is no insurmountable obstacle to such a presumption, and provided the relationship existing between the parties was not "a mere casual concubinage," but was permanent in its character, justifying the inference that they were lawfully married [1]

Continued cohabitation

Section II

Filiation by Acknowledgment.

The Mussulman Law does not recognise the validity of any mode of filiation *where the parentage of the person adopted is known to belong to a person other than the adopting father* [2]

The only form of filiation recognised by the Mahommedan Law is the one which is created by the *ikrār* or "acknowledgment" of the father Under the Sunni Law, the father alone has the right to establish the relationship Neither the mother nor any other relation has the right to acknowledge the status of sonship to another

Acknowlegment

The Calcutta High Court has laid down that the doctrine of acknowledgment is an integral portion of the

1 *Baker Hussain Khan* v *Shurfunissah Begum* [1860], 8 Moo. I A , 136
2 See *Muhammad Allahadad* v *Muhammad Ismail* [1888], I L , 10 All , 289, 340.

Mahommedan family law and the conditions under which it will take effect must be determined with reference to Mahommedan jurisprudence, rather than the Evidence Act [1].

Such acknowledgment may be either express or implied; it may be made in express terms or may be implied from the father's conduct towards, and his continued treatment of, the child as his own child [2]. But, in order to render the acknowledgment valid and effectual in law, three conditions must be fulfilled, *viz* —

Conditions of valid acknowledgment

(1) The acknowledgor and the acknowledged must be of such ages respectively as would admit of the possibility of their standing in the relation of parent and child to each other. For example, a man "cannot establish the relationship of father and son between himself and another unless he is at least twelve-and-a-half years older than the son he intends to acknowledge".

(2) The person acknowledged must be of unknown descent. If the parentage is *known* to belong to somebody else, no ascription can take place to the acknowledgor.

(3) The acknowledged must believe himself to be the acknowledgor's child, or, at all events, assent to the fact.

An infant who is too young to understand what the relationship implies, or to give an account of himself, is not required to agree to the acknowledgment, nor is his assent a condition precedent to the validity of an acknowledgment, as it is in the case of an adult.

(4) An acknowledgment can take place only when the person acknowledging possesses the legal capacity of entering into a valid contract. The person must be adult, sane and free. An acknowledgment made by an infant (under the

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1 *Fazilat-unnissa* v *Kamaruunissa* [1904] 9 Cal. W. N., 352.

2 *Khajah Hidayut Oollah* v *Rai Jan Khanum* [1844], 3 Moo. I. A., 295; *Ahmed Hussain Khan* v *Hyder Hossein Khan* [1866], 11 Moo. I. A., 94; *Mohammad Azmat Ali Khan* v *Ladli Begum* [1881], I. L., 8 Cal., 922, S. C., L. R. 9 I. A., 8; *Sadakut Hossain* v *Mohammed Yusuf* [1883], I. L., 10 Cal., 663, S. C., L. R., 11 I. A., 3; *Abdul Razak* v *Aga Mahomed Jafer Bindanim* [1893], I. L., 21 Cal., 666, L. R., 21 I. A., 56; *Masit un-nissa* v. *Patham* [1904], I. L., 26 All., 295.

Mahommedan Law, one who has not attained the age of puberty) or by a person who is in duress, or who is *non compos mentis*, is invalid.

The legal effects of an acknowledgment

An acknowledgment of paternity produces all the legal effects of natural paternity, and it vests in the child the right of inheriting from the acknowledgor

The acknowledgment by a man of the paternity of a child as his legitimate offspring has the effect of giving not only to the child but also to the mother the right of inheritance to the father, the law presuming from the acknowledgment of the legitimacy of the offspring a lawful union between the parents. For example, *A* and *B* live together as husband and wife and have issue there is no evidence that they were married, at the same time there is no "insurmountable bar" to their contracting a lawful marriage, *A* acknowledges the children, either in express terms or by conduct, that they are his *legitimate* offspring, such acknowledgment has the effect of giving a right of inheritance to the children as well as to *B* It is not necessary that the man should expressly state that the child was his *legitimate* offspring It is sufficient if he treats it as such And the presumption of legitimacy is so strong in such cases that if a man were to say 'this is my child' and do not say that 'it is mine by fornication,' the law will presume it to be legitimate.[1]

To give rise to the presumption relationship must not be casual

The acknowledgment of legitimacy proceeds upon the basis of a prior lawful relationship between the parents But if the marriage is alleged and disproved, the effect of an implied acknowledgment as deducible from mere treatment is minimised, for *an acknowledgment to be effective must directly or indirectly point to the children as the legitimate issue of the acknowledgor.*[2]

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1 *Mahatala Bibee* v *Prince Haleemoozzooman* [1881], 10 Cal L R, 293

2 Comp. *Dhan Bibi* v *Lalon Bibi* [1900], I. L, 28 Cal, 1801, *Fazilatunnissa* v. *Kamarunnissa* [1904], 9 Cal W N, 352 supra, *Masitunnissa* v *Pathani* [1904], I. L, 26 All, 295 See also *Oomda Beebee* v. *Syud Shah Jonab Ali* [1866], 5 W. R, 132.

The rule relating to the legitimation of children by acknowledgment is based on the assumption of legitimacy, and its establishment by the avoidance of the hypothesis of unlawful relationship between the parents[1]. To use the language of the Judicial Committee in the case of *Ashruf-ood-Dowla Ahmed Hossain* v. *Hyder Hossain*, "acknowledgment of paternity under the Mahommedan Law is a recognition not simply of sonship, but of legitimacy as a son" Accordingly a child proved to be the offspring of fornication or of a casual and adulterous connection cannot be legitimated by the acknowledgment of the father

The denial of a son after an established acknowledgment is "untenable"[2] in the sense that the affirmation of legitimacy by the father once made *so as to satisfy the requirements of the law* cannot be revoked by him or questioned by his heirs

Acknowledgment by a married woman—Sunni Law Shiah doctrine

Under the Sunni Law, the acknowledgment of a child by a married woman is not valid, inasmuch as it affects another person, *viz*, the husband, unless it is confirmed by the husband's own declaration

Under the Shiah Law, however, a woman whose husband is dead, may acknowledge a child as the lawful issue of her marriage with her deceased husband *But if the fact that the child is her husband's child rests only on her acknowledgment it will only affect her share in the inheritance of the deceased*

The mode of filiation known as adoption is not recognised under the Mahommedan Law, an adopted child (or *mutabanna*) has no right in the estate of his or her adoptive parents[3]

Acknowledgment of relationships other than paternity.

An acknowledgment also establishes certain other relationships besides parentage, and in these cases there is no distinction between an acknowledgment made by a man and that made by a woman. For example, a person may acknowledge another as his or her father or

1 *Muhammad Allahdad* v *Muhammad Ismail*, supra
2 *Ashrufooddowla Ahmed Hossain* v. *Hyder Hossain*, supra
3 *Muhammad Allahdad* v. *Muhammad Ismail*, supra.

mother, or brother or aunt, and such acknowledgment, if assented to or confirmed by the acknowledged, whether during the lifetime of the acknowledgor or after his or her decease, will constitute a valid relationship, *in so far as the parties themselves are concerned.*

In the case of these acknowledgments, express assent on the part of the acknowledged is necessary to constitute a valid relationship, when no such assent is proved, the acknowledgment falls to the ground and creates no right on either side

In these cases, also, the parties must be of unknown descent in order to stand to each other in the alleged relationship without disregard to obvious facts

If the acknowledgor has any *known* heir, his acknowledgment of any blood-relationship *other than that of paternity to a child* does not exclude the former from his or her natural right of inheritance, nor vest any right in the acknowledged.

CHAPTER II.

THE PATRIA POTESTAS

The Right of Guardianship for Marriage

The power of the father to give his children in marriage

Under the Mahommedan Law, according to all the schools, the power of the father to give his children in marriage without their consent can be exercised in the case of sons until they have attained puberty, when they are emancipated, so far as their personal rights are concerned from the *patria potestas*, and are at liberty to contract themselves in marriage. As regards female children, there is considerable divergence among the several schools The provisions of the Indian Majority Act (IX of 1875) have left untouched the rules of Mahommedan Law relating to marriage, dower and divorce The majority of the person, therefore, on whom the status of marriage is sought to be imposed, and consequently the competency of the person who wants to give him or her in marriage will be judged on the basis of the Mahommedan Law.

Presumption of puberty—majority for marriage

Puberty is presumed on the completion of the fifteenth year, according to most of the schools, unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and *sui juris* possessed of the capacity to enter into legal transactions

Hanafi and Shiah doctrines.

After the age of fifteen every contract of marriage entered into on behalf of a person is dependent upon his or her express consent, *and among the Hanafis and the Shiahs the children of both sexes on attaining majority are free to contract marriages without the consent of their guardians.*

Mâliki and Shâfei rules

The followers of Mâlīk and Shâfeī, on the other hand, are of opinion that the exceptional right of *jabr*, in the case of females, continues in force until they are married and thereby emancipated from paternal control. But as the followers of the different schools can easily change from one to the other by a simple change of ritual or doctrine, the hardships which might possibly arise from the rigid application of the Shâfeite and Mâlikite doctrines are obviated [1].

Incompetency of the father

When the father of the family is incompetent, by reason of mental incapacity, to exercise the right of giving a daughter in marriage, the guardian next in order to him exercises that right [2]. Similarly, when the father is absent at such a distance as to preclude him from acting, the guardian next in order can lawfully contract a child in marriage [3]. Nor is the consent of the father necessary to the marriage of his infant daughter when he has become an apostate from the Mahommedan faith [4].

Where a father was undergoing a long term of imprisonment, it has been held that the mother and grandmother were entitled to give the daughter in marriage [5].

Improper marriage may be interdicted by the Judge.

The right of *jabr* or the right of imposing the status of marriage appertains primarily to the nearest paternal relations In the absence of paternal relations, maternal relations within the prohibited degrees can give a minor in marriage For example, when the father's brother is present he is the preferential *wali* (guardian), and neither the mother nor the mother's relations have any right, *though if the proposed union be improper the mother or the maternal relations can move the Kâzi or Judge for an injunction—to restrain the wali from entering into the contract.*

1 Comp *Mohammed Ibrahim* v *Gulum Ahmad* 1864, 1 Bom. H C. R , 236

2 *Kaloo Shaik* v *Gureeboollah* [1868], 10 W. R , 12

3 Radd ul Muhtâr.

4 *In the matter of Mahin Bibi* [1874], 13 B. L. R , O C 160.

5 *Kaloo* v. *Gureeboollah*, supra.

And they can do so, even if the father is entering into the contract

Right of the minor to rescind contract on attaining majority

Where a minor is contracted in marriage by any person other than the father or grandfather, *such minor on attaining puberty has an absolute right to ratify or rescind the contract*[1]

The minor has an option even in the case of a marriage contracted by a father or grandfather if he was a prodigal or addicted to evil ways or the marriage was *manifestly* to the minor's disadvantage

1 See *post*, p 77

CHAPTER III

THE CUSTODY OF CHILDREN OR HIZÂNAT

Guardianship of the person of minors The mother, primary guardian

"THE mother is of all persons," says the *Fatâwai-Alamgiri*, "the best entitled to the custody of her *infant children* during the connubial relationship as well as after its dissolution"

This right belongs to her *quâ* mother, and nothing can take it away from her, except her own misconduct *It makes no difference whether she is a Moslemah or a non-Moslemah*

Right to the guardianship of a daughter Difference among the schools

Among the Hanafîs, the mother is entitled to the custody of her daughter until she attains puberty [1] Among the Mâlikîs, Shâfeis and Hanbalîs the custody continues until she is married

There is greater divergence among the different Sunni schools with reference to the mother's custody of male children The Mâlikîs hold that the right of *hizânat* in respect of a male child continues until such time as he arrives at puberty

The Shâfeîs and Hanbalîs allow the boy at the age of seven the choice of living with either of its parents

Hanafî doctrine regarding the mother's right to the guardianship of her male child

The Hanafî jurists, however, hold that the mother's hizânat of a male child ends with the completion of his seventh year She, therefore, is entitled, in preference to the father, to the custody of her infant child under seven years of age [2] *A fortiori* she has a better title to the guardianship of its person than the paternal uncle [3]

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1 In the matter of *Tayheb Ally* [1864], 2 Hyde, 63

2 *Lardli Begum* v *Mahomed Amir Khan* [1887], I L., 14 Cal , 615

3 As to the right of the grandmother against the paternal uncle see *Bhoocha* v *Elahie Bux* [1885], I. L , 11 Cal , 574

Shiah doctrine

Among the Shiahs, the mother is entitled to the custody of her children without distinction of sex until they are weaned *During this period, which is limited to two years, the children cannot, under any circumstance, be removed from their mother's care without her consent*

After the child has been weaned, its custody, if a male, devolves on the father, and if a female, on the mother The mother's custody of a daughter continues to her seventh year After she attains that age, the father is entitled to her custody in preference to the mother [1]

Persons entitled to the guardianship-Hanafi rules

According to the Hanafîs the persons entitled to the custody of children come in the following order —

(1) The mother, (2) the mother's mother *how remote soever*, (3) then the father's mother, *how remote soever*, (4) full sister, (5) uterine sister, (6) consanguine sister, (7) the daughter of the full sister, (8) the daughter of the uterine sister, (9) the full maternal aunts, (10) uterine maternal aunts, (11) the daughter of the consanguine sister, (12) brother's daughters, and (13) the paternal aunts [2]

If there be no female relations, or *if none of them is legally qualified to exercise the right,* it passes (1) to the father, (2) the grandfather, how remote soever, (3) to the full brother, (4) to the consanguine brother, (5) to the full brother's son, (6) to the consanguine brother's son, (7) to the full paternal uncle, etc

In all these cases the nearer excludes the more remote. When there are no agnates qualified to take charge of the child, the right passes to the male *uterine* relations

No male has a right to the custody of a female child unless he is a mahram, that is, stands to her within the prohibited degrees of relationship

The Shiahs are in agreement with the Sunnis with regard to the general principles governing the right of *hizânat.* But among them, in the absence of the mother,

1 *Futteh Ali Shah* v *Mahomed Mukamoodin* [1864], W. R., 131
2 *Almoodeen Moallem* v. *Syfoora Bibee* [1866], 6 W. R., Mis, 125

the right passes to the father, and failing him to the grandparents and other ascendants When there are no ascendants, the right passes to the collaterals within the prohibited degrees, the nearer excluding the more remote

Although the right to the guardianship of the minor passes in the order mentioned above, in the case of a contest between two persons one *preferentially entitled* to the other, the Judge has to consider not only the respective qualifications of the claimants, but also the interests and well-being of the minor [1]

The provision in the Guardian and Ward's Act (VIII of 1890), which directs the Court, in appointing a guardian, to keep in view the "welfare of the minor," is in harmony with the Mahommedan Law

The right of custody how lost The right of *hizânat* or custody, according to all the schools, is lost—

(1) By the subsequent marriage of the *hâzina*[2], with a person not related to the infant within the prohibited degrees.

(2) By her misconduct, and

(3) By her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child

Apostasy also is bar to the exercise of the right of *hizânat*

The mother is entitled to the custody of a minor married daughter in preference to the husband until she attains the age of puberty [3]

The Calcutta High Court has held that when a person acting at the instance and under the instigation of the mother takes away a minor wife from what is in law the custody of the husband, it is not taking from lawful

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1 Radd ul Muhtar Vol II, p 1053, *Idu* v *Amiran*, supra, see also *In the matter of Ameerunnessa* [1869], 11 W R, 297, *Abasi* v *Dunne* [1878], I L 1 All, 598, where it was held that a prostitute could not be appointed the guardian of an infant

2 *i e*, the female of *hâzin* or person entitled to the *hizânat* or custody. *Beedhun Bibee* v *Fuzuloolah* [1873], 20 W R, 411, *Fuseehan* v *Kajo* [1883], I L, 10 Cal, 15

3 In re *Mahm Bibee* [1874], 13 B L R, O C, 160, Comp. *In the matter of Khatija Bibi* [1870], 5 B L R, O C., 557, and *Nur Kadir* v. *Zulekha Bibi* [1885], I L., 11 Cal., 649.

guardianship "under the Indian Penal Code, and does not amount to kidnapping.[1]

Custody of illegitimate children and foundings

The custody of illegitimate children appertains exclusively to the mother and her relations The custody of a foundling belongs to the person who found it or to the State

1 *Korban* v. *King Emperor* [1905], I. L , 32 Cal. 444.

CHAPTER IV

THE STATUS OF MARRIAGE.

SECTION I.

CAPACITY AND FORM OF MARRIAGE.

"MARRIAGE is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity"

'Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union."

Marriage as a contract

Regarded as a social institution, marriage, under the Mahommedan Law, is essentially a civil contract. It is founded on proposal on one side and acceptance on the other. It does not require to be evidenced by any writing nor is the presence of witnesses essential for its legality

Capacity of the parties to marry each other

The validity of a marriage under the Mahommedan Law depends primarily on the capacity of the parties to marry each other

The capacity to contract a marriage depends on several conditions In the first place, the parties must be able to understand the nature of the act For, if either of them is *non compos mentis* or is incapable of understanding the nature of the contract, it is invalid. In the second place, they must be adult (in cases where the marriage is not contracted for them by their guardians), and they must not be acting under compulsion.

"Among the conditions," says the *Fatâwai-Alamgiri*, "which are requisite for the validity of a contract of marriage are understanding, puberty and freedom in the

contracting parties, with this difference that whilst the first requisite is essentially necessary for the validity of the marriage, as a marriage cannot be contracted by a *majnún* (insane), or a boy without understanding, the other two conditions are required only to give operation to the contract, as the marriage contracted by a (minor) boy, (possessed) of understanding is dependent for its operation on the consent of his guardian "

The same conditions are necessary in the case of a girl as in the case of a boy, she also, in order to contract a valid marriage, must be major and sane.

Besides puberty and discretion, the capacity to marry requires that there should be *no legal disability or bar to the union of the parties* —

(*a*) They should not be within the prohibited degrees, or so related to, or connected with, each other as to make their union unlawful,

(*b*) The woman must not be the wife of another man,

(*c*) Nor must the man be the husband of four wives existing at the time when he enters into the contract

As regards condition (*c*) if the first union is dissolved by death or divorce, there would be no bar, thus a man may lawfully marry his deceased wife's sister

Section II

The Legal Disabilities to Marriage

Legal disability arising from relationship

The want of capacity founded on relationship arises *firstly*, from legitimate and illegitimate relationship of blood (consanguinity), *secondly*, from affinity, *thirdly*, from fosterage

The prohibitions founded on consanguinity are the same among the Sunnis as among the Shiahs No marriage can be contracted (*a*) with the ascendants, (*b*) with the descendants, (*c*) with relations of the second rank, such as brothers and sisters or their descendants, (*d*) with paternal and maternal uncles and aunts Nor can a marriage be contracted with one's natural offspring or his or her descendants Nor can a man marry his father's wife, or

any other ascendant's wife, or his son's or any other descendant's wife [1]

Affinity and fosterage also give rise to prohibitions in respect of certain relations For example, a man cannot marry his wife's mother or daughter, nor can a woman marry her husband's son by any other wife, and a man cannot marry his foster-sister, nor can the foster-mother marry her foster-child [2]

Bar of affinity arises also from adulterous relationship

The bar of affinity arising from marriage is created also by adulterous relationship For example, if a man lives with a woman without the sanction of marriage, her mother or daughter are as much "prohibited to him" as if she had been lawfully married to him Similarly, the woman cannot marry the man's son or father

A woman who is already married cannot marry again so long as the first marriage is existing But except among the Mutazalas who do not recognise the lawfulness of polygamy, a man may have four wives at one and the same time, though not more, provided he can deal equitably with all , if he cannot he must have only one

All the schools, which recognise polygamy to this limited extent, prohibit *contemporaneous* marriages with two women so related to each other that, supposing either of them to be a male, a marriage between them would be illegal But if such a marriage be contracted *in fact* it would only be *invalid* In other words, although the Judge may separate the parties, yet any children born of the union would be legitimate [3]

Marriage of a Moslem with a non Moslemah.

According to the Sunnis a Moslem can contract a lawful and valid marriage with a woman belonging to any of the revealed faiths, in other words, Judaism or Christianity, but not with a worshipper of idols or of fire [4]

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1 See Appendix

2 See *Ibid*

3 See *ante* p 55 where I have examined the correctness of the decision in *Azimunnissa Karimunnissa*, supra

4 About Zoroastrianism there is a difference of opinion, some of the jurists, chiefly among the Shiahs, hold it to be one of the "revealed" faiths , others, chiefly among the Western Sunnis, hold it to be the same as

There is no legal bar, however, to a Moslem marrying a non-Scripturalist, a marriage even with an idolatress[1] is only *invalid* and not void

A Moslemah is prohibited from marrying a non-Moslem

Marriage of a Moslemah with a non-Moslem—Sunni doctrines.

This prohibition was founded on evident political reasons and has its analogy in other systems But here again the union, according to some authorities,[2] is only invalid.

Among the Shiahs there is some difference of opinion

Shiah doctrines

The Mutazalas, the Usûlis and a large section of the Akhbâris agree with the Sunnis in holding that a marriage with a Scripturalist woman is as valid and lawful as with a Moslemah

Some of the Akhbâris, however, think that only a temporary marriage (or *mutâa*) can be contracted with a non-Moslemah[3]

This does not mean, however that if a permanent marriage (*nikâh*) is contracted *in fact*, it would be unlawful

Section III

The Form of Marriage

There are several other conditions laid down in the Mussulman Law for the contractual performance of a marriage, some of which, however, when properly considered, resolve themselves

Form of Marriage

Magianism or fire-worship It has sometimes been supposed that when a *non Scriptural* woman marries a Moslem, in order that the marriage may be valid she must first adopt Islam If there is an actual marriage, subsequent adoption of the Islamic faith would make the union valid and no fresh ceremony would be needed

1 For she may at any time adopt Islam which would have the effect of *validating* the marriage The Mogul sovereigns married Hindu princesses who kept to their own religion ; the issue of such unions were regarded as legitimate

2 The *Muhit* and the *Muntala* According to this view although the parties must be separated by the Judge, if there is any issue before the marriage is cancelled, it would be legitimate.

3 But all the Shiah schools discountenance the marriage of a Moslemah with a non-Moslem ; comp *Bakhshi Kishore Prasad* v *Thakur Prasad* [1897], I L , 19 All , 375.

to a mere question of form It is required (*a*) that the parties to the "contract should hear each other's word," that is, the conditions of the contract should be understood by both, (*b*) that if *sui juris*, they should actually consent to the contract, and (*c*) that the husband and wife should be distinctly specified, so that there should be no doubt as to their identity

Presence of witnesses

It is also necessary, under the Sunni Law, that there should be witnesses present to attest the conclusion of the contract Two witnesses at least should be present to testify that the contract was properly entered into and in accordance with the conditions laid down above When the wife is a non-Moslemah the witnesses may be of the same faith as herself *But a marriage contracted without witnesses is not illegal*

Under the Shiah Law, "the presence of witnesses is not necessary in any matter regarding marriage." A marriage *per verba de presenti*, according to this school, is valid at all times, whether the marriage was contracted in a distant country or not

The consent may be given either in express terms or by implication

Marriages may be contracted among the Sunnis and the Shiahs through the agency of proxies or *vakils* For their appointment witnesses are not necessary, and their powers are governed by the same rules of law as apply to other contracts

When a marriage is contracted through an agent or by correspondence, under the Sunni Law the receipt of the message or letter making the proposal must be attested by two witnesses, and so also the assent. I. 4. 30.

According to the recognised custom, marriages among all the sects are solemnised by a person conversant with the requirements of law, who is designated for the occasion the *Kâzi* Two other persons, formally appointed for the purpose, act on behalf of the contracting parties, with a certain number of witnesses, and the terms are usually embodied in a deed of marriage called the *Kâbin-nâmah* or *Mahar-nâmah*. These formalities are also observed in the

marriages of Mahommedans with women of other Faiths. Under the Christian Marriage Act (XV of 1872), however, when one of the parties is a Christian, the marriage, in order to be valid, has to be solemnised in accordance with the provisions of that Act (ss. 4 and 5)

SECTION IV

PROOF OF MARRIAGE

How marriage may be proved.

Marriage may be proved directly or presumptively. *Directly* by means of the oral testimony of the witnesses present during the marriage, or by documentary evidence in the shape of a deed of marriage

Marriage may be proved *presumptively* by the statement of the parties or their general conduct towards each other "When a person," says the *Fatâwar-Alamgiri*, "has seen a man and woman dwelling in the same house (*bait*) and behaving familiarly towards each other as husband and wife, it is lawful for him to testify that that woman is the man's wife"[1]

Consequences flowing from a marriage

Marriage legalises connubial relationship, it imposes on the husband the obligation of paying the ante-nuptial settlement and fulfilling all the ante-nuptial agreements made in consideration of marriage, it establishes on both sides the prohibition of affinity and the rights of inheritance, it obliges the husband to be just towards his wife, and to treat her with respect and affection, and exacts from her in return obedience and faithfulness to him

An illegal condition annexed to a marriage does not cancel the marriage, but is in itself void.

An agreement entered into between the husband and wife before marriage, that neither of them should inherit from the other is invalid, and upon the death of either,

1 Comp. *Hidayatoolah* v *Rai Jan Khanum* [1844], 3 Moore's I A., 295, *Mahatala Bibee* v. *Ahmed Haleemoozooman* [1881], 10 Cal L R, 293, *Wise* v *Sunduloonissa Choudhranee* [1886], 11 Moore's I A, 177; *Nawabunnissa* v *Fuzloonissa* [1863], Marshall, 428.

the survivor would become entitled to his or her legal share in the deceased's inheritance

If one of the parties were to die before consummation, the survivor would be entitled to a share in the deceased's estate

SECTION V

MAINTENANCE

Usually the conditions relative to the wife's maintenance and residence are reduced to writing, but even when that is not done the husband is legally bound to maintain his wife during the subsistence of the marriage in accordance with his means and position in life, whether she belongs to the Moslem faith or not

But the right of the wife to maintenance is subject to the condition that she is not refractory or does not refuse to live with her husband without lawful cause, such as the non-payment of dower

If the wife, however, be a minor, so that the marriage cannot be consummated, in that case, according to the Hanafi and the Shiah doctrines, there is no legal obligation on the husband's part to maintain her

Nor is a husband, under the Hanafi and the Shiah Law, entitled to the custody of the person of a minor wife whom he is not bound to maintain [1]

With the Shâfeis it makes no difference in the obligation of the husband to maintain his wife, whether she be a minor or not

Desertion, without leaving any means of support for the wife or family, entitles the wife to a separation under the Shâfei Law, and the Hanafi Kâzi would give effect to the order if properly passed

A divorced wife is entitled to maintenance during her period of probation (*iddat*)[2] but not the widow The Judicial Committee has decided in the case[3] already

1 In the matter of *Khatija Bibi*, supra, see *ante*, p 67

2 See, post, p 93

3 *Aga Mahomed Jaffer Bindanim* v *Koolsoom Beebee*, [1899], I L, 25 Cal 9, s c 1 Cal W. N, 449.

referred to, that a Mahommedan widow is not entitled to maintenance out of the estate of her late husband in addition to what she is entitled to by inheritance or under his will[1]

In the absence of a special contract stipulating the amount, the wife is entitled to recover maintenance from date of decree, but there can be no order for past maintenance[2]

The wife may sue for maintenance either in the Civil Court or apply (in the absence of a special contract) to the Criminal Court for an order under s 488 of the Code of Criminal Procedure

An order for maintenance, in the case of a divorce, ceases to have operation after the expiration of the woman's period of probation.[3]

According to the Shiahs, who recognise the lawfulness of temporary marriages, a *Mutáa* wife is not entitled to maintenance unless it is fixed at the time the contract is entered into But this special rule of the Shiah Law does not interfere with the statutory right to maintenance given by the Code of Criminal Procedure[4]

Section VI.

Illegal and Invalid Marriages

Illegal connections

Connections which are illegal are null and void *ab initio* and create no civil rights or obligation, between the parties The wife has no right of dower against the husband unless the marriage is consummated, and neither of them is entitled to inherit from the other in case of the death of either, during the period when the contract is supposed to have existed *The illegality of such an union commences from the date when the contract is entered into, and the marriage is considered as totally non-existing 'in fact as well as in law"*

1 *Abdool Futteh Moulvie* v *Zebunissa Khatun* [1881], I L , 6 Cal 31 , s c 8 Cal L R , 242 .

2 See *Shah Abu Ilyas* v *Ulfat Bibi* [1896], I L , 19 All, 50 and the cases referred to there

3 *In the matter of the Petition of Luddon Saheba , Luddon Saheba Kamar Kadar* [1882], I. L., 8 Cal. 736 , s. c 11 Cal L R, 237.

Example

Marriages contracted within the degrees prohibited by the Mussulman Law fall under the head of marriages which are null and void *ab-initio*, they carry no civil rights and produce no legal effect under the Sunni Law *If the marriage has been consummated, the woman becomes entitled to her customary dower*

So, also if a man were to go through a ceremony of marriage with a woman who was already married to another, with or without a knowledge of that fact, such an union would be absolutely illegal

Invalid marriages

A marriage, which is not vitiated and rendered illegal by a radical defect of the character above described, stands on a different footing The children conceived and born during the existence of the contract are held to be legitimate, and the wife acquires as usual a right to her dower For example, if a man were to marry contemporaneously two women so related to each other, that, if one of them had been a male he could not contract a lawful connection with the other, it would be an invalid marriage, for the death or divorce of the woman first married would make the second marriage valid without any further ceremony [1]

Similarly if a man were to marry a non-Scriptural woman, the marriage, as already stated, would be only *invalid*, not *illegal*, for she may at any time adopt Islâm

Again a marriage brought about by fraud is invalid [2]

Section VII.

Option of puberty (*Khyâr-ul-Bulûgh*)

Marriage of minors Right of the infant to repudiate on attaining majority

When a minor has been contracted in marriage by the father or grandfather with an *equal*, in other words, *when the marriage is in all respects suitable, the minor has no option on attaining puberty* But when the marriage is *unequal*, or if the father or grandfather is not honest, or is a prodigal, or of bad behaviour, or it appears that the marriage is to the manifest

1 For the legitimacy of the issue of such unions, see *ante*, p 56
2 *Abdul Latif Khan* v *Niyaz Ahmed Khan*, [1909], I L 31 All. 343.

disadvantage of the minor, unless set aside at the instance of any other guardian, *it remains dependant on his or her ratification on attaining majority.*

When the marriage is contracted for a minor by any person other than the father or grandfather, such minor, whether a girl or a boy, has the option of ratifying or rescinding the contract on attaining puberty *irrespective of the consideration of injury* [1].

Sunni and Shiah rules

Under the Sunni Law *the marriage remains intact until set aside* Under the Shiah Law, *it is of no effect until it is expressly or impliedly ratified*

Where such a marriage has been contracted, the matter ought to be propounded to her on her attaining majority so that she may advisedly give or withhold her assent [2].

Judicial declaration why needed

Under the Sunni Law, if the option be exercised and the contract rescinded, it is a condition that a judical declaration should be obtained, impressing on the rescission the *imprimatur* of the Kâzi or Judge

So long as there has been no judicial declaration, under the Sunni Law the relationship continues, and if either of the parties were to die before the Kâzi's order, the survivor would become entitled to succeed to the deceased. No time is fixed for seeking the assistance of the Judge but the option must be exercised as soon as puberty is attained

The validity of the rescission does not depend, however, on the *imprimatur* of the Kazi, as the judicial declaration is needed only to provide judicial evidence in order to prevent disputes. [3] And, therefore, when a girl, who was given in marriage when an infant by her mother, on attaining puberty rescinded the contract, and married another person she could not be convicted of bigamy although the Kâzi may not have made his decree. [4]

1 See *Budal Aurat* v *Queen-Empress* [1891], I L 19 Cal , 79

2 *Mulka Jehan Sahiba* v. *Mahommed Uskuree Khan*, [1873], L. R., I A Supp Vol , 192

3 Radd-ul Muhtâr Vol , I , p , 502

4 *Badal Aurat* v. *Queen-Empress*, supra ;

The Sunni Law presumes ratification when the girl after attaining puberty, although aware of the marriage, has remained "silent" and allowed consummation.

Shiah Law

Under the Shiah Law marriage contracted by an *unauthorised* guardian *(fazúli) is wholly* ineffective until ratified, and consequently if one of the parties were to die before such ratification, the survivor would acquire no right in the property of the deceased

According to the Hanafis, as well as the Shiahs, a woman who is *sui juris* can enter into a contract of marriage with whomsoever she pleases, but if the union is *ill-assorted (wanting in equality,)* the relations of the woman may interfere and move the Kâzi to set aside such marriage at any time before there is any issue

SECTION VIII.

MUTÂ OR TEMPORARY MARRIAGE.

Among a section of the Shiahs, chiefly of the Akhbâri school, a temporary contract of marriage, or a contract for a limited term, is recognised as valid. Such marriages were frequent among the pagan Arabs and the Sabeans, and were for a time allowed by the Arabian Prophet They were, however, forbidden in the tenth year of the Hegira But somehow they have remained engrafted on the Akhbâri traditions According to them, a man and a woman (possessing the capacity to marry) may enter into a contract of marriage for any period they like Such marriage becomes dissolved either by efflux of the period fixed, or may be put an end to by mutual agreement

There is no divorce in such a marriage, but some of their lawyers think that the husband may "give away" the term without the consent of the wife This view, though recognised in one case by the Calcutta High Court,[1] is opposed to the nature of the contract which is founded essentially on mutual agreement Besides, it proceeds upon

1 *Kumar Kadar* v. *Ludden Sahiba* [1886], I. L., 14 Cal , 276.

a fallacious reasoning that as the wife is merely a debtor, the creditor (the husband) may discharge the debtor without her consent, a view which is contrary to the opinion of the great Shiah jurists

The children of such unions are legitimate and inherit from their parents, though the married parties do not, unless there is a contract to that effect

Hanafi Law

Under the Hanafi Law, a marriage for a term of years is unlawful, but if the parties have lived together as husband and wife, *it takes effect as a permanent contract and gives rise to all the consequences of a valid marriage*

As already stated an illegal condition annexed to a marriage does not cancel the marriage, but is in itself void

Section IX.

Effect of Change of Religion on the Status of Marriage.

The Native Converts' Marriage Dissolution Act (XXI of 1866) was specially designed to meet the case of converts to Christianity from Hinduism and other cognate systems, which do not recognise the dissolution of a marriage once contracted It exempts, however, from its purview Christians, Mahommedans and Jews It defines a "native husband" to mean a married man domiciled in British India, who shall have completed the age of sixteen years and shall not be a Christian, a Mahommedan or a Jew "a native wife" to mean a married woman domiciled in British India, who shall have completed the age of thirteen years and shall not be a Christian, a Mahommedan or a Jewess, and "native law" to mean any law or custom having the force of law, of any persons domiciled in British India other than Christians, Mahommedans and Jews

Renunciation of Islâm

Some of the old lawyers, like the author of the *Hedâya* hold that apostacy from the Mussulman Faith of either husband or wife dissolves the marriage-tie. This view, however, has been modified in modern times, and the jurists of Balkh

and Samarkand, whose enunciations are regarded as binding in India, have decided as follows —

(*a*) When a (Mussulman) married couple simultaneously renounce Islâm the marriage remains intact

(*b*) When the wife abjures Islâm for a revealed religion, like Judaism or Christianity, her renunciation of the Faith does not dissolve the marriage[1]

(*c*) When the husband renounces Islâm and the wife continues in the Faith the effect on the marriage is different. *The accepted doctrine is that the connection becomes unlawful,* but if the man were to return to Islâm, before the expiration of the period of probation (*iddat*) when the dissolution becomes absolute, there would be no need for a re-marriage between the parties

Conversion to Islam

Conversion to the Islâmic Faith on the part of a man following any of the revealed religions (Judaism, Christianity or Zoroastrianism) does not lead to a dissolution of his marriage with a woman belonging to his old creed

For example, if a Hebrew or a Christian husband were to adopt Islâm and the wife were to continue in the religion of her race, the marriage would remain *lawful and binding*

When a non-Scripturalist husband married to a non-Scripturalist wife adopts Islâm, the marriage would not be dissolved unless there is a refusal on the part of the wife to adopt the Mussulman Faith If she adopts Islâm the marriage will remain intact If she does not, the parties are to be separated But during its subsistence the connection becomes *invalid,* but not void, and will have all the consequences of an invalid marriage The latter doctrine is recognised as authoritative

When a non-Moslem female, whether a Scripturalist or non-Scripturalist, married to a husband who also is a non-Moslem, adopts Islâm, her marriage becomes dissolved under the following circumstances —

(*a*) If the conversion takes place in an Islâmic country (*Dâr-ul-Islâm*) where the laws of Islâm are in force, she will

1 Nahr-ul-Faik , Radd-ul-Muhtar, Vol II., p , 644 , Fath ul-Kadir.

have to apply to the Kâzi to summon the husband to adopt the Moslem Faith, and on his refusal to do so the marriage would be dissolved.

(*b*) Should the conversion take place in a non-Islâmic or alien country (*Dar-ul-Harb*), the marriage would become dissolved on the expiration of three months from the date of the woman's adoption of Islâm The Calcutta High Court has held[1] that India is not a non-Islâmic country, and that consequently when a married non-Moslem woman adopts the Mahommedan Faith and thereafter contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islâm, she is guilty of bigamy But it does not say what would happen if the Judge or Magistrate refused to listen to the prayer of the woman, or the husband declined to accede to her demand It is to be presumed, however, that the Court's conscience would be satisfied on her making the application, and the first marriage would be regarded as dissolved on the expiration of three months

When a non-Moslem female married to a husband, who also is a non-Moslem, adopts Islâm, and her union becomes dissolved under the provisions of the Mahommedan Law, as stated above, she is entitled to contract a valid marriage in accordance with the Mussulman rites The issue of such second marriage are legitimate The decision, therefore, in *Sundari Letani* v *Petambari Letani*[2], is in conflict with the recognised rule of the Mahommedan Law

When a non-Moslem husband and wife, married according to the rites of their professed faith, subsequently adopt Islâm, their marriage remains intact, but in practice, it is considered expedient to contract a fresh marriage according to Mahomedan rites After their adoption of the Mussulman religion their rights and status are subject to the Mussulman Law This principle has been enforced by the Judicial Committee in the case of *Skinner* v. *Skinner*[3]

1 In the matter of the petition of *Ram Kumari* [1891] I L , 18 Cal , 264

2 [1904] 9 Cal W N 1003

3 [1897] L R , 25 I A , 34 s c., I L., 25 Cal , 531 , 2 Cal. W N., 219

In this case it appeared that two persons, a man and a woman, were married as professed Christians in a church, and that subsequently they had adopted Islâm and gone through the Mahommedan form of marriage The husband died, leaving a will excluding the wife from all participation in his estate It was held by the Privy Council that the personal status of the deceased being at the time of his death that of a Mahommedan, and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate notwithstanding his will, which purported, but under the Mahommedan Law was inoperative, to exclude her.

CHAPTER V.

DOWER.

SECTION I

GENERAL OBSERVATIONS

Validity of marriage does not depend on the express stipulation of dower

THE *mahr* of the Islâmic system is similar in all its legal incidents to the *donatio propter nuptias* of the Romans It is a settlement in favour of the wife, made prior to the completion of the marriage-contract in consideration of the marriage The settlement of a dower is an essential condition in a marriage, *but the validity of the marriage does not depend upon its express mention*, so that where no dower is settled at the time of the contract, that fact does not affect its validity, *and the wife becomes entitled to the dower customary in her family* And even where it is made a condition that there should be no dower, the law, nevertheless, attaches the liability to the husband.

The amount of dower or *mahr* varies in different countries, there is no fixed rule as to the maximum. It depends on the social position of the parties and the conditions of the society in which they live.

SECTION II

THE DIFFERENT KINDS OF DOWER.

Customary dower.

When no dower is fixed at the time of the marriage, or has not been distinctly specified either before or after marriage, or has been intentionally left indeterminate, the woman becomes entitled to what is called the *mahr-ul-misl*, "the dower of her equals," or "the customary dower."

The customary dower of a woman is regulated with reference to the social position of her father's family and her own personal qualifications

The *mahr-ul-misl* may vary in amount not only according to the social position of the woman's family and her own personal qualifications, but also according to the wealth of her husband, the circumstances of the times, and the conditions of society surrounding her

When does dower become due

Under the Sunni Law, dower becomes due upon the consummation of the marriage either actually or presumptively Consummation is presumed when the parties have been together under circumstances which may validly give rise to the inference This is called *valid retirement* (*khilwat-us-sahih*)

Shiah rule

Under the Shiah Law, dower becomes due upon the completion of the contract, *viz*, consummation

It is usual, however, to make a portion payable on demand, and another portion on the dissolution of the marriage-tie. That portion of the dower which is payable immediately on demand is called the *mahr-ul-muajjal*, "prompt" or "exigible," and the wife can refuse to enter the conjugal domicile until the *prompt* portion of the dower has been paid The other portion is called *mahr-ul-muwajjal*, "deferred dower," which does not become due until the dissolution of the contract, either by death or divorce.

It is customary in India to fix half the dower as *prompt* and the remaining moiety as *deferred*, but the parties are entitled to make any other stipulation they choose.

When no time is specified for the payment of the dower or where its nature is described only in general terms, and it is not mentioned in the contract of marriage how much is *prompt* and how much *deferred*, it must be seen what is the custom among the class of people to which the parties belong, and the question must be decided on that basis [1]

1. Comp. *Tawfikunnissa* v *Ghulam Kanbar* [1877], I. L., 1 All., 506; *Eidan* v. *Mazhar Hossain* [1877], I. L, 1 All, 483.

Dissolution of marriage before consummation

When the marriage is dissolved before consummation or *valid retirement*, the wife becomes entitled to half the dower under the Sunni Law

Under the Shiah Law, there is a difference of opinion, some lawyers agreeing with the Sunnis, others holding that, in such a case, the wife is entitled only to a present The former is regarded as the preferable opinion

A transfer of property by the husband in exchange for dower is called a *bai-mukâsa*

Right of wife to refuse co habitation

Under the Sunni Law, the wife is entitled to refuse co-habitation, until her prompt dower is paid, and the husband would not be entitled to maintain an action for restitution of conjugal rights until such payment [1] If he were to pay the amount after the suit is brought, he would be entitled to a decree [2]

The widow's claim for dower is only a debt against the husband's estate and has priority over legacies and the rights of the heirs, but she has no lien over any specific property Where, however, she has obtained actual and lawful possession of the estate of her husband, under a claim to hold the same for her dower, she will be entitled to retain possession until the debt is satisfied, with the usual liability for account to the heirs [3]

The lien which a Mahommedan widow has over the estate of her deceased husband for her unpaid dower is a

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1 *Eidan* v *Mazhar Hussain* [1877], supra, *Wilaet Hussain* v *Allah Rakhi* [1880], I, L, 2 All, 831

2 *Abdul Kadir* v *Salima* [1886], I L, 8 All, 149 In this case the Allahabad High Court held, it is submitted on somewhat strained reasoning, that after *consummation*, non payment of dower cannot be pleaded in defence of an action for restitution of conjugal rights This view has been followed by the Madras High Court in *Kunhi* v *Moidin*, [1888], I L, 11 Mad, 327, and the Bombay High Court in *Bai Hansa* v *Abdulla Mustafa* [1905], 1 L, 30 Bom, 122 *See also *Hamid-un-nissa* v *Zahiruldin* [1890], I L, 17 Cal, 670, *see* Mahommedan Law, Vol II, p 494, where these cases are examined

3 *Mussamat Beebee Bachun* v. *Sheikh Hamid Hossein* [1871], 14 Moo, I A, 398, *see* also *Amanatunnissa* v *Bashirunnissa* [1894], I L, 17 All, 77, *Muhammad Karim ullah Khan* v. *Amani Begum* [1895], I. L., 17 All, 93.

purely personal one and does not descend to her heirs,[1] although the right to the dower itself passes to them by succession Nor can she mortgage the property of which she is in such possession.[2]

When she has obtained possession under a claim of dower, the heirs can sue to recover the property on the ground that the dower-debt has been satisfied from its usufruct

The Allahabad High Court has held that a Mahommedan widow "lawfully in possession of her husband's estate in lieu of dower occupies a position analogous to that of a mortgagee"[3]

But where the husband had not specifically hypothecated his property for the dower-debt, the Madras High Court considered that the widow's possession gave her no right as against a purchaser in execution of a decree for sale passed on a mortgage executed by her husband[4]

The mere fact that a widow is in possession of the property of her husband in lieu of dower does not preclude her from bringing a suit for the dower-debt against the heirs, although in such an action she would be bound to account for the rents and issues whilst the property was in her hands[5]

Limitation

Limitation does not run against *deferred* dower until it has become due, either by the death of one of the parties or by divorce The *prompt* or *exigible* dower, however, is a debt always due, and demandable during "the subsistence of the marriage, and certainly payable on demand" On a clear and unambiguous demand for payment of dower by the wife and its refusal by the husband, a cause of action accrues, against which limitation would begin to run When there has been no explicit demand on the wife's part, limitation will

1 *Hadi Ali* v *Akbar Ali* [1898], I L, 20 All, 262
2 *Chuhi Bibi* v *Shamshunnissa Bibi* [1894], I L, 17 All, 19.
3 *Azizullah Khan* v *Ahmad Ullah Khan* [1885], I L, 7 All, 353.
4 *Ameer Ammal v Lankara Narayan Chetty* [1901], I L, 28 Mad, 658
5 *Ghulam Ali* v. *Saghir-ul nissa* [1901], I. L., 23 All., 433.

not affect her claim with reference to the *exigible* dower The wife has an absolute option to demand the *mahr* during the lifetime of her husband and to elect her own time for demanding it [1]

Act XV of 1877 (Schedule II, Articles 103 and 104) provides the periods of limitation in the case of *exigible* and *deferred* dower respectively

1 *Khajoorunnissa* v *Saifoollah Khan* [1875], 15 B L R, A C., 305. See also *Rani Khyarannissa* v *Rasannissa* [1870], 5 B L R, 84, where the claim was barred, and *Ameerunnissa* v *Moradoonnissa*, 6 M I A, 261

CHAPTER VI

THE DISSOLUTION OF THE MARRIAGE CONTRACT

SECTION I

GENERAL OBSERVATIONS

The rights of the parties to dissolve the marriage tie

The generality of the schools accord to both the parties to the contract the option of dissolving the tie or relationship under specified circumstances

The powers of the Judge

The Kazi also has the power of dissolving the marriage on the application of either the husband or the wife on the ground of cruelty, desertion, and like causes He is also authorised to cancel the marriage for initial disability on the part of either of the parties to fulfil the contract, or on the ground of deception or fraud practised or either side

Talâk — When the dissolution of the marriage-tie proceeds from the husband, it is called *talâk*

Khulâ — When it takes place at the instance of the wife, it is called *khulâ*

Mubârât — When it is by mutual consent, it is called *mubârât*

In all these cases, according to the Sunnis and a large number of the Shiahs, no decree of the Judge is necessary to dissolve the union The mere act of the parties is considered as sufficient in law, provided all the conditions required for effecting a valid divorce are complied with

It is, however, strongly inculcated in the Koran that the parties should settle conjugal disputes by arbiters chosen from the family of the husband and the wife

The Prophet also denounced *talák* as "the most detestable of all permitted acts"

The Mutazalas hold that in every case the sufficiency of the cause for which a cancellation is sought should be considered by the Judge

The Mutazala doctrine

Section II.

Talak

Two kinds of *talâk* are recognised by the Hanafis, *viz.* (1) the *talâk-us-sunnat* and (2) the *talâk-ul-bidaat* or *talâk-ul-badai*

(1) The *talâk-us-sunnat* is the divorce which is effected in accordance with the rules laid down in the traditions (the *sunnat*) handed down from the Arabian Prophet

(2) The *talâk-ul-bida it*, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Mahommedan era

The Shiahs and the Mâlikis do not recognise the validity of the *talâk-ul-bidaat*, whilst the Hanafis and the Shâfeis agree in holding that a divorce is effective, if pronounced in the *bidaat* form, "though in its commission the man incurs a sin"

Difference among the schools

(1) The *talâk-us-sunnat* is either (*a*) *ahsan* or (*b*) *hasan*,—most proper or simply proper

In the *talâk-us-sunnat* pronounced in the *ahsan* form the husband is required to submit to the following conditions, *viz* (*a*) he must pronounce the formula of divorce once in a single sentence, (*b*) he must do so when the woman is in a state of purity (*tahr*), and there is no bar to connubial intercourse, and (*c*) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three terms or three months

Two kinds of proper *talâk—ahsan* (most proper)

This latter clause is intended to demonstrate that the resolve on the husband's part to separate from the wife is not a passing whim but the result of a fixed determination On the lapse of the term of three months, or three *t uhrs*, the separation takes effect as an *irreversible* divorce (*talâk-ul-bâin*).

Proper *talâk*

In the *hasan* form, the husband is required to pronounce the formula three times in succession, at the interval of a month during the *tuhr* of the wife When the last formula is pronounced, the *talâk* or divorce becomes *irreversible*

These two forms alone, as stated before, are recognised by the Shiahs

Improper *talâk*

In the *talâk-ul-bidaat* the husband may pronounce the three formulæ at one time, whether the wife is in a state of *tuhr* or not The separation then takes effect definitively after the woman has fulfilled her *uldat* [1]

Recantation allowed

The Sunnis as well as the Shiahs allow recantation, that is, a husband, who has suddenly and under inexplicable circumstances pronounced the formula against his wife, *may recant or revoke any time before the expiration of three tuhrs or three months*

Irreversible or reversible

When the power of recantation is lost, the separation of *talâk* becomes *bâin* or absolute, while it continues, the *talâk* is simply *rajai* or reversible Revocation may be made either in express terms or by the resumption of cohabitation

Legal effect of an irreversible *talâk*

When a definite and complete separation (*talâk-ul-bâin*) has taken place, the parties so separated cannot re-marry without the woman going through the formality of marrying another man and being divorced from him

Object of the rule

This rule was framed with the object of restraining the frequency of divorce in Arabia The check was intended to control a jealous, sensitive, but half-cultured race, by appealing to their sense of honour

As a general rule, the power of *talâk* under the Sunni doctrines is larger than under the Shiah Law.

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1 *Iddat* is the period of probation of three months to see whether the woman is *enceinte* or not As to the validity of a *talâk ul bidaat*, see *Furzund Hossein* v. *Tanu Bibi* [1878], I L, 4 Cal, 588, *Hamid Ali* v. *Imtiazan* [1878], I L, 2 All, 71, *Ibrahim* v. *Syed Bibi* [1888] I L, 12 Mad, 63.

Sunni doctrine—*talâk* by implication permitted

According to the Sunni doctrines, *talâk* may be effected expressly, in terms which leave no doubt as to the intention of the repudiation (*sarîh*), or by the use of ambiguous or implicative expressions, (*b'ilkinâyèh*) [1]

For example, a man may effect a repudiation or divorce by calling his wife his sister or any other prohibited relation

But whatever expression is used it is essential that it should clearly indicate the person whom he intends to divorce [2]

Shiah rule—*talak* by implication not allowed

According to the Shiahs, repudiation pronounced "implicatively," or in ambiguous terms, does not take effect, whether there be intention on the part of the repudiator or not, nor does it take effect if it be made dependant upon or subjected to any condition

Presence of wife not necessary

Neither the Sunnis nor the Shiahs (with certain exceptions among the Usūli lawyers), require that the *talâk* should be pronounced in the presence of the wife But so long as it does not come to her knowledge she is entitled to her maintenance

Section III

Capacity of Talâk.

Conditions essential under the Shiah Law for the validity of a *talâk*

Under the Shiah Law three conditions are essential to the capacity of pronouncing a valid *talâk* It is required (1) that the husband should have attained majority, (2) that he should be sane and possessed of sound understanding, (3) *that, on his part, there should be distinct intention to dissolve the marriage-tie*

Repudiation pronounced under compulsion is invalid and ineffective under the Shiah Law

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1 In *Hamid Ali* v *Imtiazan* supra, the man said to his wife "thou art my cousin [the daughter of my uncle] if thou goest to thy father's house without my consent;" that was held to amount to a divorce The correctness of the decision is, however, open to question as a cousin is not a prohibited relation

2 *Furzund Hossein* v *Jan Bibee*, supra

Similarly, a repudiation obtained by fraud, or given under undue influence, is invalid under the Shiah Law. Intention is a necessary element to the validity of all *talâks*.

A *talâk* pronounced by a person in a state of intoxication, or by one labouring under a temporary stupor from the use of narcotics, or any other cause, is likewise invalid. *So also is the case of a talâk pronounced by mistake or inadvertence, in anger or in jest, or when the words have been uttered whilst talking in sleep*

Hanafi doctrines

According to the Hanafî doctrines, a "*talâk* pronounced by any husband who is of mature age (*bâligh*) and possessed of understanding (*aâkil*) is effective, whether he be free or a slave, willing or acting under compulsion, and even though it were uttered in sport or jest, or inadvertently by a mere slip of the tongue"

Among the Hanafîs, a *talâk* pronounced by a man whilst in a state of intoxication is "effective," unless the liquor or the drug which caused the intoxication was administered against his will, or was taken, "for a necessary purpose," *i e*, medicinally

In the case of *Ibrahim Moolla* v *Enayet-ur-Rahaman*[1], the High Court of Calcutta held that the divorce of one "acting under compulsion is effective." The principle, however, enunciated in this judgment must be confined exclusively to the Hanafîs

All the Sunni jurists agree that the repudiation of a boy under puberty, though possessed of understanding, is ineffective

Witnesses necessary under the Shiah Law

Under the Shiah Law, it is further necessary that there should be two reliable witnesses present at the time of repudiation

It is a further condition under the Shiah doctrines that the witnesses should be present together.

Sunni doctrine

The Sunnis, on the contrary, do not require the presence of witnesses

Under the Shiah Law, a *talâk* pronounced in a paroxysm of anger, during which all self-control is lost, is invalid Under the Sunni Law, it is valid.

[1] [1869] 4 B. L. R., A. C., 13; s. c. 12 W.R. 460.

But neither school requires the *talâk* to be pronounced in the presence of the wife And a deed of divorce signed by the husband executed in the absence of the wife has been held to be valid.[1]

Talâk by *tafwîz* or delegation of authority

The husband can delgate the power of divorce to the wife to be exercised on breach of any of the conditions of marriage This is called, in Mahommedan Law, *tafwîz*.[2]

Where a man suffering from a death-illness divorces his wife she does not lose her right of inheritance to the widow's share in his estate But it is otherwise when he divorces her in "health" and dies during her *iddat* or probationary period.[3]

Section IV

Khula and Mubarat.

When a divorce takes place at the instance of the wife, she has to give up to her husband either her settled dower or some other property, in order to obtain a discharge from the matrimonial tie, such a divorce is, consequently, called a *khulâ* But the woman's right is a qualified right The husband has the option of refusing to assent to the *khulâ* The Kâzi, however, has the power of compelling him to do so upon proper grounds.[4]

Mubarat

When a divorce is effected by mutual consent on account of incompatibility of temper or otherwise, it is called a *Mubârat*

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1 *Waj Bibee* v *Azmat Ali* [1867], 8 W R, 23, *Sarabai* v *Rahabai* [1905], I L, 30 Bom, 537

2 *Ashraf Ali* v *Ashad Ali*, [1871], 16 W R, 260, *Budarunnissa Bibi* v *Mafatalla* [1871], 7 B L R, 442 s c, 15 W. R, 555 *See* also *Poonoo Bibee* v *Fyez Bukhsh* [1874], 15 B L R, App. 5, and *Hamidoolla* v *Faizunnissa* [1882], I L, 8 Cal, 327

3 *Sarabai* v *Rabia Bibi*, supra

4 The Madras High Court has held that a *khulâ* though granted under compulsion, is valid, *Vadake Vital Ismal* v *Odakel Beyakutti Umah* [1881], I L, 3 Mad, 347, this view is, however, open to question *Ful Chand* v *Nazab Ali Choudhry* [1908], I L, 36 Cal, 184; *Ayatunnissa Beebee* v *Karan Ali* [1908,] I L, 36 Cal., 23, *Nuruddin* v *Mussamat Chanuri* [1905], 3 Cal, L J 49.

The term *mubârât* signifies a mutual discharge from the marriage-tie Under the Sunni Law, when both the parties enter into a *mubârât*, all matrimonial rights which they possess against each other fall to the ground

The same conditions are required for the validity of a *mubârât* as in the case of a *khulâ* or *talâk*

The Judge has the power of decreeing separation on the application of the wife if the husband is unable, from any inherent defect or supervenient cause (such as mutilation), to consummate the marriage

Upon a suit by the wife for separation on the ground of impotency where it is constitutional, the Judge has to postpone his decision for a year in order to ascertain whether the husband is capable of consummating the marriage or not

If consummation does not take place within that period the wife is entitled to a decree of separation. In the works on Mahommedan Law certain formalities are laid down as to how consummation is to be proved, but these are mere rules of procedure and not of substantive law

During the pendency of the proceedings the wife is not entitled to alimony, nor is the husband bound to pay her costs as under the English Law [1]

If before the suit there has been a *valid retirement*,[2] the wife, under the Hanafi Law, would be entitled to her full dower, otherwise she would get only half.

Under the Shiah Law a wife who obtains separation on the ground of her husband's impotency, gets only half the dower, irrespective of any question of "retirement"

The Judge can also decree separation if either of the parties were, from before marriage, afflicted with insanity, leprosy, or any such incurable and pernicious disease, or the wife was wholly unfit for connubial relationship,[3] provided the party seeking relief was unaware of the fact. He has the same power in case of desertion, habitual cruelty or contumacious refusal on the part of the husband to maintain the wife

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1 A v B, (1896), I L 21 B, 77 2 See ante p 85

3 The more reasonable provisions of the Shâfei Law, with which Imâm Mohammed is in agreement, furnish in modern times the guiding principles for the decisions of Hanafi Kâzis

SECTION V

MISCELLANEOUS PRINCIPLES.

Iddât.

As already stated, the Mahommedan Law prescribes a period of probation technically called the *iddat* for a widow as well as a divorced and a separated wife, in order to see whether she is with child or not

The period of probation for a widow is four months and ten days, whilst that for a divorcée and a woman separated under the decree of the Judge extends only to three months

During this period she cannot enter into a contract of marriage with any other person

When a man suffering from mortal illness divorces his wife, not at her instance or for a compensation (*mubârât*), and then dies before the expiration of her period of probation (*iddat*), she is entitled to a share in his inheritance But when a woman is divorced and she dies before the end of her probation the husband has no right in her inheritance

Suit for restitution of conjugal rights

The Mahommedan Law recognises suits for restitution of conjugal rights,[1] and the Kâzi is authorised to constrain the recalcitrant party to resume connubial relationship.[2]

In an action for restitution of conjugal rights on the part of the husband the wife is entitled to plead as a defence that she has not been paid her dower or such portion of it as was exigible, or that she had rescinded the contract in exercise of the option of puberty.[3] Habitual ill-treatment may also constitute a defence to such an action

Proceeding by *Laan*

When the father denies the paternity of a child born of his wife, the Mahommedan Law allows the latter to challenge his denial by a formal proceeding before the Kâzi which is called *Laan* The formalities, however, laid down with

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1 *Moonshee Buzloor Ruheem* v *Shumsoon nissa Begum* [1867], 11 Moo 1 A , 551.

2 *ante* p 75 and p 86

3 See *Badul Aurat* v *Queen Empress*, supra.
Hussaini Begum v *Rustam Ali Khan*) I. L , 29 All , 222

respect to *Laan* are rules of procedure rather than of substantive law

Under the *lex fori* in British India such a proceeding would probably take the form of an action for the establishment of the child's legitimacy.

CHAPTER VII

THE STATUS OF INFANCY

SECTION I —AGE OF MAJORITY

Age of Majority

The Islâmic system recognises two distinct periods of majority, one of which has reference to the emancipation of the person of the minors from the *patria potestas*, and the other to the assumption by them of the management and direction of their property

These two periods are designated as *sinn-bulûgh* and *sinn-i-rushd*, the age of puberty and the age of discretion

Presumption of puberty

Among the Hanafîs and the Shiahs, puberty is presumed on the completion of the fifteenth year, among the Mâlikîs, on the completion of the eighteenth year

The Hanafîs and the Shiahs, generally speaking, consider *rushd* (discretion) and *bulûghyét* (puberty) to go together, and therefore the personal emancipation of minors which occurs on their attaining puberty, carries with it the emancipation of their goods from the hands of their guardians They then become entitled to take over the charge of their own property

The principle of two distinct and yet concurrent periods of majority is maintained also in the Indian Majority Act (IX of 1875) Section 2, clause (*a*) of that Act declares "nothing herein contained shall affect the capacity of any person to act in the following matters (namely), marriage, dower, divorce, and adoption"

Section 3 provides that, "subject as aforesaid," every minor who should not be a Ward of Court [whether under the Guardians and Wards Act (VIII of 1890), which has been substituted for Act XL of 1858, or the Court of Wards Act (B.C.),] should be deemed to attain his or her majority

on the completion of *the eighteenth year and "not before"*

But every minor of whose person or property a guardian 'has been" or shall be appointed by a Court of Justice, and every minor under the jurisdiction of the Court of Wards, 'shall be deemed to have attained his majority, when he or she shall have completed the age of twenty-one years, and not before "[1]

SECTION II

GUARDIANSHIP OR TUTELAGE

Guardianship or tutelage comprehends —

(i) The direction or care of the person of the infant, and this arises when the *hizânat* and the guardianship are vested in one and the same person,

(ii) A simple supervisory direction over the person of the infant, when the *hizânat* is vested in another person,

(iii) The administration and care of the property of the minor

Guardians are either (*a*) natural, (*b*) testamentary, or, (*c*) appointed

Father, primary guardian

The first and primary natural guardian is the *father.* Among the Hanafis, when the father is dead, the guardianship of his minor children devolves upon *his executor* When he has died without appointing an executor, but his own father is alive, the tutelage of the minor children is allowed to the grandfather, when the grandfather also is dead, the guardianship devolves on *his* executor

Among the Shiahs, when the grandfather is alive, he is entitled to the guardianship in perference to the father's executor

In default of natural as well as testamentary guardians, *viz*, the father and his executor, the obligation of appointing a tutor or curator, for the preservation and management of the minor's property, rests on the Kâzi or Judge as representative of the Government or "Sultan."

1 *Jagon Ram Marwari* v *Mahadeo Prosad Sahu* [1909] I L, 36 Cal.' 768

Among the Hanafîs, if a person sufficiently qualified to undertake the guardianship of the minor can be found among the male agnates of the deceased father, such person should be appointed by the Judge in preference to a stranger, but no relative other than the father or grandfather has any right to interfere in any way with the property of a minor *unless appointed by the Judge*

Father's powers

The father has the power to make by will such dispositions as he may think best relative to the guardianship of his minor children and the protection of their interests.

Mother

A mother is entitled to the custody of the person of her minor children, *but she has no right to the guardianship of their property*[1] It she deals with their estate without being specially authorised by the Judge or by the father, her acts should be treated as the acts of a *fazûli* (an unauthorised person) The same principle applies to the acts of other relatives such as a brother, sister or uncle who have no right to the guardianship of the property of a minor.[2]

The Calcutta High Court has held that under the Mahommedan Law the mother is not the *de facto* guardian of her minor children, and unless she is specially authorised by the District Judge, she has no power to bind their estate by mortgage or otherwise, and that any such act by her is entirely void.[3] The Allahabad High Court, on the other hand, has held a transaction for the minor's benefit entered into by a mother acting as their *de facto* guardian, to be binding against them[4]

In two later cases the Calcutta High Court upheld the transactions by a mother in respect of the minor's

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1 See *Sitaram* v *Amir Begum* [1886] I L., 8 All , 324 *Baba* v *Shivappa* [1895,] I L , 20 Bom , 199 , *Pathummabi* v. *Vitil Ummachabi* [1902], I L , 26 Mad , 734

2 *Bhuthnath* v *Ahmed Hosein* [1885,] I L , 11 Cal , 417 *Mussamma Bakhshan* v *Mussammat Doolhin* [1869,] 12 W. R , 337 ; *Husaini Begam* v. *Zia-ul- Nissa Begam* [1882,] I. L , 6 Bom., 467 *Nizam-ud-din Shah* v. *Ananda Pershad* [1896], I. L , 18 All , 373.

3 *Moyna Bibi* v. *Banku Behari Biswas* [1902,] I L , 29 Cal , 473

4 *Majidan* v *Ram Narain* [1903] I L , 26 All., 22.

property on the ground that she had purported to act as *de facto* guardian for his benefit

The Mussalman Law does not recognise a *de facto* guardian Every person, unless a legal guardian of a minor's property, is a *fazúli*, and cannot deal with his immoveable property without the authorization of the Court But the authorities seem to indicate that where a *transaction is manifestly to the advantage of a minor it may be maintained at the discretion of the Judge* But this does not refer to a case of alienation for necessity or otherwise [1]

A testamentary guardian

A mother, whether Moslemah or non-Moslemah, can be validly appointed executrix of the father, and, when so appointed, is entitled to exercise the rights and power which the law vests in testamentary guardians

A testamentary guardian stands in *loco parentis* in every matter relating to the welfare of the minors and the care and preservation of their property In certain cases, and especially when the appointment of the *wasi* or executor is general in its nature, the father's or grandfather's executor may delegate the trust to his own executor

Powers of sale possessed by a guardian

A guardian *de jure* is authorised to sell the moveable property of his ward for an adequate consideration and invest the proceeds in a "profitable undertaking" for the benefit of the minor

(*a*) A guardian may not sell his ward's real porperty "into his own hands" or into the hands of any one connected with him, under any circumstance

(*b*) He may sell it to a stranger for double its value or where it is to the *manifest* advantage of the ward

(Section 31 of Act VIII of 1890 uses the words "evident advantage")

(*c*) He may also sell it when there are some general provisions in the *wasiyet* (will) of the testator, which cannot be carried into effect without the sale of the property

[1] *Moffizal Hossain* v *Bashid Shaikh* [1907] I L 34 Cal, 36; *Ramchurn Sanyal* v *Anukul Chandra Acharya, Ibid.* 65

(*d*) When the property is required to be sold for the purpose of paying off the debts of the testator, which cannot be liquidated in any other way

(*e*) When the income accruing from the estate is not sufficient to defray the expenditure incurred in its management and the payment of the *khiraj* (land revenue)

(*f*) When it is in imminent danger of being destroyed or lost by decay

(*g*) When the minor has no other property, and the sale of it is absolutely necessary for his maintenance

(*h*) When it is in the hands of a usurper, and the guardian has reason to fear there is no chance of restitution.

In other words, even a guardian *de jure*, like the father or his executor, cannot sell the immoveable property of the minor without absolute necessity or unless it is to the evident advantage of the minor [1]

In a case where disputes existed as to the title to revenue-paying land, of which part formed the minors' shares, and it was sold by their guardian for a fair price, and the sale had the result of ending the disputes and rendering the settlement of the remainder practicable, the validity of the transaction was maintained [2] It was also held that, although the sale-deed incorrectly stated the purpose of the sale, yet on the transaction being afterwards impeached by the wards it was open to the guardian to prove the real nature of the sale and to show that it was one beneficial to them.

As a general rule, the powers of the testamentary guardian are subject to the same limitations, and extend to the same degree as the powers of the testator

The Shiah Law is in general accord with the Sunni Law in respect of the powers of guardians.

The powers of a person appointed or declared by the Court to be guardian of the property of a ward are subject to the provisions of section 29 of Act VIII of 1890

Any disposal of immoveable property by the guardian in contravention of sections 28 and 29 is declared by section 30

1 Comp *Hirbai* v *Hirapi* [1895], I L., 20 Bom., 116
2 *Kali Dutt Jha* v *Abdul Ali* [1888], I. L , 16 Cal., 627.

to be "voidable at the instance of any other person affected thereby." The remedy is not confined to the minor.

SECTION III

MAINTENANCE OF CHILDREN.

Maintenance of children

The father is at all times bound to maintain his infant children If the father be poor and the grandfather or the mother be rich, the obligation devolves on them, with a right of recourse against the father should he become subsequently possessed of means

The father is not bound to maintain his adult male children unless they are infirm or weak He is authorised to engage his male children in work, though not adult, if they are strong enough to earn their own livelihood, *but not in such work as is unsuited to their position.* He is bound, however, to maintain his female children until they are married

The obligation to maintain his children, whether legitimate or illegitimate, may be enforced against the father under the provisions of the Code of Criminal Procedure

Children possessed of means are bound to maintain their aged parents

PART III.

The Law Relating to Property

CHAPTER I.

THE LAW RELATING TO GIFTS

SECTION I.

GENERAL OBSERVATIONS.

DISPOSITIONS of property divide themselves under two heads, *viz* —

(1) Dispositions *inter vivos*

(2) Dispositions which are in their nature testamentary, and which are not intended to operate until after the death of the person disposing.

A disposition made at a time when the disposer is suffering from a disease, which is technically called death-illness (*marz-ul-mout*) stands, so far as its legal effect is concerned, on the same footing as a testamentary disposition.

The dispositions *inter vivos* with which we have principally to concern ourselves are *Hiba* and *Walf*[1]

SECTION II.

HIBA OR GIFT

A *hiba* is a gift and is, generally speaking, divisible under three heads—

(*a*) A *hiba* pure and simple.

(*b*) A *hiba-b'il-ewaz* (a gift for a consideration), which is more in the nature of an exchange than a gift

(*c*) A *hiba ba-shart-ul-ewaz* or a grant made on the condition that the donee should pay to the donor at some future time or periodically some determinate thing in return for the gift.

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1 Sale, bailment, etc., are governed by Statute

A simple *Hiba*

(*a*) A *hiba* pure and simple, or a *hiba* properly so-called, is a voluntary transfer, or a grant, without consideration, by one person to another of some specific thing whether existing in substance, or as a *chose in action*

A gift may be made verbally or in writing The Transfer of Property Act IV of 1882 leaves this provision of the Mahommedan Law untouched. And the Privy Council in the case of *Kamar-un-Nissa Bibi* v *Hussaini Bibi*[1] upheld a verbal gift when it appeared to be supported by all the attendant circumstances

Capacity for making a gift.

The capacity for making a gift or voluntary settlement is dependent upon the same conditions as are required for the validity of any other contract, *viz* —

(1) Majority.
(2) Understanding
(3) Freedom
(4) Ownership of the subject-matter of the disposition

In other words, a person, in order to be able to make a valid disposition, must be *sui juris*, must be able to understand the nature of the act, be subject to no undue influence, coercion or duress, and must be the owner of the property of which he purports to make the disposition

Capacity to receive a gift

Any person may, without distinction of sex, age or creed, receive a gift provided he or she is in existence at the time of the gift An absolute gift, therefore, to an unborn child, one not *in esse*, either actually or presumably, is invalid, but a gift to a child *en ventre sa mère* is valid, if the child be born within six months from the date of the gift, because in that case it is presumed that the child was actually existing as a distinct entity in the womb of its mother.

Definition of death-illness or *Marz ul mout*

A death-illness (*marz-ul-mout*) is defined to be a malady which it is highly probable will terminate fatally, and from which death results whether it incapacitates the sufferer from pursuing his ordinary avoca-

1 [1880], I L., 3 All , 266

tions or not When the malady is of long continuance, and there is no immediate apprehension of death so as to overpower his disposing faculty or when its progress is so imperceptible as to cause no fear to the sufferer, the disease does not come within the category of *marz-ul-mout*

A gift made by a person suffering from a disease which had lasted over a year, without any immediate apprehension of death, has been held to be valid.[1]

Gifts made in death-illness

Gifts made in *extremis* or at a time, when the donor is suffering from what is called a death-illness takes effect, when made in favour of a non-heir, in respect of a third of the donor's estate unless assented to by the heirs When made to an heir, it is altogether invalid unless it is assented to by the other heirs[2]

SECTION III

Mouhoob OR THE SUBJECT OF THE GIFT

The subject of a gift

Anything over which dominion or the right of property may be exercised, or anything which can be reduced into possession or which exists either as a specific entity or as an enforcible right, in fact, anything which comes within the meaning of the word *mál*, may form the subject of a gift. *Choses in action* and incorporeal rights may form the subject of a gift equally with corporeal property

A gift of property in the occupation of a tenant is lawful, for this implies the grant of the right to receive the rent from the occupying tenant or lessee[3] So is a gift of property in the hands of a mortgagee,[4] or under attachment,[5]

1 *Labbi Beebee* v *Bibbun Beebee* [1874] 6 N W P High Court Reports, 159, *Muhammad Gulshere Khan* v *Mariam Begam* [1881,] I L, 3 All, 731, *Hassarat Bibee* v *Ghulam Jaffer* [1898,] 3 *Cal.* W N, 57; *Fatima Bibee* v *Ahmad Bukhsh* [1905], I L, 31 Cal, 319

2 *Wazir Jan* v *Sayyed Altaf Ali* [1887] I L, 9 All, 357

3 *Ibrahim* v *Shaik Suleman* [1884], I L, 9 Bom, 146

4 *Rahim Bakhsh* v *Muhammad Hassan* [1888], I L, 11 All, 1 In *Mohinudin* v *Manchershah* [1882] I L, 6 Bom, 650, and *Ismal* v *Ramje* [1899] I. L. 23 Bom, 682, the Bombay High Court has, it is respectfully submitted, misconceived the Mahommedan law.

5 *Anwari Begam* v *Nizam-ud din* [1898], I. L., 21 All. 165.

of an undistributed share inherited by the donor of which he has not obtained possession,[1] of the malikana interest or the right to receive from Government the proprietor's share of the assets of landed property which has been settled with another *Zamindar* or *Malguzar*.[2]

Gift of an undivided part of impartible property

A person may validly make a gift of an undivided part of any property which does not admit of partition.[3]

Under the Sunni Law, where the property is capable of partition, and the share is not divided off, the gift *thereof is considered to be invalid, but if possession is delivered or taken, the invalidity is removed and the gift takes effect*.[4]

In the case of *Shaik Mahammad Mumtaz Ahmed and others* v *Zubaida Jan and others*,[5] the Judicial Committee of the Privy Council gave effect to this principle. They held, in accordance with the authorities on Mahommedan Law, that possession taken under an invalid gift of *mushâa* transfers the property. They added that "the doctrine relating to the invalidity of gifts of *mushâa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules."

Definition of *mushâa*

Undivided property is called *mushâa*. Freytag defines it as meaning '*pluribus communis*." In other words, every joint undivided property subject to the right of more than one individual is a *mushâa*.

The doctrine of *mushâa* has been held not to be applicable to zemindaris.[5]

Gift of partible property to two persons jointly

Where a gift of a property which is capable of partition is made to two persons jointly, without specification of shares, the gift is invalid, *but may be validated by the donees taking possession*.

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1 *Mahomed Bukhsh* v *Hossaini Bibi* [1888], L R, 15 I A, 81, I L, 15 Cal, 684.

2 *Malik Abdool Guffoor* v *Mussamat Mulecka* [1884], I L 10 Cal., 1812 and the authorities cited there.

3 *Kassim Hussain* v *Sharfunnissa* [1883], I L 5 All, 285.

4 [1889], L R, 16 I. A. 205, s c I. L 11 All 460.

5 *Abedoonnissa* v *Ameeroonnissa* [1875], L R, 2 I A, 87, s c 15. B. L. R., 67.

Where a gift is made to an infant and an adult jointly it is valid

Under the Shiah Law, a gift of an undivided part of property capable of partition is valid *ab initio* So where a thing is given to two persons jointly, *i e*, without apportionment and they take possession jointly each donee becomes the proprietor of the portion given to him. If, again, one only of them should accept the gift and take possession while the other should refuse, the gift to the acceptor would be valid

Shiah doctrines relating to *mushâa*

A gift of property which is not in existence at the time of the donation and *whose existence at some future time is problematical*, is invalid For example a gift of the future fruit of a tree is inoperative

Where, however, a person has a subsisting recurring right in something which is neither variable nor uncertain, there is no reason in principle why its gift should not be valid. Thus an assignment of the ascertained rents and issues of any particular property moveable or immoveable may validly be effected [1] 10.4.30.

The gift of a mere claim or right of litigation in respect of property not in the possession of the donor but in that of a third party who holds it adversely to the donor is invalid [2] If after the donation the subject of the gift were to come into the possession of the donor and he were to place the donee in seisin thereof, the gift would be validated.

But where the donor has undisputed title in property not actually in his posssession, and makes a gift thereof expressly authorising the donees to take possession, the gift is valid [3]

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1 The Bombay High Court in the case of *Amtul Nissa Begam* v *Mir Nurudin Hussein Khan* [1896] , I L , 22 Bom, 489, seems to have missed, it is respectfully submitted, the real principle under which a gift of something not in existence at the time is invalid, *viz* , the uncertainty relating to the subject-matter of the gift, not merely the inability to give possession

2 *Meher Ali* v *Tajuddin* [1888], I L 13, Bom , 159 , *Rahim Buksh* v *Muhammed Hassan* [1888] I L., 11 All., 1.

3 *Mahomed Buksh* v *Hossaini Bibi*, supra

SECTION IV.

CONDITIONS NECESSARY FOR THE VALIDITY OF A GIFT.

Conditions necessary to the validity of a gift.

The following conditions are necessary for the validity of the act of gift —

(*a*) A manifestation of an intention on the part of the donor, (*b*) the acceptance of the donee, either implied or express, and (*c*) the taking possession of the subject-matter of the gift by the donee either *actually or constructively.*

The legal effect of every transfer depends on the intention of the transferor, and, as a gift or *hiba* under the Mussulman Law implies an absolute grant, the Moslem lawyers regard the question of intention as an essential element in considering the legal effect of a voluntary transfer. A gift, of course, does not take effect unless accepted by the donee In ancient times when transfers of property were not evidenced by documents, the giving and taking, selling and buying, were effected by actual change of possession. In cases of immoveable property, the delivery of seisin was symbolical, and took the shape of what is called "feoffment of seisin" under the old English Real Property Law. Hence the early Mussulman lawyers laid much stress on delivery of seisin. According to the modern lawyers, "ability to take possession" (on the part of the donee) is tantamount to "delivery of seisin," and consequently where the donor places the donee in a position to take possession of the subject of the gift, the requirements of the law as to transmutation of possession are satisfied. For example, where the donor delivers to the donee the key of a house or the title-deeds of the property, it amounts to a valid gift.

Doctrine of seisin

In the case of a gift by a parent to a minor child, no acceptance is necessary, "the gift is completed by the contract, and it makes no difference whether the subject of the gift is in the father's hands or in that of a depositary."[1] Nor is transmutation of possession necessary, for the

A gift to a minor child by a parent.

1 *Mallik Abdul Gufoor* v *Mussamat Muleeka*, supra.

possession of the parent is tantamount to that of the child [1].

If a fatherless child be under the charge of his mother, and she takes possession of a gift made to him, it is valid

Gift to a child in the guardianship of a stranger

If a child is in the custody of, and is being brought up by, a stranger, the possession of the stranger would be sufficient [2].

If a minor girl is married and is living with her husband, a gift of which possession is taken by the father or the husband is equally good

When a gift is made by a husband to a wife or by a wife to a husband, actual transmutation of possession is not necessary [3].

Delivery of seisin is also not necessary where the subject of the gift is in the hands of the donee.

Transmutation of possession—its meaning and scope

In considering the question of transmutation or delivery of possession the relationship of the parties must be kept in view For example, if a husband makes a gift of a house or landed property to his wife, and continues to reside in the house or to realise the rents and profits of the estate, the gift cannot be held to be invalid on that ground For those acts are explainable by the relationship of the donor and the donee [4] Similarly, if the father makes a gift of his business to his minor son and continues to manage it for him, or a mother conveys a house to her daughter and continues to reside in it [5], or an uncle gives some property to a nephew and continues to be supported by the donee, the gift will not be invalid on that account.

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1 *Fatema Bibi* v *Ahmad Bakhsh*, supra

2 *Fakhruddin* v *Banoo Bibi* [1834], 5 Sel Rep 40

3 *Amina Bibi* v *Khatija Bibi* [1864,] 1 Bom. H C Reports, 157

4 *Azim un Nissa* v *Dale*, supra, *Emnabai* v *Hoyrabai* [1889,] I L, 13 Bom, 352, *Humera Bibi* v *Najm un Nissa Bibi* [1905,] 1 L 28 All, 147

5 *Kandath Veettil Bava* v *Musaliam Veettil Pakrukutti* [1907] 1 L 30 Mad 305, In *Yahazullah Sahib* v *Boyapatti Nagayya* [1906] I L 30 Mad, 519. The Madras High Court carried the principle of seisin further than the said warrants.

The delivery of seisin must depend on the nature of the subject of the gift

For example, a gift of moveable property contained in a box would be complete by delivery to the donee of the key of the receptacle, of immoveable property in the occupation of tenants either by the delivery of the title-deeds or by requisition to the tenants to attorn to the donee of zemindari rights by mutation of names in the Collectorate Register[1]

So a valid gift may be made of property attached by the Collector for arrears of revenue *by the donor transferring such interest as he possesses at the time*[2] In other words, the donor must do all he can to perfect the contemplated gift either by delivering actual possession of the property or placing the donee in a position *to take possession of it*[3]

Realisation of debts

Where a person places another in a position to realise the debts due to him, it amounts to a sufficient delivery of possession under the Mahommedan Law

But the mere handing over of deposit notes signed by the Agent of a Bank, acknowledging the receipt of sums of money as deposit bearing interest and not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof, has been held not to amount to a transfer of the debts so as to give the person to whom they were made over any dominion over them or enable her to recover the money secured by the notes At most, it showed an intention to make such a transfer, but that the gift was incomplete and no legal effect could be given to it[4]

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1 *Ibrahim* v *Shaik Suleman* [1884], I L , Bom , 146 , *Bibi Khawer Sultan* v *Bibi Rickia Sultan* [1905], I L , 29 Bom , 468

2 *Sayad Ahmed Khan* v *Kadri Begum* [1895], I L , 18 All , 1

3 *Amrao Begum* v *Nizamuddin Shah*, supra

4 *Mohamed Buksh* v *Hoosein Bibi*, supra The view expressed in *Moqul Shah* v *Mahamud Saheb* [1887], I L , 11 Bom , 517, and *Ismal* v *Ramji* [1888], I L , B , 23 Bom , 682, that "registration of the deed was not sufficient to cure the want of delivery of possession" seems rather strained

5 *Aga Mahommed Jaffer Bindamin* v *Kolsoom Beebee* [1888], 1 L., 25 Cal , 9 , *Muntaz un Nissa* v *Tufail Ahmad* [1905], I. L., 28 All., 264.

SECTION V

CONDITIONAL GIFTS.

Conditional gifts.

In the Hanafî system there is great difference between *conditional gifts* and *gifts with conditions attached to them* According to the Hanafî Law any derogation from the completeness of the gift is null, and if the intention be clear to give to the donee the entire subject-matter of the gift, subsequent conditions derogating from or limiting the extent of the right would be null and void *But where a condition does not render the gift nugatory, it is valid* For example, where a gift is made to *A* and it is conditioned that he should take it only for his life, the condition is void, and the gift takes effect absolutely.[1] Or, if a man were to give a piece of land to another on the condition that he should give to him *in perpetuity the whole produce of the land*, the condition would be invalid

Gifts with conditions

But where a gift is made to *A* absolutely, subject to a reservation by the donor of an interest in the usufruct of the property for his life, the reservation is valid.[2]

Or, where a gift is made by *A* to *B* of a certain property without any restriction on the power of disposition, but subject to the condition that *B* should pay periodically to *A*, or to *A* and his heirs, *a part* of the usufruct of the property, both the gift and the condition would be valid And if *B* should alienate the property, the assignee would take it subject to the condition.

But a gift depending upon a contingency which may or may not happen is invalid according to all the schools For example if *A* were to say to *B* "I give you this property in the event of my son returning home on such and such a day," the gift, being contingent on the son returning home on that particular day, is bad in law.[3]

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1 See *Nizamuddin* v *Abdul Gafur* [1888], I L, 13 Bom, 264, s c. on App, I L, 17 Bom, 1

2 *Nawáb Amjad Ali Khan* v *Mohamdi Begum*, [1867], 11 Moo,. I A. 517

3 Comp. *Umes Chunder Sircar* v. *Mussumat Zahoor Fatima* [1890] L. R., 17 I. A., 201, 209.

Hiba ba-shart ul-ewaz

In a *hiba-ba-shart-ul-ewaz*, what is required is *that the condition should be determined or fixed at the time of the grant or contract, and that it should not render the gift absolutely nugatory*

Shiah Law—Life estate or *umra*

Under the Shiah Law, *conditional gifts* are valid, and limited estates are recognised to the fullest extent For example, a *hiba* by *A* to *B* for *B*'s life takes effect, under the Hanafi Law, as an absolute gift to *B* Under the Shiah Law, *B* would take, under such a grant, an estate for life, and on *B*'s death the property would revert to the donor or his heirs Similarly, under the Shiah Law, a grant to *A* for life and then to *B* absolutely, is valid, or a life-estate, to *A* and then to *B* for life, and thereafter to *C* absolutely is valid So also a grant may validly be made to *A* for his life and thereafter to his children absolutely. In other words, an estate for life or for several lives in succession is valid under the Shiah Law

SECTION VI

REVOCATION OF GIFTS

Revocation when permissible

Under the Hanifi Law, a gift is revocable *except under the following circumstances* —

(1) When the subject-matter of a gift has passed out of the possession of the donee by gift, sale, or any other form of alienation by which the right of property is transferred

(2) When the donee has died and the subject-matter of the gift has devolved on his or her heirs.

Option of revocation a personal right of the donor

(3) When the donor has died; in other words, the donor's heirs have not the power of revocation. *The option of revocation is a personal right in the donor.*

(4) When the thing given is lost

(5) *When the gift is for a consideration.*

(6) When the subject-matter of the gift has altered in substance in the possession of the donee.

(7) When an increase or accretion has taken place in the thing given, and such increment or accretion is of such a nature as to be united with or inseparable from it And it makes no difference in the irrevocability of the gift whether the increase be in consequence of an act of the donee or without such act, and whether it has issued from the thing itself (such as fruits on trees), or be an accession to it (such as accretion by growth) But it must be incorporated with, or form part of, the body of the subject-matter of the gift, and imply an addition to, or enhancement in, its value. Dyeing, sewing, porterage, etc, are considered as causes which extinguish the power of revocation

Increase of value in the subject of gift.

Mere transfer from one place to another, when it adds to the value and has occasioned expense, is sufficient to prevent revocation A separate increase does not prevent the revocation of a gift, nor does any loss or damage sustained by the subject of the gift

(8) When the donor and donee stand towards each other in the marital relationship But such a gift in order to be irrevocable must be made during the subsistence of the relationship For example, a gift made prior to marriage may be revoked. But when a gift is made during marriage and the relationship is afterwards dissolved, the gift cannot be revoked Difference in the creed of the married parties makes no difference in the irrevocable character of the gift

(9) Relationship of blood within the prohibited degrees is a bar to revocation, without any restriction as to the creed of the donor or the donee

(10) The natural growth of the subject-matter of the gift also debars the donor from revoking

According to the Shiah Law, *after possession has been taken of a gift*, it cannot be lawfully retracted when made in favour of parents (according to general consensus), *nor even when the donee is any other relative by consanguinity of the donor, or stands in the relation of husband or wife.*

Shiah doctrines

But if the gift be to a stranger, *i. e*, to a person who is not a consanguineous relation or a husband or wife, it may be revoked at any time so long as the substance of the thing given is in existence. After it has perished there can be no revocation.

A gift, however, cannot be revoked if anything has been received in exchange, "though of little value"

In order to be effective revocation must be explicit Mere resumption of the gift is not sufficient And should the donor die without giving any express proof of his intention to revoke the gift, it will be regarded as the donee's property although found in the donor's possession at the time

SECTION VII

GIFTS FOR CONSIDERATION

Gifts for consideration (*ewaz*) are of two kinds, depending on the nature of the contract. The consideration for a gift may either be stipulated for in the contract of the gift or its effectuation may be postponed to a time subsequent to the donation

(*a*) When the consideration is stipulated in the contract it is called a *hiba-bil-ewaz* or a gift in lieu of an exchange (*ewaz*)

(*b*) When the performance of the condition relating to the consideration is postponed to a future time it is called a *hiba-ba-shart-ul-ewaz* or a gift *on condition of an exchange* Such a *hiba* differs in essential particulars from a *hiba-bil-ewaz.*

In *hiba bil ewaz* delivery of seisin not necessary

A *hiba-bil-ewaz* is a sale in all its legal incidents and, consequently, *delivery of seisin is not necessary*,[1]

Any consideration, however small, would be sufficient to take it out of the category of a simple hiba which requires delivery of seisin for the completion of the gift.

Where an uncle relinquished his right to a share in certain

1 *Meer Nujeebullah* v *Mussamaut Kusseema* [1795], 1 Sel R., 10, *Chaudhri Mehdi Hassan* v. *Muhammad Hassan* [1906], 19 Cal W N. 706

property in favour of a minor niece in consideration of the Collector taking charge of the minor's estate, the gift has been held to be valid and not requiring seisin [1]

Suppose, for example, a person in making a gift expressed himself to this effect, that he had made a gift of, and conferred upon another, the proprietary right in his property in lieu of something given by the donee, this is not a gift in consideration of an exchange, to be prospectively given, *but it is a contract of mutual transfer or sale, both as to the condition and the effect* In such a case, seisin is declared not to be a requisite condition nor is the transfer revocable

Hiba ba shart ul-ewaz

A *hiba-ba-shart-ul-ewaz* is a contract of a different description The terms used in the constitution of such a *hiba* imply a *contingency* Thus, "I have given you this on condition of your giving me such a thing" This contract is declared to have the property of a sale, when the parties have given effect to it according to their meaning and intent [2]

In other words the transaction remains a simple *hiba* until the performance of the condition relating to the consideration or *ewaz*

If a man were to assign to his wife any property in lieu of her dower the transaction would be a *hiba-bil-ewaz*, the assignment being called *bai-mokasa* [3].

If he were to convey his property to another on condition that the latter should pay a fixed yearly sum to him, and after him to his heirs, it would be a *hiba-ba-shart-ul-ewaz*

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1 *Mahamudunissa Begum* v *Batchelor* [1905], I L , 29 Bom , 428.
2 See Mahommedan Law Vol I , 102
3 *Muhammed Esuph* v. *Pattamsa Ammal* [1889], I L , 23 Mad , 70

CHAPTER II

THE LAW RELATING TO *WAKFS*

SECTION I.

GENERAL OBSERVATIONS

Meaning of the work *wakf*

The word *wakf*, literally, signifies *detention*, technically, it means *a dedication in perpetuity of some specific property for a pious purpose or a succession of pious purposes.*

When a *wakf* is made of a property, the proprietary right of the grantor is divested therefrom, and it remains thenceforth in the implied ownership of the Almighty *The usufruct alone is applied for the benefit of human beings and the subject of the dedication is rendered inalienable and non-heritable in perpetuity*[1]

The *wakif* or dedicator

The person creating the trust, or making the dedication, is called the *wákif*, whilst the person or object for whose benefit it is created is called the *mowkoof alaih* (in the plural, *mowkoof alaihim, cestuis qui trustent*)

Under the Mussulman Law, every object which tends to the good of mankind, individually or collectively, is a pious purpose A dedication to a mosque signifies the support of a place of worship for human beings, to a *caravanserai*, the maintenance of a place of rest for travellers Similarly, a provision for one's children and descendants, kindred or neighbours, is a pious object under the Mussulman Law

Accordingly, a *wakf* may be made for a body of individuals one after another, and afterwards for the poor generally, or for a mosque, *madrassa* (school or college), hospital, etc

1 *Mohummud Sadik* v *Mohummud Ali and others* [1798], 1 Sel. Rep , 17

No formality necessary to constitute a *wakf*

There is no essential formality or the use of any express phrase requisite for the constitution of a *wakf* To create a valid *wakf* it is not essential to use the word *wakf*, any expression which conveys distinctly the intention of the donor to dedicate the property to a pious purpose is sufficient to constitute a valid dedication under the Mussulman Law[1] It may be created either by writing or verbally and may be made either *inter vivos* to take effect in the dedicator's life-time or by a testamentary disposition to come into operation on his death[2]

When it is by writing the document is called the *wakfnâmah*

Conditions relating to the *wakf*.

The settlor must be (1) *compos mentis*, (2) must be *sui juris*,[3] and (3) must not be acting under compulsion or undue influence, and in order that the settlement may be valid in its entirety, (4) must be in good health, or, more correctly speaking, *must not be suffering from an illness of which he subsequently dies*, and (5) must be the owner of the property which forms the subject of the appropriation

A *wakf* created by a person suffering from a death-illness is valid to the same extent and subject to the same conditions as a testamentary disposition.

According to the rule laid down by Imâm Abû Yusuf, which is recognised as law by the entire Hanafi world, the mere declaration of the dedicator (*wâkif*) that he constitutes a certain property as a *wakf* or permanent benefaction, is

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1 See *Jewan Doss Sahoo* v *Shah Kabeerooddeen Ahmed* [1840], 2 Moo I A., 398, *Kulb Ali Hoosun* v *Syef Ali* [1814], 2 Sel R, 110, *Abul Hussun* v *Mahomed Maseh Kerabulai* [1831], 5 Sel R, 87 *Sahigunnissa* v *Mote Ahmed*, [1903], I L, 25 All, 418

2 *Balar Ali Khan* v *Anjuman Ara Begum* [1902], I L, 25 Cal 236.

3 As already pointed out, under the Mahommedan Law a person is held to be *sui juris* on completion of the fifteenth year, when he is presumed to have attained puberty.

Since the passing of Act IX of 1875, a Mahommedan cannot make a valid *wakf* or in fact any disposition until he has completed his eighteenth year, or if a ward until the completion of the twenty first year

sufficient to impress on it the character of a valid *wakf*. No consignment to a trustee (*mutwalli*) or delivery of possession is necessary to complete the act [1]

If after constituting the *wâkf*, the *wâkif*, continues in possession he does so as a trustee for the beneficiaries and is accountable as such

Sunni Law—delivery of possession not necessary to constitute a valid *wakf*

Once the *wâkif* declares that he dedicates the property for a purpose recognised as lawful in the Mussulman system the *wakf* is irrevocable

But a *wakf* made by a person to take effect after his death, or what is called a *wakf* by way of a *wasiat* (*wakf-bi'l-wasiat*, is revocable at any time before his death A *wakf* intended to come into operation upon the death of the settlor will, under the Sunni Law, take effect in respect of one-third of his estate unless assented to by his heirs.

Shiah Law—conditions relating to transmutation of possession.

Under the Shiah Law, a benefaction in favour of persons *sui juris* does not become irrevocable until there has been a transmutation of possession, express or implied, or some indication that the *wâkif* has divested himself of his proprietary interest in the property dedicated.

But no change of possession is required to make the *wakf* irrevocable when it is in favour of minors or for pious purposes or for purposes of general utility

A testamentary *wakf* intended to take effect after the death of the testator is valid also under the Shiah Law and is revocable at any time before his death

As under the Sunni Law, a testamentary *wakf*, like a *wakf* made *in extremis* or when the person creating the *wakf* is suffering from a mortal illness, takes effect with regard to a third of his estate unless the heirs consent as to the entirety [2]

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1 *Doe dem Abdoollah Barber* v *Jaun Beebee* [1838], Fulton's Reps, 345 Imam Mohammed held that a *wakf* was not complete until the property was delivered to a curator or *Mutwalli* This view has never been acted upon or recognised by the sect, although by a strange chance some of the British Indian Courts of recent years have chosen to adopt it.

2 The view expressed by Mahmood, J in *Aga Ali Khan* v *Altaf Hassan Khan* [1891], I L., 14 All , 429 which was adopted by the Full Bench and

Hanafi Law—Perpetuity need not be expressly mentioned

According to all the schools perpetuity is a necessary condition to the constitution of a *wakf*, in other words, *the property must be dedicated permanently* But under the rule of Imâm Abû Yusuf which is the recognised law, *it is not necessary that it should be so stated at the time of dedication* When a dedication is made by the term *wakf*, or any expression which conveys the meaning of permanent appropriation, it is sufficient *When any such expression is used the law will presume perpetuity Where an object is mentioned which is liable to become extinct, the reversion will be for the poor although they are not expressly mentioned at the time of dedication.*

Shiah rule—Perpetuity must be expressly mentioned

Under the Shiah Law, a *wakf*, in order to be valid, must be for an object or objects which, individually or collectively, would presumably last always If the *wakf* is primarily in favour of an object likely to fail some other lasting object must be expressly mentioned For example, if the *wakf* is for one's descendants, as they are likely to become extinct, the reversion must be reserved in *express* terms for the poor or some other permanent charitable purpose, such as a mosque or an *imâmbâra* The *wakf* must also not be dependant for its operation on a future contingency

Shiah rule—Consignment to a trustee necessary except in certain cases.

Again, under the Shiah Law, consignment to a *mutwalli* or trustee is necessary except in the case of *wakfs* for minors, or *wakfs* created for a pious purpose or for the benefit of the public at large or large bodies of people

But such consignment is not necessary when the wakif constitutes himself the mutwalli of the wakf What is required under the Shiah Law is that *there should be a transmutation of the proprietary right and that the subject of the wakf should cease to be the property of the wâkif*

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afterwards followed in another case by the Allahabad High Court, has been disaffirmed by the Judicial Committee in *Baker Ali Khan* v *Anjuman Ara Begum* [1902], L. R , 30 I. A , 94 , s c , 7 Cal W. N., 465

The *wakf* of buildings and trees without the land is valid, so is the *wakf* of moveable property and chattels of all kinds which may be renewed from time to time, or which may be sold, and the proceeds invested in business The *wakf* of implements of husbandry and war, biers and shrouds, books, money, securities, stock, shares in Companies, etc, is lawful

What may be constituted as *wakf*.

Where money is dedicated it will be invested in commerce or business, and the proceeds applied to the benefit of the purposes for which the benefaction is created [1]

The dedication of a share in a property which is capable of partition is not open to the objection of confusion, (*mushâa*)

A dedication of *wakf* of property subject to a mortgage or in the possession of a lessee or tenant, is valid

The wakf of property subject to a mortgage is valid

When a property is dedicated which is subject to a mortgage, its income will be devoted to the discharge of the debt, and after it has been paid off, it will be applied to the purposes of the dedication

Under the Hanafi law, a *wakif* may lawfully make a dedication with the condition that the income of the property should be applied to his benefit or to the payment of his debts

Under the Shiah Law such a condition would be invalid

SECTION II

THE DIFFERENT KINDS OF *Wakfs*.

According to Mahommedan lawyers *wakfs* are of three kinds, *viz* -

Three kinds of *wakf*

1 See *Abu Sayid Khan* v *Bakar Ali* [1901], I L 24, All , 190 , *Sakina Khanum* v *Luddun Sahiba* (App from O D, No 114 of 1900 decided 10th June 1902) , In *Kulsum Bibee* v *Golam Hossein Cassim Ariff* [1905], 10 Cal W N , 499, the learned Judge has dissented from the above decisions, and has questioned the author's statement of the law on this subject (Mahommedan Law, Vol 1, pp 176-183) It is submitted, with profound respect, that the view taken in the case proceeds on a strained and mistaken construction of the authorities In Appendix X, I give briefly some reasons for adhering to the exposition of the law set forth here and in that work.

(1) For the affluent first, and after them for the indigent

(2) For the affluent and indigent equally,

(3) For the indigent exclusively

The first class of *wakfs* includes benefactions in favour of individuals

(1) A *wakf* or dedication may be made in favour of children unborn, contrary to the rule with regard to a *gift* When a *wakf* is in favour of the children of *A* and he has no children, the usufruct will be applied for the benefit of the poor, until children are born to him

In whose favour a *wakf* may be made

A *wakf* may be made in favour of—

(*a*) a Mussulman or a *Zimmi*,[1] but not in favour of an alien or *harbi* (an inhabitant of the *Dar-ul-Harb*, i e, an enemy),

(*b*) One's children and descendants, male and female, born or unborn,

(*c*) Similarly, other people's children and descendants.

(*d*) One's kindred, neighbours, dependants, servants, etc,

(*e*) Strangers,

In other words, any person, except an alien enemy, irrespective of age or sex, may be constituted the beneficiary of a *wakf*

Under the Hanafi Law *wakif* may be the first beneficiary

(*f*) Under the Hanafi Law, a *wakif* may constitute himself the first beneficiary of the trust, and if he does so, he can lawfully reserve the benefit for himself either wholly are partially

A provision for the payment of the *wakif's* debts is valid under the Hanafi Law

Shiah rules

Under the Shiah Law, the *wakif*, if he reserves for himself the governance of the trust, can take the allowance which he has fixed for the *mutwalli*, but he cannot derive nor reserve for himself any further benefit from the *wakf*.

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1 A non-Moslem fellow subject.

Again under the Shiah Law, the *mowkoof alaihim* or *cestuis qui trustent* must (1) be specified, and (2) the *wakf* must begin with an existent object.

Hanafi Law General principles

Where a *wakf* is made in favour of individuals, and no other purpose is mentioned, on the extinction of the persons for whom it is primarily created, it will enure to the benefit of the poor *who are the ultimate beneficiaries of all wakfs A wakf*, therefore, can never be avoided by the failure of the objects for which it is primarily created

Provisions for one's family a pious act

Under the Mussulman Law, without any difference, a provision for one's family is an act of piety, and consequently, a *wakf* constituting the *wakif's* own family or descendants the primary recipients of the benefaction is not only valid in law but extremely meritorious On failure of the dedicator's descendants the *wakf* will go to the poor /8 · 4

According to Abu Hanifa and Imam Mohammed, when a *wakf* is created in favour of objects liable to extinction, such as one's family or descendants, the ultimate and unfailing object must be distinctly mentioned

Abu Yusuf's doctrine the recognised rule

According to Imam Abu Yusuf, when a dedication is made with the word *wakf* or any of its synonyms, *it is not necessary to mention the ultimate object*, the law will presume it from the expression itself, and will, on failure of the objects designated, apply the *wakf* for the benefit of the poor

The doctrine of Imam Abu Yusuf is universally in force among the Hanafis The Bombay High Court seems to follow Imam Mohammed's view though contrary to the recognised rule among the Hanafis.[1]

In the Calcutta High Court, there is some divergence of opinion, though all the old cases point to the recognition of Abu Yusuf's doctrine.

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1 See *Amrat Lall* v *Shaik Hossain* [1887] I. L 11 Bom., 264

Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry

In *Abul Fata Mahomed Ishak* v *Russomoy Dhur Chowdhry*,[1] the Judicial Committee of the Privy Council lay down the following principle —That, under the Mahommedan Law, a perpetual family settlement expressly made as a *wakf* is not legal merely because there is an ultimate, but illusory, gift to the poor If this enunciation means that a *wakf* primarily in favour of one's descendant is not valid, then it must be respectfully submitted that the views expressed by their Lordships are opposed to the Mahommedan Law and the general *consensus* of Mahommedan nations 19 · 4 · 3[illegible]

Even according to the enunciation of their Lordships, where it is proved that a substantial portion of the income is devoted to or is likely to be spent in purposes which, according to the law or customs and usages of the Mahommedans, are pious or meritorious, or in the performance of ceremonies and the distribution of charities on occasions regarded as sacred, the dedication is valid.[2]

As a necessary corollary from the above proposition it follows, that when the *wakf* has appropriated a substantial portion of the income for the maintenance of the dependant members of his family, relatives and servants, either by periodical allowances or in the ordinary mode customary in Mahommedan households, the *wakf* would be lawful

Meer Mahomed Israil Khan v Sashti Churn Ghosh

In the case of *Meer Mahomed Israil Khan* v *Sashti Churn Ghosh*,[3] where the *wakf* was upheld, the *wâkif* set apart one-third of the income of the dedicated properties for the support of dependants, relatives, and servants, one-third for the preservation of the estate and the remaining one-third, as the allowance of the curator or *mutwalli*.

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1 [1894] L R 22 I A , 76 , s c I L 22 Cal 619 Similar views have been expressed in the case of *Fazlur Rahim Abu Ahmud* v *Mahomed Obedul Alim Abu Ahsan* [1903] I L 30 Cal. 666 *Mahommed Marawar Ali* v *Razia Bibi* [x] I L 27 All,, 320

2 *Phulchand* v *Akbar Yar Khan* [1896] I. L 19 All., 211.

3 [1892] I. L , 19 Cal , 412

Where the *wakfnamah* provided in the first instance for the support of the descendants and kindred of the grantor who might be in want and in need of support, and directed that the surplus of the income of the property dedicated should be applied to purposes regarded as "undoubtedly religious," the *wakf* has been held by the Allahabad High Court to be perfectly valid [1]. Under the Mahommedan Law, of course, there is no question as to the validity of such a *wakf*.

(2) The second class of *wakfs* consists of dedications in the benefit of which both the affluent and the indigent are equally entitled to participate, as mosques, *imambaras*, colleges, caravanserais, wells, roads, etc.

(3) The third class includes such *wakfs* as are exclusively for the indigent like poor-houses, *langarkhanas*, *etc.*

How the right of the wakif becomes extinguished in a place of worship

The right of a person in a building or place which he proposes to consecrate for a mosque, *idgah* or *mussalla* (prayer-ground) becomes extinguished *either upon the express declaration of the wâkif or by the performance of prayers in the place.* Prayers offered by a single person are sufficient.

In a cemetery.

So, in the case of a cemetery, the burial of one corpse is sufficient to divest the proprietary right, provided the owner has the intention of dedication.

Lands which are not expressly dedicated for a cemetery but are covered by graves are regarded as consecrated, and consequently inalienable and non-heritable. But when there are only one or two graves, the particular spots where the bodies are buried are regarded as sacred [2].

A *wakf* is lawful also for the purpose of performing the usual religious ceremonies over the tomb of a deceased person (*fâtihas*), or celebrating the anniversary of the deaths of holy personages or ancestors (*urs*), of spreading flowers and lighting lamps on the graves of relatives.

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1 *Deoki Prosad* v. *Inaitullah* [1892] I L., 14 All, 375.
2 *Mir Nur Ali* v *Mayidah and others* [1831], 5 Sel. Rep, 136.

SECTION III

WAKF IN FAVOUR OF *Khankahs*, ETC.

Dargahs are the shrines of saints and are consecrated grounds A *wakf* in favour of a *Dargah*, *Imambara*, or *Khánkah* is valid A *Khankah* is in the nature of a monastery or convent where religious devotees congregate or reside for religious instruction or spiritual communion

The *cypres* doctrine, well-known in English law, is applicable to all *wakfs* in the Mahommedan system Under the Mahommedan Law, a *wakf* can never fail for want of an object, for it is distinctly provided that when the primary object fails the *wakf* will be applied for the benefit of an object nearest in character to the first, *e g*, when a *wakf* is created for a mosque situated in a particular locality, which afterwards becomes deserted, the law provides that the proceeds of the *wakf* should be applied to a neighbouring mosque, similarly, if the *wakf* be in favour of a poor-house, caravanserai, cisterns, etc

The *cypres* doctrine in the Mahommedan system

Under the Hanafi Law, in the case of a *wakf* in favour of individuals, or of the *wakif*'s descendants generally, upon their extinction it will go to the poor whether they are mentioned or not

When a *wakf* is created in favour of one's children and their descendants, all the descendants of the *wakif* existing at any one time are equally entitled, unless there are words to indicate that the generations are to take successively. 20. 4. 30.

SECTION IV.

THE *Mutwalli*.

It is lawful for the *wakif* to reserve the *towliat* (the governance of the trust) for himself.[1] And where a *wakf* has been created, but the *wakif* has appointed no trustee or *mutwalli* for the

The *towliat*.

1 *Advocate General* v. *Fatima Sultani Begum* [1872] 9 Bom, H. C R, 19.

administration of the trust, nor has expressly reserved the *towliat* for himself, the office would nevertheless appertain to him *qua wâkif*

The powers of the Judge

He has the power of appointing a *mutwalli* during his lifetime whenever he likes Should he die without making any express appointment, the power devolves upon his executor In the absence of an executor, as a general rule, the Kazi or Judge has the power to nominate a *mutwalli*

The right of the beneficiaries to appoint a trustee

Where the *wakf* is in favour of an ascertainable body of people limited in number, the beneficiaries may elect a trustee Accordingly, if the devotees or congregation of a mosque appoint a *mutwalli*, it is valid

The *mutwalli* should be (1) major, and (2) possessed of understanding

Freedom and Islam are not necessary conditions

A woman may be a *mutwalli*

A woman may be appointed a *mutwalli*,[1] but if the officer has spiritual functions to perform which, as regards men, can only be performed by a man, women would not be eligible.[2]

For example, the curator of a *Dargah* or a *Khankah* is called a *sajjâda-nashin* (*sajjâda* means a prayer-mat, and *nashîn*, the person seated thereon) The *sajjâda-nashin* is a spiritual preceptor as well as the curator of the *Dargah* or *Khankah*, as the case may be A female cannot be appointed as a *sajjâda-nashîn*, while she can be appointed as a *mutwalli*

But when the spiritual and religious functions can be dissociated from the secular duties which may be discharged by proxy, a woman may lawfully hold the office of curator

The *wakif* cannot remove the *mutwalli*, whom he has once appointed, *unless he has reserved the power at the time of making the dedication*

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1 *Piran Bibi* v *Abdul Karim* [1891], I L. 19 Cal , 203 See also *Hyatee Khanum* v *Koolsoom Khanum* [1807], 1 Sel R , 214, 217

2 *Hussain Bibi* v *Hussain Sheriff* [1868], 4 Mad H C R , 23 , *Mujawar Ibram Bibi* v. *Mujawar Hossain Shariff* [1880], I L 3 Mad , 95 See also *Shah Imam Bukhsh* v. *Beebee Shahee* [1835], 6 Sel R , 22

The Kazi or Judge has the power of removing a *mutwalli* for breach of trust, even though the appropriator should have made it a condition that there should be no such power

The *mutwalli* cannot assign or transfer the office to any one, or appoint another *whilst in good health and able to discharge his duties unless his own powers are general*, that is, unless he was appointed a *mutwalli* without any reservation and in respect of every particular relating to the *wakf*.

The *mutwalli* cannot transfer his office unless his powers are general

In the absence of such general power he can appoint a successor only when dying or when incapacitated from discharging his duties[1] A *mutwalli* may, however, apply to the Court to relieve him of his office

Where there is no rule laid down in the *wakfnamah* as to the mode in which the appointment of a successor should be made, the *mutwalli* is authorised on his death-bed, or when incapacitated by old age from discharging his duties, to appoint a successor.

But may appoint a successor on his death-bed or when incapacitated

But where the *wâkif* has laid down a rule or made some provision regarding the succession of trustees, the *mutwalli* will have no power of acting contrary to such rule If the *wâkif* has declared that the office shall descend in the lineal male line in a particular family, none of the incumbents will have the power to change the course of descent Or, if the *wakif* has declared that after *A*, *B* should succeed to the office, *A* has no power to appoint *C* Nor can the Judge alter the succession.

So long as there is a relative of the *wâkif* in existence qualified to hold the office, a "stranger" should not be appointed *mutwalli*

The Calcutta High Court has held that when a *mutwalli* in failing health appoints a successor, his nomi-

1 See *Sheikh Amir Ally* v *Syed Wazir Hyder* [1905] 9 Cal. W N., 876. The *dictum* in *Wahid Ali* v *Ashraf Hossain* [1882] I L., 8 Cal., 732, must be read with the above qualification.

nation is not necessarily restricted to the founder's family.[1] In view, however, of the recognised rule of the Mahommedan Law, the view expressed must be considered applicable to the special facts of the case

Alienation of *wakf* property illegal

Alienation, temporary or absolute, by sale or mortgage of *wakf* property, even though purporting to be for the benefit of the endowment, unless made with the sanction of the Judge, previously obtained, is illegal according to the Mahommedan Law.

When there is no provision in the deed of dedication regarding the salary of the *mutwalli*, the Judge has to fix a proper remuneration having regard to what is customary; ordinarily however such remuneration should not exceed one-tenth of the proceeds of the trust estate. The application of this rule, however, is confined to such *mutwallis* as have no beneficial interest in the usufruct.[2]

A *mutwalli* cannot charge the *wakf* unless expressly authorised by the *wakif*

A *mutwalli* cannot contract debts for the *wakf* unless they are made in consequence of, or pursuant to, the directions given by the *wakif* Nor can he create any charge on the *wakf* estate, or incur liabilities, for which the *wakf* estate might be liable, unless such charge is created or debt is incurred under express powers given by the *wakif*.

A property devised by a Mahommedan to a Mahommedan trustee with the object of providing for certain Mahommedan religious duties cannot be taken out of the hands of that trustee and sold to a person of another religion so that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties.[3]

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1 *Sheikh Amir Ally* v. *Syed Wazir Hyder*, supra.
2 *Mohiuddin* v. *Sayiduddin* [1890], I L, 20 Cal. 810
3 *Kishen Chand Basawat* v. *Syed Nadir Hassain* [1887], L. R, 15 Ap. 1

SECTION V.

MISCELLANEOUS PRINCIPLES

If a person make a *wakf* for his children (*awlâd*) both males and females are included in its benefit When a *wakf* is created in favour of one's children and their descendants, all the descendants of the *wakif* existing at one time are entitled equally to the income unless there are words to indicate that the generations are to take successively.

If a man were to make a *wakf* for his descendants, without mentioning the order in which they should enjoy the income of the *wakf*, the near and the remote will take equally, in other words, the division will be *per capita*.

SECTION VI

RIGHT OF SUIT.

Where the *wakf* is of a public nature, every Mahommedan has an inherent right to maintain a suit, for the purpose of establishing the *wakf*, or his own right to a share in its benefits

The position of a *mutwalli* is like that of an executor The dealing of one of two *wasis* (executors), like the acts of one of two *mutwallis* is void, for the two *mutwallis* and the two executors are like one in certain matters

But where the *wakif* has associated another person with himself in the management of the trust, he can nevertheless act by himself.

Where there are several *mutwallis*, all of them, if possible, should be made plaintiffs , but if one or more of them should refuse, then he or they should be made defendant or defendants.

The right of the *cestui qui trust* to sue

A *cestui qui trust* cannot bring a suit without leave of the Judge, for the recovery of any property, which has been wasted or usurped, unless the *towliat* is in him also, in other words unless he is a trustee with a beneficial interest in the trust-estate, but he can sue the *mut-*

walli, if guilty of breach of trust, or establish his title to a share in the profits of the *wakf*.

When the existing *mutwallis* alienate *wakf* property in their charge, the persons, on whom the *towliat* or office of *mutwalli* would devolve on the death of the alienors, are entitled to maintain a suit to set aside such alienation and the *wakf* property to be restored to its original purpose [1].

When a suit is brought to set aside an alienation made to a stranger, such a suit by the worshipper at a mosque does not fall within section 539 of the Civil Procedure Code (Act XIV of 1882) [2] That section is only applicable where there is an alleged breach of trust created for a public, charitable, or religious purpose, and the direction of the Court is necessary for the administration of the trust, as against strangers section 539 does not apply

Section 539 of the Code applies both to contentious and non-contentious cases The interests required to enable a person to proceed under that section must be an existing one, and not a mere contingency, the mere possibility of an interest, or the mere possibility of succession to the managership of the properties concerning which the suit is brought is not sufficient to give a right to take action under section 539.[3]

When the dispute is merely one between two entirely private parties each claiming to exercise rights as *mutwallis* over *wakf* property, it does not come within the purview of section 539 of the Code of Civil Procedure and does not require the sanction of the Advocate-General to maintain the suit

The right of worship of each worshipper in a Mahommedan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers, and, therefore, non-compliance by a worshipper with the provisions of section 30 of the Code of Civil Procedure does not affect a suit for the removal of a trustee of a Mahomedan endowment.

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1 *Kazi Hassan* v *Saqun Balkrishna* [1905], I L, 24 Bom., 170, see also *Sajedurraza Chowduri* v *Gour Mohun Das* [1897], I L, 24 Cal., 418

2 S. 92 of Act V of 1908

3 *Mohiuddin* v. *Sayiduddin*, supra

SECTION VII

DIRECTIONS OF THE *Wakif*

Directions of the *Wâkif.*

The direction of the *wâkif*, if in themselves lawful, are to be carried out in the same ways as if they were enjoined by the law.

But, in certain matters, the Kâzi is vested with the discretion of varying or altering them For example, if a man were to make a dedication in favour of a particular object in a specified manner, the wishes of the donor will be carried out so long as the object exists, and upon its extinction, it will be devoted to the poor If the *wâkif*, however, were to have laid down that the *mutwallî* should not be removed even if found guilty of breach of trust, the Kazi would, nevertheless, have the power of removing the *mutwalli* on its being established that he had committed a breach of trust

Discretion of the Judge

So, also if a man were to provide for the distribution of alms in kind, the Kâzi may commute it into money-payments

The Kâzi is vested with the discretion of making such alterations in the management of the *wakf*, as might be for its benefit, and at the same time generally consistent with the wishes of the *wâkif*, for example, if a man were to provide that the *wakf* property should not be leased for more than a year, and it be found impossible to lease the land for so short a period, the Kâzi can authorise the *mutwalli* to grant a lease for a longer term.

CHAPTER III.

WILLS.

SECTION I.

GENERAL OBSERVATIONS

The meaning of *wasiat*

Wasiat means the act of conferring a right in the substance or the usufruct of a thing after death.

It may be consituted by the use of any expression that sufficiently indicates the intention of the testator. So long as it is apparent that the intention of the testator is to make a disposition operative on his death, it will be regarded as a *wasiat*

How a testamentary disposition may be effected

The devise may be either to the legatee beneficially or in trust for some purpose or object, and may be constituted, by saying, "I have bequeathed such a thing to such an one," or "I have bequeathed *towards* such an one," or *by any other word or words that convey the idea of a disposition dependent for its operation upon the death of the testator.*

A letter written by the testator containing directions as to the disposition of his property to take effect after his death has been held to constitute a valid will.[1]

Nuncupative will valid.

The Mahommedan Law does not insist that a will should be in writing, and a nuncupative will, if proved, is as valid as a testamentary disposition reduced to writing No particular form even of verbal declaration is necessary.[2]

1 *Mazhar Hussein* v *Bodha Bibi* [1898], I L., 21 All , 91
2 *Mahomed Altaf Ali Khan* v. *Ahmed Bukhsh* [1876], 25 W R 121.

Will may even be made by signs.

A will may be made by signs, as in the case of a dumb person who does not possess the faculty of speech, but who can express his meaning by signs. So also in the case of a person who is a *marîz*, that is, suffering from a mortal illness, and unable from weakness to speak.

The character of the disposition, whether it is a will or a disposition *inter vivos*, whether it operates *in præsenti* or *in futuro* as a *wasiat*, is dependent upon the intention of the testator.

A *wasiat* may be *conditional* or *contingent*

Where a devise is made dependent for its operation upon the happening of a contingency, if the contingency does not happen, it will not be given effect to

Section II.

The Capacity of Testators

As in the case of other dispositions, to make a valid will the testator must be—

(*a*) In the full possession of his senses at the time,

(*b*) *Sui juris.*[1]

(*c*) And must not be acting under compulsion (*jabr*) or under undue influence (*ikrâh*)[2]

An infant does not possess the capacity of making a disposition of his property by will. But if he or she were to confirm or ratify the same after attaining majority, it would become valid and operative *ab initio*

A bequest by a person who commits suicide made before he has done the act which puts an end to his life, is valid,[3] but not if it was made after such act[4]

As regards the subject of the bequest, it is not necessary that it should be in existence at the time of the will. So long as it exists at the testator's death, the disposition would be valid

1 See *ante*, p 98

2 When it is stated that freedom (*hurriyet*) is a necessary condition it means that a bondsman cannot make any disposition, *inter vivos* or testamentary.

3 *Mazhar Hussein* v *Bodha Bibi*, supra

4 *Ibid.*

SECTION III.

OBJECTS IN WHOSE FAVOUR A WASIAT MAY BE MADE.

According to all the schools, a bequest to any one of the heirs is not valid, without the consent of the others.[1]

Whether the person in whose favour the devise is made is an heir or not must be determined not at the time of the will but at the testator's death.

When the disposition is in favour of non-heirs or of a pious or charitable purpose it is valid and operative in respect of one-third of the testator's estate without the assent of the heirs and in respect of more than one-third *with their consent.*

A grandson whose father has died in the lifetime of the testator is a non-heir when he co-exists with a son, and a bequest to him not exceeding a third is valid.

Under the Shiah Law, such consent, in the case of a legacy to an heir or a non-heir, may be given either *before* the testator's death or *after.* Under the Hanafi Law, it must be given *after* his death.

Such consent may be given either expressly or may be indicated by unequivocal conduct, such as signing the will with a full understanding of its meaning, without outside pressure or undue influence, or allowing the devisee to enter into possession without objection.[2]

When a bequest is made in favour of two persons, which in the aggregate exceeds one-third of the testator's estate, and the heirs do not consent, there must be a proportionate reduction.

When a bequest to a non-heir exceeds one-third of the testator's estate, and some of the heirs consent, whilst others do not, the excess, like a bequest to an heir, will come out of the shares of the consenting heirs

A bequest may validly be constituted in favour of specified persons without distinction of sex or creed, or in

1 See *Bafatun* v *Belasi Khanum* [1903], I L, 30 Cal, 683; *Khajooroonissa* v *Roushan Jehan* [1876], L. R, 3 I. A, 291; s c, I. L., 2 Cal., 184

2 *Doulatram* v. *Abdul Kayum* [1902], I. L, 26 Bom, 497; *Sharifa Bibi* v *Gulam Mahomed Dastagir Khan* [1892], I L., 16 Mad., 43.

favour of any object recognised as lawful in the Mahommedan system.

But in order to be entitled to the bequest the legatee or legatees must be either actually or presumptively in existence *at the time of the testator's death.*

Thus a disposition in favour of an infant *en ventre sa mere* is valid according to all the schools.

A child born within six months from the testator's death is presumed to be in existence at the time [1]

A *wasiat* is lawful in favour of the following, among other, objects —

(*a*) for the children of one's heir, the kindred, neighbours, etc ,

(*b*) for the poor generally or a particular body of them ,

(*c*) for the holy shrine of the *Kaaba* or any mosque ,

(*d*) for Almighty God, or to spend in the way of God (*sabil-illah*) ,

(*e*) for *wujuh-ul-khair* or *wujuh-ul-birr* (good or charitable purposes) generally ,

(*f*) "to fight in the way of the Lord," *i e*, holy warfare ,

(*g*) for the performance of religious ceremonies over the tombs of deceased persons, celebration of the *moharram*, &c.[2]

(*h*) for the emancipation of slaves ,

(*i*) for the payment of one's debts ,

(*j*) for feeding the poor.

A *wasiat,* however, in favour of a person who intentionally causes the death of the testator is unlawful according to all the schools

Section IV.

Revocation.

A will is essentially revocable in its nature. It may be revoked at any time, even during the last illness of the testator

Revocation may be either express or implied, made either directly or indirectly It is express when the testator

1 See *ante*, p 57.

2 See the *wasiat namah* (or will) in the case of *Bishen Chand Basawut* v. *Syed Nabir Hossein*, supra.

revokes the *wasiat* in express terms It is implied or indirect when the testator indicates by his conduct or his subsequent acts that he does not intend to maintain the legacy

But a Mahommedan will is not revoked by the marriage of the testator subsequent to its execution

Capability of revocation

As regards the mode and capability of revocation, bequests are usually divided into four categories —the first can be revoked either in express terms or by implication, *i e*, by conduct, the second kind may be revoked only by express words, the third, by an overt act only, and the fourth cannot be revoked at all

The first kind of bequests consists of specific legacies which can be revoked by an express declaration of the testator to that effect, or by his selling or transferring the subject of the bequest in such a manner as to place it beyond his power to cancel or reverse the transfer, or by bequeathing it by a subsequent will to somebody else

The second kind of bequest is, where the testator bequeaths a third or fourth share of his property to some person In such a case, the legatee is entitled to that particular share in any property, which might be left by the testator at the time of his death, and consequently, unless a revocation of the bequest is made in express terms, the legacy will take effect

The third kind of bequest is qualified emancipation which can be withdrawn only by express overt act

The fourth kind of *wasiat* which cannot be cancelled either expressly or impliedly, is absolute emancipation

Acceptance of a legacy.

According to the Shiah doctrines, an acceptance of a legacy before the death of the testator is lawful

According to the Hanafi Law, an acceptance before the death of the testator is of no effect

A bequest may be accepted either expressly or by implication [1] If the legatee die before expressing either rejection or acceptance of the bequest, he would be presumed to

1 See *Doulatram* v *Abdul Kayum*, supra.

have accepted the same, and his heirs would inherit the legacy.

SECTION V.

EXECUTORS.

Who may be appointed executors.

The testator has the power of confiding the execution of his last wishes to whomsoever he likes, and, subject to certain restrictions, the executorship may be entrusted either to *a man or a woman, a stranger or a relative.* And though a testamentary disposition may be invalid, the appointment of the executor, so far as the guardianship of the minor children and their education are concerned, would be valid

The appointment may be either *limited to a special purpose or may be general*

The appointment of an infant under the age of puberty or of an insane person, whether permanently so or with lucid intervals, is unlawful But a woman, a blind person, or "one who has even undergone the specific punishment for slander," may lawfully be appointed an executor.

A non-Moslem fellow subject may be appointed an executor

According to all the schools, a Moslem cannot appoint a *harbi*, *i e*, a non-Moslem subject of a hostile power, to be his executor whether such a non-Moslem be *mustámin*[1] or not. Such an appointment, if made, is liable to be cancelled by the Kâzi The appointment of a *Zimmi i. e*, a non-Moslem fellow-subject, is lawful, but the Judge may, in his discretion, set it aside

In *Moohummud Ameenoodeen and another* v. *Moohummud Kubeeroodeen*,[2] a Mussulman female had bequeathed the whole of her property to a stranger, and had appointed a Hindu as the executor to her will Upon a reference by the Judges of the Sudder Court to the Kâzi-ul-Kuzzât and Muftis of the Court, they pronounced, (*a*) if the testatrix left no heirs, she was at liberty to bequeath the whole of her property, (*b*) if she had heirs, the bequest of

1 A non-Moslem subject of a hostile state who has entered the Islamic territories under a guarantee of safety

2 [1825] 4 Sel. Reports, 49, see also *Henry Jarlach* v *Zuhoorunnissa* [1828], *ibid*, 303.

more than one-third would depend on the consent of such heirs, and (*c*) though the appointment of other than a Moslem as executor to the will of a Moslem is lawful, yet the Kâzi might remove him, but that till regularly displaced all his acts are valid.[1]

The legal position of the executor

The executor is termed *wasî* and *musî-ilehí*, and is defined to be an *amin* or trustee appointed by the testator to superintend, protect, and take care of his property and children after his death. He is also his *kâim-mukâm* or personal representative.

The acts of one executor singly, like the acts of any one *mutwalli*, will not be *bâtil* (void) in the following cases, *viz*, in the purchase of shrouds for the testator, in the payment of his funeral expenses, in the litigation of his rights, in the purchase of necessaries for his children, in the acceptance of gifts made to the testator, in returning deposits (with the testator), and in the payment of specified legacies

If there are co-trustees of lands, any one of them may receive the rents though all must join in a conveyance.

Section VI

The Powers of the Executors

Probate and Administration Act

Generally speaking the powers of executors in British India are now regulated by the provisions of the Probate and Administration Act (V of 1881), but as a Mahommedan executor is not bound to take out probate of the will in order to entitle him to act, it is important to know the general rules of the Mahommedan Law on the subject.

Rules of the Mahommedan Law.

When the heirs of the testator are minors the powers of the executor are, within certain limits, absolute. In case of necessity, he has the power of selling the property and investing the proceeds in other and more profitable kinds of

1 See also *Jehan Khan* v. *Mandley* [1868], B. L. R., S N., 16, s c. 19 W. R, 185.

property, after discharging any debts of the testator or debts incurred in the maintenance of his infant children. The sale, however, must be for an adequate consideration, "such as is reasonable among people of business" The executor cannot sell the property to himself or to any relative of his, whose evidence under the Mahommedan Law would be inadmissible against him He can enter into a partition with the co-sharers of the deceased or the legatee, if any, in respect of the minor's shares in all kinds of property, both moveable and immoveable, "even with a slight inadequacy in the terms *ghubn-î-yasîr*)" *A partition, however, where the inadequacy is manifest or glaring*, i e., *great, is ineffective*

When all the heirs are minors, the allotment by the executor of the legatee's share, and the retention by him of the residue for the heirs, is valid and effective. And in case any portion of their share is lost in the hands of the executor, the minors have no right to be recouped, either by the legatee, or by the executor, *unless it is occasioned by his wilful neglect or default.*

But when some of the heirs are adult and absent, the executor can lawfully enter into a partition on their behalf with the legatee in everything except *akar* or what is immoveable, and to hold the shares of the minors for them If all the heirs are adult, or some of them are adult and present, any partition made by him is void against those heirs who are adult, both with respect to moveable and immoveable property But if the heirs, though *sui juris*, are absent, the partition effected by the executor is inoperative, so far as the immoveable property is concerned , in other words, if the heirs are adult but not present, the partition of moveable property alone made by the executor with the legatee is valid.

When a person has appointed two executors, and one of them dies, appointing the other as his executor, the surviving executor can act for the original testator as the sole executor.

Under the Hanafî Law an executor is entitled to

nominate a successor to carry out the purposes of the will under which he himself was appointed an executor.[1]

The grant of probate (under the Indian Probate and Administration Act of 1881), in respect of a Mahommedan will is to make the executor after he has realized the estate, a bare trustee for the heirs as to two-thirds and an active trustee as to one-third for the purposes of the will.[2]

1 See *Hafeez ur-Rahman* v *Khadim Hossain* [1871], 4 N.-W. Rep., 106

2 *Mirza Kurratulain Bahadur* v *Nawab Nuzhatuddowla Abbas Hossein Khan* [1905], 9 Cal W N, 938

CHAPTER IV.

THE LAW OF PRE-EMPTION.

SECTION I

GENERAL OBSERVATIONS

THE right of pre-emption (*shufa*) is the right possessed by one person to purchase a property in preference to another, and, in the Mahommedan system, is based upon considerations of convenience and the avoidance of the presence of a stranger amongst co-sharers or neighbours

Right of pre-emption where enforceable.

The Sunni Hanafi Law of pre-emption was introduced in this country with the Mahommedan Government, and in certain places it has become a part of the *lex loci*, for example, in Behar, parts of the Punjab and the North-Western Provinces, both Hindus and Mahommedans are entitled to claim the right of pre-emption In other places, it depends upon custom Generally speaking, in lower Bengal the right is confined to Mahommedans, but in some places Hindus and Christians have exercised the right of pre-emption. Under the Mahommedan Law itself, the right of pre-emption may be claimed by any person, irrespective of his or her creed

Applicable to what property.

The right of pre-emption applies only to immoveable property, whether held jointly or separately and whether capable of partition or not, and comes into operation when the property, in respect of which the right is claimed, is *transferred for a consideration*

It does not therefore take effect with regard to property which has devolved by right of inheritance or which has been received in gift without any consideration or as a legacy. Nor does it arise in respect of property given

in lieu of services rendered or to be rendered, or by way of a reward or as a dower to a wife

The right of pre-emption also does not accrue when a property is conveyed by the husband to the wife in discharge of her dower-debt.[1] The reason of this rule is obvious for a husband conveying to the wife does not thereby introduce a stranger among co-sharers and neighbours. Where a property is conveyed to another by virtue of a compromise of a claim the right of pre-emption accrues.

In the case of an assignment by *Hiba-ba-shart-ul-ewaz*, it takes effect only after the settled consideration has been paid by the transferee.

It accrues only when a complete transfer of the right, title, and interest of the transferor has taken place and not where there is a mere agreement to sell or transfer, or where the transfer is only fictitious or the sale is invalid.

The question whether the transaction amounts to a complete transfer will be determined on the basis of the Mahommedan Law and not of the Transfer of Property Act.[2]

As a corollary to the above principle it follows that no right of pre-emption arises in respect of property leased in perpetuity[3] or mortgaged even though by a conditional sale until foreclosure of the equity of redemption.[4]

Section II.

Persons entitled to Claim the Right of Pre-emption.

Under the Sunni (Hanafi) Law three classes of persons are entitled to the right of pre-emption not simultaneously but in succession to each other —

1. Persons who are partners in the substance of the thing, these are called *shafi-i-sharik*

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1 The decision in *Fida Ali* v. *Muzaffar Ali* [1882], I L., 5 All, 65, does not seem to be correct

2 *Najm-un- nissa.* v *Ajaib Ali Khan* [1900], I. L., 22 All., 343; *Begam* v *Muhammad Yakub* [1894], I. L, 16 All., 344.

3 *Baboo Ram Golam Singh* v. *Nursing Sahoy* [1875], 25 W. R., 43; *Dewanatullah* v. *Kazemmolla* [1887], I L., 15 Cal, 184

4 *Begam* v *Mahammad Yakub*, supra; *Gurdial Munder* v. *Teknarayen Singh* [1865], B. L. R Supp. Vol., 166; s. c., 2 W. R, 215.

Three classes of persons entitled to pre-emption.

2. Persons who have a right of easement in respect of the property which forms the subject of the sale, or to use the language of the Arabian lawyers, are "sharers in the appendages," these are called *shafî-i-khalît*

3. Persons entitled by vicinage, in other words, neighbours, whose property is contiguous to the subject of the sale, these are called *shafî-i-jâr*

Thus, one who has actually a share in the property has a stronger claim than a person who has a mere easement over it, whilst the latter has a superior right to a person claiming on the ground of vicinage or neighbourhood.[1]

Right based on vicinage not applicable to large estates

But when a person preferentially entitled disclaims or abandons his right the person next in order can assert his claim

A co-sharer has a right of pre-emption in large estates but a neighbour's right has been held to extend only to houses, gardens and small plots of land.[2]

Under the Shiah Law, co-sharers in the property, that is *shaji-i-shârik* alone, are entitled to the right of pre-emption, but as the Sunni Hanafî Law of Pre-emption is the law in force in this country either territorially or by custom, a Sunni would be entitled to pre-empt on the basis of a right of easement or vicinage when the vendor is a Shiah.[3] The same rule would apply if the vendor is a Sunni. The Allahabad High Court, however, has held that when both the vendor and the vendee are Sunnis, a pre-emptor belonging to the Shiah sect claiming on the ground of vicinage has no right of pre-emption.[4]

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1 *Golam Ali Khan* v. *Agurjeet Roy* [1872], 17 W R, 343, *Chand Khan* v *Naimat Khan* [1869], 3 B. L R 296; *Ranchoddas* v *Jugaldas* [1899], I L 24 Bom, 414, *Karim* v. *Prio Lal Bose* [1905], I. L 28 All., 127, I. L, 31 All., 519

2 *Mahammed Hossein* v *Mohsin Ali* [1870], 6 B L R, A C., 41; s c. 14 W. R, F. B. *Shaik Karim Bukhsh* v. *Karim-ud-din Ahmed* [1874,] 6 N. W Reps, 377, *Abdul Rahim Khan* v. *Kharag Singh* [1892] L L 15 All., 104.

3 *Jugdeo Sing* v. *Kazi Syed Mahammed Afzal* [1905,] 9 Cal., W. N, 826.

4 *Kurban Hossein* v. *Chote* [1899], I. L 22 All., 102.

SECTION III.

CONDITIONS ON WHICH THE RIGHT OF PRE-EMPTION DEPENDS

Formalities essential to maintain a claim of pre-emption

There are two essential formalities the performance of both of which is a condition precedent to enable a person to claim the right of pre-emption [1]

(1) A person, who intends to advance a claim based on the right of pre-emption in respect of property which has been sold to another, must, immediately on receiving information of the sale, express in explicit terms his intention to claim the property *The intention must be formulated in the shape of a demand* No express formula is necessary so long as the assertion of the right, or what is called a demand, is expressed in unequivocal language, this is called *talab-i-mowasibat* or *immediate demand* [2]

Talab i mowasibat

In making this demand there must be no delay on the part of the pre-emptor It must follow immediately upon the receipt of the information Any delay in the performance of this formality would defeat the right of pre-emption [3] It is not necessary, however, that this demand should be made in the presence of witnesses [4]

(2) The second condition is that the pre-emptor should, with as little delay as possible under the circumstances, repeat before witnesses his demand (*a*) *either on the premises in dispute, or* (*b*) *in the presence of the vendor or* (*c*) *the vendee, invoking them to bear testimony to the fact* [5] This formality is called *talab-i-ishtesh-had* or *demand by invocation of witnesses*

As the right of pre-emption is *strictissimi juris*, failure to perform the "demands" in accordance with the requirements of the law will defeat the claim.

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1 *Jadu Sing* v *Rajkumar* [1870], 4 B L R, A C, 171

2 *Ibid* See also *Prokas Sing* v *Jogeswar Sing* [1868], 2 B L. R, A C, 12; and *Jugdeo Singh* v *Kazi Sayed Mahomed Afzal*, supra

3 *Ali Muhammad* v *Taj Muhammad* [1876], I L, 1 All., 283; *Jarfan Khan* v *Jabbar Meah* [1884], I. L, 10 Cal, 383

4 *Jadu Sing* v *Rajkumar*, supra

5 *Mubarek Husain* v. *Kaniz Banu* [1904], I. L, 27 All, 161, *Ganga Prasad* v *Ayudhia Prasad* [1905], I. L, 28 All. 24

In order to entitle the pre-emptor to perform the second demand in the presence of the vendee it is not necessary that the latter should be in possession of the property in respect of which the right is claimed.[1]

The Courts in India have held that at the time of making this second demand the pre-emptor should distinctly state that he has already made the *talab-i-mowâsibat*.[2]

It has also been held that the personal performance of the *talab-i-ishtesh-hâd* depends on the claimant's ability to perform it. He may do it by means of a letter or a messenger, or may depute an agent if he is at a distance and cannot attend personally.[3]

The pre-emptor must offer to pay the price that has been paid by the vendee, or, if he considers the consideration alleged as not real, must express his willingness to take the property for the actual price paid for it.[4] But he is not required to tender the price at the performance of either ceremony

Claimant must pay for *interim* improvements unless detachable

The claimant by virtue of the right of pre-emption is bound to pay for any improvement effected by the purchaser, unless the improvements are detachable In case of deterioration in the hands of the purchaser, the pre-emptor is entitled to a deduction, unless the deterioration has taken place without the instrumentality of the purchaser, in which case the pre-emptor must pay the full value

Where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption

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1 *Ali Muhammad Khan* v *Muhammad Said Husain* [1896], I L, 18 All, 309

For what is a good demand on the premises, see *Kulsum Bibi* v *Faqir Muhammad Khan* [1896] I L, 18 All, 298

2 *Rujjub Ali Chopdar* v. *Chandi Churn Bhaddra* [1890], I L, 17 Cal, 543, *Mubarak Hossain* v. *Kaniz Banu* [1904], I L, 27 All., 160, *Abbasi Begum* v *Afzal Husain* [1898], I L, 20 All, 357

3 *Syed Wajid Ali Khan* v. *Lalla Hanuman Prasad* [1869], 4 B L R, A. C., 139, s c, 12 W. R., 484; *Mussamut Ojheeoonissa Begum* v *Sheikh Rustum Ali* W R, 1864, 219; *Imamuddin* v *Shah Jan Bibi* [1870], 6 B L. R, 167 note; *Ali Muhammad Khan* v *Muhammad Said Husain*, supra, *Abadi Begam* v. *Inam Begum* [1877], I L., 1 All., 521

4 *Lajja Prasad* v. *Debi Prasad* [1880], I L., 3 All., 236; *Karim Bakhsh* v *Khuda Bakhsh* [1894], I. L., 16 All., 247.

is only entitled to a certain portion of the property in respect of which he claims pre-emption and not to the whole of it, he is not bound to frame his suit for the whole of the property sold, but only for so much as he would be entitled to, having regard to the claims of the other pre-emptors

Where a pre-emptor sues for possession by right of pre-emption of certain property sold by one and the same sale-deed, claiming as to one portion of the property under the Mahommedan Law, and as to another under the *Wajib-ul-arz*, and it is found that he has by his own acts or omissions disentitled himself from claiming that portion of the property to which the Mahommedan Law applied, he is not entitled to pre-emption in respect of any portion of the property covered by the deed of sale[1].

SECTION IV.

MISCELLANEOUS PRINCIPLES

Where the claim to pre-emption is based neither on custom nor special agreement, the British Indian Courts have held that in order to assert the right, the vendor and claimant must both be subject to the Mahommedan Law[2].

The Calcutta High Court has introduced a further qualification It has held that the vendee should also be a Mahommedan,[3] which destroys the whole policy of the Mahommedan Law The Allahabad High Court, on the contrary, has laid down, it is submitted rightly, that in order to maintain the right, *it is not necessary that the vendee should be a Mahommedan*[4]. It holds that it would not be equitable that persons who were not Mahommedans, but who had dealt with Mahommedans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Mahommedan

The vendee need not be a Mahommedan

1 *Mujib ullah* v. *Umed Bibi* [1898], I L , 21 All , 119

2 *Dwarka Das* v *Hussain Bakhsh* [1878], I. L , 1 All , 564 , *Poorno Singh* v *Hurry Churn Surmah* [1872], 19 B L R , A. C , 117.

3 *Sheik Kudratulla* v *Mohini Mohan Shaha* [1869], 4 B. L R., A. C , 134

4 *Brymohan* v. *Abul Hassan Khan* [1885], I L., 7 All., 775.

Law, be permitted to evade those conditions and obligations.

When a plurality of persons belonging to the same category are entitled to the privilege of pre-emption, their rights are equal without reference to the extent of their shares.[1] *E. G.*, if *A*, *B* and *C* are co-sharers in a property *A's* share being one-third, *B's* being half, and *C's* being one-sixth, and *A* sells his share to *D*, *B* and *C* will become entitled to *A's* share in equal moieties

Rights of co-sharers in sales by sharers

A Full Bench of the Calcutta High Court has held that when one co-sharer conveys his share to another co-sharer, no other co-sharer, if any, can have a right of pre-emption, the right of all being equal, and the reason on which the right is founded being, therefore, absent.[2]

The Allahabad High Court has taken a different view and held that when there are more than two co-sharers and one sells his share to another, the remaining co-sharers are entitled to take the share sold in equal parts with the vendee co-sharer.[3]

For example, if there are four co-sharers *A*, *B*, *C* and *D*, and *A* sells his share to *B*, *C* and *D* would be entitled respectively to one-third of that share

Rule of the Mahommedan Law.

This view is undoubtedly in conformity with the enunciations of the Mahommedan jurists The principle is based on the following ground. As all the pre-emptors have equal rights against a stranger, their rights are the same *inter se*, and it would be unfair to give perference to one sharer over the others And any one pre-emptor may pre-empt in respect of his specific share.[4]

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1 *Moharaj Singh* v. *Lalla Bheechuk Lall* [1865], 3 W R, 71 In the case of *Abbas Ali* v *Maya Ram* [1888], I L, 12 All, 229, a Division Bench of the Allahabad High Court held that, under the Shiah Law, no right of pre emption exists in the case of property owned by more than two co sharers This view is opposed to two other decisions of the same Court, and its correctness is open to question firstly, on the ground that the Sunni Hanafi Law furnishes the guiding rule in this country in cases of pre emption, and, secondly, that the Shiah Law is by no means as explicit as has been assumed in this case.

2 *Lalla Nowbut Lall* v *Lalla Jewan Lall* [1878], I L, 4 Cal, 831

3 *Amir Hasan* v *Rahim Bakhsh* [1897], I L., 19 All, 466.

4 *Abdulla* v. *Amanatullah* [1899], I L., 21 All, 292

But both Courts are agreed that where the co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt in respect of the whole of the property sold, but it is not obligatory on him to impeach the sale so far as the co-sharer vendee is concerned.[1]

Relinquishment of the right

The right of pre-emption is lost by the acquiescence of the claimant in the sale. For example, when he has agreed to purchase[2], or take a lease of the property from the vendor, it amounts to an abandonment What constitutes acquiescence is a question of fact Mere offer to take the property from the vendor paying him the sale-price with a view to avoid litigation has been held not to amount to acquiescence or waiver [3]

Where the right has been relinquished upon misinformation of the amount or the kind of price, or of the purchaser, or of the property sold, the pre-emptor can assert the right on being informed of the true facts [4].

Nor does relinquishment in favour of one operate in favour of another For example, if the pre-emptor on learning that A is the purchaser waived his right, he can on subsequently learning that the purchaser is in reality B, assert his title

When the pre-emptor has different rights of pre-emption, the extinction of one does not affect the other , and, therefore, when he is both a partner and a neighbour, and he sells his share on which his right in the former capacity is founded, he may still assert his claim on the ground of neighbourhood [5]

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1 *Manna Singh* v *Ramadhin Singh* [1881], I L , 4 All , 252 , *Harjas* v *Kanhya* [1884], I L , 7 All , 118 *Saligram Sing* v. *Raghubar Dyal* [1887], I L , 15 Cal., 224

2 See *Habib un nissa* v *Barkat Ali* [1886], I L , 8 All , 275 Comp *Toral Komhar* v *Achhee* [1872], 9 B L R , 253, S C 18 W R , 401, where the partner was held to be estopped

3 *Muhammad Nasir-ud din* v. *Abdul Hassan* [1894], I L , 16 All 300 , *Muhammad Yunus Khan* v. *Muhammad Yusuf* [1897], I L , 19 All , 334

4 Comp *Abadi Begam* v *Inam Begam* [1877], I L , 1 All , 521

5 In two cases the Calcutta High Court has held that where a plaintiff sought to enforce a right of pre-emption upon the ground of partnership, he could not obtain a decree on the ground of vicinage ,

Right of pre-emption, a personal right.

The right of pre-emption is a personal right, and does not survive to the pre-emptor's heirs Of course if they are themselves entitled to claim the right, they stand on a different footing

When the pre-emptor dies after making the necessary demands, but before he has taken over the property, or before he has obtained from the Court a decree therefor, the right falls to the ground[1] But it is not rendered void by the death of the purchaser, and the pre-emptor can, therefore, assert his right and take the property from his heirs

Loss of right

Where the pre-emptor brings an action to assert his right and it is found that he had, before suit, transferred to another the property on which his right was founded, his action must fall to the ground[2] In order to obtain relief his right must be subsisting at the time of the decree[3] But to destroy the right the alienation must be absolute and not partial

The pre-emptor cannot transfer *his right of pre-emption* before decree,[4] although he may convey the property sued for after decree[5]

Pre-emptor must have proprietary interest

To entitle a person to claim the right of pre-emption, the *milkiat* or proprietary interest in the property on which he bases his right must be in him, but it is not necessary he should be in actual possession of it[6]

Thus a tenant[7] or a mortgagee or a mere *benamidar* is not entitled to pre-empt on any of the grounds recognised by law

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Kunja Behari Lal v *Gudhari Lal* [1868], 1 B L R, S N, 12, s c, 10 W R, 189, *Shiu Suhai Mullick* v *Hari Suhai Sing* [1869], 3 B. L R, App. 142 But that is different from the superior right becoming extinguished by operation of law

1 *Muhammed Husain* v. *Niamat un nissa* [1897], I L,, 20 All, 88

2 *Janki Pershad* v *Ishar Das* [1899], I L, 21 All, 374

3 *Ram Gopal* v *Piari Lall* [1897], I L, 21 All, 441

4 *Rajjo* v *Lalman* [1882], I L,, 5 All, 180

5 *Ram Sahai* v *Gaya* [1884], I L, 7 All, 107

6 *Sakina Bibi* v *Amiran* [1888], I L, 10 All, 472 Comp *Beni Shankar Shelhat* v *Mahpal Bahadur Singh* [1887], I L, 9 All, 480.

7 *Gooman Singh* v *Tripool Singh* [1867], 8 W. R, 437.

Hindu widow.

A Hindu widow, however, holding a life-estate and not in possession of land in lieu of maintenance, represents the full estate, and her possession carries with it the right to pre-empt.[1]

Right of pre-emption under the *wajib ul arz*

A right of pre-emption based on the village settlement record or *wajib-ul-arz* in the North-Western Provinces is not in all respects analogous to the pre-emptional right under the Mahommedan Law It has been held by the Allahabad High Court that when there are several co-sharers in a village and one of them sells his share or part of his share to another co-sharer and a stranger, under one and the same deed of sale, if the interest conveyed to the stranger can be separated from that conveyed to the co-sharer, the remaining co-sharers would be entitled to claim the stranger's interest Otherwise they would be entitled to succeed against both vendees[2]

When the sale-deed covers two properties in respect of one of which only the claimant has a right of pre-emption he is entitled to sue for that alone

Pre-emptor cannot divide the property sold.

If his right extends to the entire subject-matter of the particular transaction, he cannot split it up so as to take one part of the property sold and reject the other part He must abide by the bargain as a whole[3]

But where a property is purchased by several persons in specified shares the pre-emptor may take the whole or the portion of any of them

Device to defeat the right

One of the devices by which the right of pre-emption may be defeated is to exclude a piece of property, however small, contiguous to that of the pre-emptor, so as to separate his property from the property sold.

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1 *Muhammad Yusuf Ali Khan* v. *Dal Kuar* [1897], I. L., 20 All., 148.

2 *Ram Nath* v *Badri Narain* [1896], I L., 19 All., 148, *Sheobharos Rai* v *Juach Rai* [1886], I L., 8 All., 462.

3 *Durga Prasad* v. *Munsi* [1884], 1 L., 6 All., 423; *Amir Hassan* v. *Rahim Bakhsh* [1897], I. L., 19 All, 466

Limitation

The period of limitation for a suit to enforce a right of pre-emption is provided for in Art 10, Schedule II of the Indian Limitation Act (XV of 1877) 12 4. 5 0.

Where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act (IV of 1882) the right to sue for pre-emption accrues, not from the date fixed in the decree under section 86, as the date upon which payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under section 87 of the said Act [1]

1 *Batul Begum* v *Mansur Ali Khan* [1898], I L 20 All, 315, *Anwar ul Haq* v. *Jwala Prasad* ibid, 358, *Raham Ilahi Khan* v *Ghasita*, ibid, 375, Right of suit, I L, 32 All, 340

CHAPTER V [1]

SALE

SECTION I

GENERAL OBSERVATIONS

Definition of sale (*Bai*)

A *Bai* or sale is the voluntary transfer of some specific property by one person to another for some definite consideration.

It is not necessary, however, that the property should be in existence at the time of the contract So long as it is forthcoming or found to be in existence at the time when the contract is to be performed, the transfer is valid Barter and exchange are governed by the same rules as the transfer of property for money or tokens of value

Different kinds of sale

A sale may be effectuated either immediately at the time of the contract by mutual delivery of the property and the consideration, or may be postponed for completion to a future time The first kind of sale comes under the head of *Bai sirf* A *Bai-sirf* is defined as "a pure sale" in which the articles opposed in exchange to each other are both representatives of price This is termed *sirf*, "because *sirf* means a removal, and in this mode of sale it is necessary to remove the articles opposed to each other in exchange from the hand of each of the parties, respectively, into those of the other"

The second kind is generally called *sullim*, which is defined to mean "a contract of sale, causing an immediate payment of the price, and admitting a delay in the delivery of the wares"

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1 I have added this Chapter as it is included in the Law Course of the Calcutta University, though, as a matter of fact, the principles of the Mahommedan Law applicable to Sales have been practically abrogated by the Contract Act and the Transfer of Property Act.

Sales are either (*a*) absolute or (*b*) conditional, (*c*) imperfect or (*d*) void.

(*a*) An absolute sale is that which takes effect immediately

(*b*) A conditional sale is one contracted by an agent for his principal and depends on the ratification of the latter, or, where one of the parties is a minor, on the consent of his guardian

(*c*) An imperfect sale is an agreement for sale, which takes effect on the delivery of the property sold and the consideration respectively.

(*d*) A void sale is one where there is no legal consideration

The consideration for a sale may consist of anything which possesses a value in the eye of the law duly agreed upon between the parties But it must be fixed either at the time or be capable of determination

The consideration

Sale is contracted by declaration and acceptance, expressed in any language calculated to convey the meaning of the parties, by word of mouth or by letter, or by means of messengers

An offer made by the purchaser cannot be restricted by the seller to any particular portion of the property regarding which the offer is made.

Proposal and acceptance absolutely expressed render the sale binding, but if a proposal is not accepted within the stipulated period, it falls to the ground.

Proposal of acceptance

Misrepresentation as to the description or quality of the goods renders the contract of sale void.

The parties to a contract of sale must understand the nature of the transaction A lunatic may enter into a contract of sale in his lucid moments. So may a minor with the consent of his guardian.

A sale may be transacted by an agent acting on behalf of both vendor and vendee

It is essential to the validity of every contract of sale that the subject-matter thereof, like the consideration,

should be sufficiently determinate, and there must be no vagueness, or uncertainty in the terms.

Section II.

Option in Sales.

Reservation of an option

Both the vendor and the vendee may reserve an option for the rescission of the contract, but this option must be exercised within three days

Acceptance on the part of the person reserving the option will complete the contract

A condition to the effect that, if in the course of three days the purchaser does not pay the price the sale shall be null and void, is lawful

When the option is reserved by the vendor, the property remains in him, but when it is reserved by the vendee, and the property is made over to him and is lost or injured in his hands, he is responsible for the *price*

But where the option was reserved by the vendor, the purchaser would be responsible for the *proper value* only

A purchaser may reject an article upon inspection after purchase, although before seeing it he should have signified his satisfaction

If a person look at the front of a house, and then purchase it, he has no option of inspection, although he should not have seen the apartments, and so also if a person view the back of a house or the trees of a garden from without

A purchaser discovering a defect in an article purchased, is at liberty to return it to the seller, unless he was aware of the defect beforehand

When the payment is deferred to a future period, the time must be determinate and cannot be suspended on an event the occurrence of which is uncertain.

Right of sale on the part of the purchaser

A re-sale of movable property cannot be made by the purchaser until the property shall have actually come into his possession.

But land may be re-sold previous to seisin by the first purchaser.

A warranty as to freedom from defect and blemish is implied in every contract of sale

Where the property sold differs, either with respect to quantity or quality from what the vendor had described, the purchaser is at liberty to recede from the contract

When a piece of land is sold, nothing thereon which is detachable from it passes under the sale. Thus the fruit on a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land

How vendee's option is annulled

The condition of option reserved by the vendee is annulled by his exercising any act of ownership, which changes the character of the property

Where the property has not been seen by the purchaser, nor a sample (where a sample suffices), he is at liberty to recede from the contract, provided he has not exercised any overt act of ownership, if upon seeing the property it does not suit his expectation, even though no option may have been stipulated

When a vendee has not agreed to take the property with all its defects, he is at liberty to return it to the seller on the discovery of a defect of which he was not aware at the time of the purchase, unless it has deteriorated in his hands in which case he is only entitled to compensation

When the purchaser has sold such article to a third person, he cannot exact compensation from the original vendor

Where articles are sold and are found on examination to be faulty, complete restitution of the price may be demanded from the vendor, even though they have been destroyed in the act of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportionate compensation.

Right of the purchaser for compensation.

Where a person purchases a property and sells it to another, and it is then found to be defective, and he is compelled to refund the price he would be entitled to proceed against the original vendor, if the defect existed at the time of his purchase.

But the vendee may waive his right to compensation or to the refund of the price, by any act which may imply acquiescence on his part

Where the property sold is not capable of division without injury, and part thereof subsequently to the purchase is found to be defective, or to be the property of a third person, the purchaser is not entitled to keep a part and to return a part, demanding a proportionate restitution of the price for the part returned He must either keep the whole, demanding compensation for the portion that is defective, or he must return the whole, demanding complete restitution of the price It is otherwise where the several parts can be separated without injury

A sale with an option is called an *invalid* sale It becomes absolute when the purchaser takes possession of the property or the option becomes extinguished

The legal consequences resulting from a completed transaction arise only when the sale has become absolute[1]

1 *Najm un Nissa* v *Ajaib Ali Khan* [1900] I L, 22 All, 343

APPENDIX I

SHARERS.

Father, mother and daughter

Father $= \frac{1}{6}$
Mother $= \frac{1}{6}$ $= \frac{5}{6}$.
Daughter $= \frac{1}{2}$

The residue goes to the father

If there were two daughters, father $= \frac{1}{6}$, mother $= \frac{1}{6}$, and the two daughters $= \frac{2}{3} = \frac{4}{6}$

(No residue)

Father, mother, daughter and son

Father $= \frac{1}{6}$
Mother $= \frac{1}{6}$.
Son $= \frac{2}{3} \times \frac{2}{3} = \frac{4}{9}$
Daughter $= \frac{1}{3} \times \frac{2}{3} = \frac{2}{9}$

If there are two daughters

Father $= \frac{1}{6}$
Mother $= \frac{1}{6}$.
Son $= \frac{5}{9}$
Two daughters $= \frac{1}{9}$

Father, mother and husband

Husband $= \frac{1}{2}$
Mother $= \frac{1}{3} \times \frac{1}{2} = \frac{1}{6}$.
Father $= \frac{1}{3}$.

(As residuary.)

Mother, father and one sister

Mother $= \frac{1}{3}$.
Father $= \frac{2}{3}$.

(As residuary.)

Sister excluded by father.

Mother, father, and two sisters

Mother owing to there being two sisters $= \frac{1}{6}$

Father (as residuary) $= \frac{5}{6}$.

Sisters excluded by father.

Father, mother, daughter and two son's daughters (granddaughters)

Father	$= \frac{1}{6}$
Mother	$= \frac{1}{6}$
Daughter	$= \frac{1}{2}$
Two granddaughters	$= \frac{1}{6}$

If there were two daughters they would take two-thirds excluding the son's daughters

Residuaries

Father's mother, mother's mother and paternal grandfather

Father's mother and mother's mother $= \frac{1}{6}$

Paternal grandfather $= \frac{5}{6}$

Two daughters, son's daughter and son's son's son

Two daughters	$= \frac{2}{3}$
Son's son's son	$= \frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$
Son's daughter	$= \frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$

Widow, mother, two sons and three daughters

Widow	$= \frac{1}{8}$
Mother	$= \frac{1}{6}$ $\Big\} = \frac{14}{48} = \frac{98}{336}$.
Two sons	$= \frac{4}{7} \times \frac{24}{24} = \frac{136}{336}$
Three daughters	$= \frac{3}{7} \times \frac{24}{48} = \frac{102}{336}$.

Aul (Increase)

Husband, mother, three full sisters, four consanguine brothers and sisters and two uterine brothers and sisters

Husband	$= \frac{3}{6}$
Mother	$= \frac{1}{6}$
Three full sisters	$= \frac{4}{6}$
Two uterine brothers and sisters	$= \frac{2}{6}$ $\Big\} = \frac{10}{6}$

Mother Daughter $= \frac{1}{8}$ $\frac{1}{2} = 1$ 3.

Divide proportionately between mother and daughter $= \frac{5}{9\,6} : \frac{1\,5}{9\,6}$.

Widow	=	$\frac{1}{8} = \frac{1\,2}{9\,6}$
Mother	=	$\frac{1}{6} + \frac{5}{9\,6} = \frac{2\,1}{9\,6}$
Daughter	=	$\frac{1}{2} + \frac{1\,5}{9\,6} = \frac{6\,3}{9\,6}$.

Consanguine sister or sisters with one full sister and no excluder ($\frac{2}{3} - \frac{1}{2} = \frac{1}{6}$).

One full sister and several consanguine sisters —full sister, $\frac{1}{2}$, consanguine sisters, $\frac{1}{6}$, or as $\frac{3}{6}$ $\frac{1}{6}$, ∴ full sister $= \frac{3}{4}$, consanguine sisters divide $\frac{1}{4}$ equally

Two daughters, two son's daughters, three consanguine sisters —Two daughters $= \frac{2}{3}$, three consanguine sisters being residuaries with daughters, get $\frac{1}{3}$, son's daughters not being sharers or residuaries with daughters are excluded.

Two son's daughters, one full sister and several consanguine sisters the full sister excludes consanguine sisters owing to propinquity to the deceased and takes the residue two son's daughters $= \frac{2}{3}$, full sister $= \frac{1}{3}$

Husband	=	$\frac{1}{4}$.
Daughters	=	$\frac{2}{3}$
Sister	=	$\frac{1}{12}$.

The son of the father's paternal uncle is excluded by the sister.[1]

APPENDIX II.

The Asabah.

"Among the *Asabah* the nearest is the son, then the son's son, however low, then the father, then the father's father, however high, then the brother by the father and

1 The principle was enforced in *Meheryan Begam* v *Shajadi Begam* [1899], I. R., 24 Bom., 112.

Mother : Daughter $= \frac{1}{6} : \frac{1}{2} = 1 \cdot 3$.

Divide proportionately between mother and daughter $= \frac{5}{9\,6} : \frac{1\,5}{9\,6}$.

Widow	=	$\frac{1}{6} = \frac{1\,6}{9\,6}$.
Mother	=	$\frac{1}{6} + \frac{5}{9\,6} = \frac{2\,1}{9\,6}$.
Daughter	=	$\frac{1}{2} + \frac{1\,5}{9\,6} = \frac{6\,3}{9\,6}$.

Consanguine sister or sisters with one full sister and no excluder ($\frac{2}{3} - \frac{1}{2} = \frac{1}{6}$).

One full sister and several consanguine sisters:—full sister, $\frac{1}{2}$, consanguine sisters, $\frac{1}{6}$; or as $\frac{3}{6} : \frac{1}{6}$, ∴ full sister $= \frac{3}{4}$, consanguine sisters divide $\frac{1}{4}$ equally.

Two daughters, two son's daughters, three consanguine sisters.—Two daughters $= \frac{2}{3}$, three consanguine sisters being residuaries with daughters, get $\frac{1}{3}$, son's daughters not being sharers or residuaries with daughters are excluded.

Two son's daughters, one full sister and several consanguine sisters the full sister excludes consanguine sisters owing to propinquity to the deceased and takes the residue, two son's daughters $= \frac{2}{3}$, full sister $= \frac{1}{3}$.

Husband	=	$\frac{1}{4}$.
Daughters	=	$\frac{2}{3}$.
Sister	=	$\frac{1}{12}$.

The son of the father's paternal uncle is excluded by the sister.[1]

APPENDIX II.

The Asabah.

"Among the *Asabah* the nearest is the son; then the son's son, however low; then the father, then the father's father, however high, then the brother by the father and

1 The principle was enforced in *Meheryan Begam* v. *Shajadi Begam* (1899), I. R., 24 Bom., 112.

mother; then the brother by the father, then the full brother's son, then the son of the brother by the father only, then the full paternal uncle; then the half paternal uncle on the father's side; then the son of the full paternal uncle, then the father's full paternal uncle, then the father's half paternal uncle on the father's side, then the son of the father's full paternal uncle, then the son of the father's half paternal uncle on the father's side, then the paternal uncle of the grandfather and so on so in the *Mabsut*" (It must be remembered that where sons are spoken of, it means the lineal male descendants)

APPENDIX III.

Prohibited Relations

Women with whom marriage is prohibited on the ground of consanguinity are the following —

"The *mothers*, *daughters*, sisters, aunts, paternal and maternal, brothers' daughters and sisters' daughters, and marriage or sexual intercourse with them, or even soliciting them to such intercourse, is prohibited for ever, that is, at all times and under any circumstances"

Mothers are a man's own mother, and his grandmothers on the father's or mother's side, and how high soever *Daughters* are his own daughters, and the daughters of the sons or daughters, how low soever. Sisters are the full sisters and the half-sisters on the father's or the mother's side, similarly, the daughter's of brothers and sisters how low soever, include descendants of sisters and brothers of the half-blood Paternal aunts are of three kinds the full paternal aunt, the half-paternal aunt by the father (that is, the father's half-sisters on the father's side) and the half paternal aunt by the mother (or the father's half-sister on the mother's side) And so also the paternal aunts of his father, the paternal aunts of his grandfather and the paternal aunts of his mothers and grandmothers. Maternal aunts are the full maternal aunt, the half-maternal aunt by the father, that is, the mother's half-sister on the father's side and the

half-maternal aunt by the mother (or the mother's half-sister on the mother's side), and the maternal aunts of fathers or mothers.

Those prohibited by reason of affinity are the following —

'The mothers of wives, and their grandmothers on the father's or mother's side, the daughters of a wife or of her children, how low soever (subject to the condition that consummation has taken place with their mother, that is the wife), whether the daughter be under the husband's protection or not." [The Hanafis do not regard "retirement with a wife equivalent to actual consummation in rendering her daughters prohibited"] The third degree of affinity comprises the wife of a son or of a son's son, or of a daughter's son, how low soever, whether the son have cohabited with her or not The fourth degree includes the wives of fathers and of grandfathers whether on the father's or mother's side, and how high soever. With all these marriage or sexual intercourse is prohibited for ever."

"The prohibition of affinity is established by a valid marriage, but not by one that is invalid So that if a man should marry a woman by an *invalid contract*, her mother does not become prohibited to him by the *mere contract*, but by sexual intercourse And the prohibition of affinity is established by sexual intercourse whether it be lawful or apparently so, or actually illicit When a man has committed fornication with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grandfathers, how high soever, and to his sons, how low soever"

APPENDIX IV.

Scripturalists (*Kitâbis*)

"All who believes in a heavenly or revealed religion and have a *kitâb* or Scripture, such as the Pentateuch or the psalms of David, are *kitâbis* (scripturalists) and intermarriage with them or eating of meat slaughtered by them

is lawful." In the *Fatâwai-Alamgiri*, a *Majûsa* or Magian woman is placed in the same category as an idolatress. But Magianism or fire-worship is different from Zoroastrianism

According to the Shiahs, even Magians stand on the same footing as Christians or Jews

According to the *Fatâwai-Alamgiri*, the *Radd-ul-Muhtâr*, etc, a "*Moslem* is one who is a believer in the Unity of God, and the divine mission of Mohammed"

APPENDIX V

Delegation of Authority to Divorce.

According to the legists of the primitive schools, the husband has the power of dissolving the marriage contract at his own free will And he may delegate his power of *tâlak* to anybody he likes, even to the wife herself Accordingly it often happens that at the time of marriage it is specially agreed between the parties that should the husband contravene any of the conditions of marriage or take a second wife, the first wife should be entitled to *tâlak* the husband This is called *tafuiz* or *delegation of authority*, and constitutes a valid agreement.

APPENDIX VI.

Ilâ and *Zihâr*.

In ancient times there were two other modes of separation between husband and wife which, however, with the development of family life, have become wholly obsolete in Mahommedan countries at all advanced in culture. These two modes were called *Ilâ* and *Zihâr*. In the first, the man swore to have no relation with his wife for four months, and on the expiration of that period, without any resumption of marital duties in the interval, the separation became absolute. In the second, the man likened his wife to some prohibited female relative, and thereby

subjected himself either to a penance, or, under the decree of the Judge, to separate himself definitely from her

Both these modes were in vogue among the pagan Arabs, and though countenanced to some extent by the Arabian Prophet, were so hedged round by strict conditions that they may be regarded as actually prohibited

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APPENDIX VII

"Gift of a Debt" or Release

According to the Hanafî Law, the gift of a debt to the debtor is a release or discharge, and is valid, but if the debtor does not accept it, he is not released The gift may be made not only to the debtor himself, but also, on his death, to his heir, whether adult or minor

So the creditor may "make a gift of the debt," in other words, assign it to somebody else, but in order that such assignment may be valid, *the donee must be authorised to take possession of the debt* But as all assignments of debts imply in authority to recover the same, the condition may be regarded as a refinement

Among the Shiahs there is a difference of opinion on this question The great Jurist Imâm Jaafar at-Tusi and other eminent lawyers agree with the Hanafîs, whilst the author of the *Sharâya* holds that the gift of a debt can be made only to the debtor or his heir, and is effectual *with or without his consent* The former opinion is, however, recognised in practice (*urf*)

An assignment or gift by A to B of his share in certain monies held for him by a third person is valid under both schools of law and is not open to the objections based on the doctrine of *Mushâa* [1]

An acknowledgment of a debt, though made in *marz-ul-mout*, not being regarded as an act of bounty, is held to be operative in respect of the whole estate of the deceased and not merely of a third

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1 Comp *Ebrahimbhai* v. *Fulbai* [1902], I. L., 26 Bom , 577

APPENDIX VIII.

SUIT TO SET ASIDE ALIENATION OF *WAKF* PROPERTY.

THE plaintiffs sued to recover possession of certain lands, upon the allegation that those lands had been granted in *wakf* to their ancestor and his lineal descendants to defray the expenses for, or connected with, the services of a certain mosque , and that their father (defendant No 3) and cousins (defendants Nos 4 and 5), who were *mutwallis* in charge of the said property, had illegally alienated some of the *wakf* property, and had also ceased to render any service to the mosque, whereupon they (the plaintiffs) had been acting as *mutwallis* in their stead They, therefore, claimed to be entitled as such to the management and enjoyment of the lands in dispute. It was contended by the defendant (*inter alia*) that the plaintiffs could not sue in the life-time of their father (defendant No 3), he not having transferred his right to them.

The Court held that the plaintiffs were entitled to sue to have the alienations made by their father and cousins set aside, and the *wakf* property restored to the service of the mosque. They were not merely beneficiaries, but members of the family of the *mutwallis*, and were the persons on whom, on the death of the existing *mutwallis*, the office of *mutwalli* would fall by descent, if, indeed, it had not already fallen upon them, as alleged in the plaint by abandonment and resignation [1]

APPENDIX IX.

Will

The Probate and Administration Act has made no alteration regarding the power of a Mohammedan to make an oral will. An oral or nuncupative will, if established, will be admitted to probate.[2]

1 *Kazi Hussain* v. *Sagun Bal Krishna* [1899], I L., 24 Bom , 170.
2 In re *the will of Haji Mahomed Abba* [1899], I. L., 24 Bom., 8.

APPENDIX X.

THE *Wakf* OF MONEY AND MOVEABLE PROPERTY IN GENERAL

IN the case of *Kulsum Bibee* v *Golam Hossein Cassim Ariff*,[1] the learned Judge has held that "the *wakf* of shares in a Company" is not valid under the Mahommedan Law It is respectfully submitted that this conclusion is not warranted by the authorities and has the effect of unsettling a settled rule of Mussulman Law

1. There is some misapprehension regarding the meaning of the word *Ijtihâd*, which signifies the evolution of new principles The privilege of evolving new principles (*Ijtihâd*) ceased, according to the Hanafî ideas, in the third and fourth centuries of the Hegira But there is absolutely no warrant for holding that any limit is imposed on the interpretation of the old rules and doctrines so as to bring them into accord with social progress and the requirements of the times.[2]

2 When there is a difference of opinion between Abû Yusuf and Mohammed, "the Mussulman Judge is at liberty to adopt either of the two decisions which seems to him the more consonant with reason,"[3] or consistent with the requirements of the times [4] He is entitled to decide according to the principle most in conformity with *Maslahat* (what is beneficial) in the religious sense [5]

3 In the law relating to *wakf* there are certain primary rules on which the principal doctors are in agreement. With regard to the subsidiary principles there is considerable divergence. The primary rules are (*a*) that the subject of the *wakf* should be dedicated in perpetuity, (*b*) that all human right should be divested therefrom, and (*c*) that it should be made non-heritable and inalienable.

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1 [1905] 10 Cal W. N 499.

2 See the authorities cited in Mohammedan Law, Vol 1, Introd., p. lii.

3 Sir William Jones's Works, Vol III, p 510.

4 Fatâwai Hamâdia

5 Radd-ul-Muhtâr, Vol. III, p. 578.

With regard to these there is *consensus* When we come to the subsidiary principles, *e g*, how and for whom a *wakf* may be made, what expressions should be used in its constitution, what things are fit subjects for a *wakf*, we find a difference of opinion between Abû Yusuf and Mohammed On some "the *Fatwa* is with Abû Yusuf," that is, decrees are passed according to his views, on others, according to Mohammed Mohammed insists that for a *wakf* to be valid, an unfailing object should be expressely designated, Abû Yusuf does not consider that essential The Jurists of Bokhara adopted Mohammed's view, those of Balkh, Abû Yusuf's In India this was the recognised rule But the British Indian Courts have chosen to follow Mohammed's principle [1]

Mohammed considered consignment to a trustee essential, Abû Yusuf did not, and his views were adopted by the jurists of Balkh, and were followed in India

Abû Yusuf considered that, save certain kinds of moveable property which it had already become the custom to dedicate, the *wakf* of others was not valid, being inconsistent with the main purpose of a dedication, namely, *perpetuity* as they were likely to be consumed in user Mohammed was of opinion that every kind of moveable property which formed the subject of common dealing among men, or which it was the practice anywhere to dedicate, may lawfully be constituted as *wakf*. *The rule of Mohammed is now the universally recognised doctrine*, and in every treatise it is laid down that on this point "the *Fatwa* is with Mohammed" that "*Fatwas* (decisions) are given according to his rule" [2]

Zuffar, a contemporary and disciple of Abû Hanîfa, who is classed with Abû Yusuf and Mohammed [3] as a *mujtahid* Imâm of the first rank, and entitled to *Ijtihâd*, agreed with Mohammed and declared the *wakf* of moveables including money to be absolutely lawful.

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1 See *ante*, p 123
2 Radd ul-Muhtâr, Vol. III, p. 578
3 See the Multeka and D'Ohsson, *Tableau Général de l' Empire Ottomane.*

The author of the Radd-ul-Muhtâr, one of the greatest authorities on Hanafî Law, states that as the rule of Mohammed, *according to which is the Fatwa*, covers all kinds of moveable property, it is not necessary to refer to Zuffar [1].

4 It is a fundamental error to suppose that on this point the opinion of Abû Yusuf supplies the principle for decision Such an assumption is at variance with the recognised rule of Mahommedan Law

5 With reference to moveable property, the Hanafî jurists require that the article dedicated should be the subject of common dealing among people, as, if it were not so, it would hardly be possible to renew it or derive permanent benefit therefrom For example, unless a cow dedicated for supplying milk to the poor could be sold when it ceased to give milk, the benefaction would come to an end

6 The word *taâmul* (to the rendering of which in Mahommedan Law, Vol I, p 178, exception has been taken) is defined in Catafago's Arabic Dictionary, and in Johnson's Arabic and Persian Dictionary as meaning "dealing, acting together," whilst *taârûf*, according to Johnson, signifies "practice, custom, fashion"

The *Wajiz-ul-Muhit* has the following passage in which the two words occur together in the same sentence, excluding the suggestion that they both convey the same meaning "Similarly is lawful the *wakf* of moveables (*mankûl*), such as horses and arms, pick-axe, cauldrons, hatchets, saws (*manshâr*), biers and shrouds, copies of the Koran, books on jurisprudence, traditions and literature, and other things which people deal in [2] and which it is the practice (*taârut*) to make *wakf* of"

7. Assuming that *taâmul* means not the *practice of dealing*, as Catafago and Johnson declare it does, but the practice of making *wakf*, I submit it makes no difference in the settled principle relating to the validity of all kinds of moveable property including money. It would only mean that the *wakf* of every article which people are in the practice of making *wakf* is lawful.

1 Radd-ul-Muhtâr, Vol III, p 578, see also the Fath ul-Kadir, Vol II, p. 636

2 Or "wherein there is mutual dealing"

8 Since the days of Abû Yusuf, the legal conception regarding articles that may validly be made *wakf* has made a great advance.[1] He did not recognise the validity of the *wakf* of buildings and trees apart from the land, *that* is now universally admitted by the Hanafî jurists. The *wakf* of coin (*dirhems* and *dinârs*) which he discountenanced on the ground of *analogy* (*Kyâs*), as likely to be consumed in use, is now admitted as lawful wherever it is in vogue, and it is declared that where actual coin is dedicated, its value should be laid out in *muzâribat* (business) or *bazâat* (commerce).[2] (This is not even referred to in the judgment in *Kulsum Bibee* v. *Golam Hossein Cassim Ariff*) If any other object likely to perish in its use is made *wakf*, the direction is, that it should be sold and its proceeds similarly invested.[3] Even where a thing is dedicated, the *wakf* of which is not common, the Kâzi is authorised to declare its validity, if he considers it suitable for its purpose.[4]

No sacramental value or significance is attached to the *wakf* of any particular kind of property in contradistinction to another What the Judge has to see is whether the subject of dedication is capable of yielding *permanent* benefit by renewal from time to time, or by investment of the proceeds when sold, in business or commerce (*muzâribat* or *bazâat*) It is a mistake to attach canonical importance to the statements and arguments in the Hedâya, for many of the doctrines set forth in it are long since exploded, or have been considerably modified. One has only to study the commentaries on it (especially the Fath-ul-Kadir,)[5] to understand this.

9 The *wakf* of money invested in stock or business is now universal among Mahommedans from Algeria to India and Burmah The shrine at Mecca, and at Kerbela, the endowments at Ajmere, Hossainabad (Lucknow), and many of the mosques and religious institutions all over the country are largely supported by the income of monies invested in Government securities, which people have come to regard as safer and more permanent than even land.

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1 This is clear from the Hedâya itself

2 Radd ul-Muhtâr, Vol. III, p 579 For the meaning of *Muzaribat* and *bazâat*, see Johnson.

3 *Ibid.* 4 *Ibid.* 5 Vol. II, p. 636.

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