Case-noted

MAHOMEDAN LAW

BY

A. C. MITTRA, B.A., B.L.

CALCUTTA:

PUBLISHED BY THE AUTHOR

AT THE LAW-PUBLISHING PRESS

3 TO 5, BOW STREET.

1902

[M. L.—*a.*]

CALCUTTA :
PRINTED BY B. BARAL
AT THE "LAW-PUBLISHING PRESS"
NOS. 3 TO 5, BOW STREET.

PREFACE.

THIS little volume contains all the important principles of the Mahomedan Law of both the *Shiah* and the *Sunni* Schools, upon such topics as are generally in discussion in Courts of British India. I have collected the case-law upon each subject from the earliest times down to the current reports, and these have been arranged under the sections dealing with the respective subject. The Chapters on the Law of Inheritance have been dealt with elaborately, as the importance of the subject demanded, and copious examples have been appended to illustrate the principles of succession and the method of computing shares. It is to be hoped that the volume will prove useful both to the student and to the profession, as a digest of the leading principles of the law collected from authoritative works, and of the decisions of our Courts modifying or expanding those principles.

CALCUTTA:
Dated the 15th September 1902.

THE AUTHOR.

T

Cha

SEC.

1. Orig
2. Diffe
3. Text
4. *Appl*
Law

Chap

5. Majo
Signs
6. *India*
7. *Sabi*
8. Capa
litie
9. Guar
10. *Hiea*
11. Custo
legi
12. *Remo*
after
13. Differ
14. Autho
15. Sale o
perty

Chap

16. Marri
17. Perma
riage
18. Essen
19. Princi
tions
20. Presur
21. Conse
22. Equali
23. Witne
24. Rule re
men
25. Marria
with
26. Legal e
27. Differe
sect.

CONTENTS.

TABLE OF CASES CITED.

Chapter I.—Introductory.

SEC.
1. Origin of Mahomedan Law.
2. Different Sects.
3. Text-books of Authority.
4. Application of the Mahomedan Law.

Chapter II.—Minority and Guardianship.

5. Majority.
   Signs of puberty.
6. Indian Majority Act.
7. *Sabi* and *Murahik*.
8. Capacities, incapacities, and liabilities of Minors.
9. Guardianship.
10. *Hisanat*, or the custody of Infants.
11. Custody over adult virgins, and illegitimate children.
12. Removal of child by the mother after separation from her husband.
13. Different kinds of guardians.
14. Authority of guardians.
15. Sale of minor's immoveable property.

Chapter III.—Marriage.

16. Marriage defined.
17. Permanent and temporary marriages.
18. Essentials of a valid marriage.
19. Principal conditions and prohibitions.
20. Presumption of marriage.
21. Consent of the woman in marriage.
22. Equalities of the parties.
23. Witnesses to the marriage contract.
24. Rule regarding the joining of women in marriage.
25. Marriage with another's wife, and with pagans.
26. Legal effects of marriage.
27. Different doctrines of the *Shiah* sect.

SEC.
28. Authority of guardians in marriage.
29. Marriage contracted by a minor or an insane person.
30. Order in which guardians exercise authority.
31. Marriage contracted through agents.
32. Fosterage.
33. Foster relations prohibited in marriage.
34. Certain exceptions.
    Prohibiting fosterage according to the *Shiahs*.

Chapter IV.—Dower.

35. Dower defined, and its importance.
36. Priority of the dower-debt.
37. What can be, and what cannot be, dower.
38. The amount of dower; *proper dower*.
39. Dower left to be fixed by husband.
40. Two women married on one dower.
41. Different kinds: Prompt and deferred dower: Limitation.
42. Amount of prompt dower, when not fixed.
43. Effect of non-payment of dower.
44. Confirmation of dower: Payment.
45—49. Dower of wife divorced *before* or *after* consummation.
50. Dower under invalid marriage.
51, 52. Dower according to the *Shiah* school.

Chapter V.—Divorce.

53. Definition of the term "Talak."
54. Conditions of a valid divorce.
55. Divorce by a sick man.
56. ,, by an apostate.
57. Delegation of the power to repudiate.
58. There cannot be more than three divorces.
59. Different forms of divorce.

SEC.
60. *Lian, ila, khula, and mubarat*; impotency.
61. Revocable or irrevocable.
62. Meaning of the term "*tuhr*."
63. ,, of the term "*iddat*."
64. *Ahasan* form of *Sunni* divorce.
65. *Hasan* form of *Sunni* divorce.
66. Distinction between the two.
67. Single divorce of an unenjoyed wife.
68. 69. *Badai* or irregular divorce.
70. Ambiguous expressions used in divorce.
71. Effect of certain other forms of divorce.
72. Separation for the husband being eunuch or impotent.
73. Observation of *iddat* is incumbent.
74. Women not liable to observe *iddat*.
75. Period of the *iddat*.
76. *Rajat* or remarriage with divorced wife.
77. Legal effects of divorce, upon mutual inheritance.
78—81. Peculiarities of the *Shiah* school.

Chapter VI.—Parentage.

82. Proof of maternity.
83. Paternity how established.
84. Parentage of child born of lawful wedlock.
85. Parentage where marriage was invalid.
86. Child born within six months of marriage.
87. Child of *Zina* or fornication.
88. Child of woman observing *iddat*.
89. Denial of parentage by *lian* or imprecation.
90, 91. Parentage established by acknowledgment.
92, 93. Acknowledgment of relationship by a man.
94. Acknowledgment of relation by a woman.
95. Acknowledgment of child by a woman.
96. Effect of valid acknowledgment.
97. Acknowledgment made in sickness.
98, 99. Doctrines of the *Shiah* school.

Chapter VII.—Maintenance.

100. What is included in maintenance.
101. Persons entitled to maintenance.

SEC.
102. Maintenance of wife.
103. Maintenance under invalid marriage.
104. Maintenance of wife observing *iddat*.
105. Husband alone liable to maintain wife.
106. When wife is not entitled to maintenance.
107. Arrears of maintenance.
108—111. Maintenance of children.
112. Maintenance of parents.
113, 114. Property liable for maintenance.
115—119. Maintenance of poor relatives.
120, 121. When maintenance is not due.

Chapter VIII.—Gift.

122. Definition of *hiba* or gift.
123. Essentials of valid gift.
124. Conditions of valid gift.
125. Oral gifts valid, as also by writing.
126. Gifts in health.
127, 128. Gifts in death-illness.
129. ,, to infants and lunatics.
130. ,, of a thing not in existence.
131. ,, of land without crop.
132. ,, by one partner to another.
133. ,, to an orphan.
134. ,, for donee's life.
135. ,, in expectation of future event.
136. ,, of a debt to the debtor.
137. Legal effects of a gift.
138. ,, ,, when complete.
139—148. Revocation of gifts.
149. *Hiba-bil-iwaz*.
150. *Hiba-ba-shart-ul-iwaz*.
151. *Iwaz* can be made by a third party.
152. Gift of undivided part valid according to the *Shias*.

Chapter IX.—Wills.

153, 154. How wills can be made.
155. Legal effect of a bequest.
156. Conditions of a valid will.
157—160. Void bequests.
161. Bequest to one's kindred.
162. ,, to another's heirs.
163. ,, in general terms.
164. ,, of a part without specifying amount.

SEC.
165—168. Bequest exceeding a *third*, to several legatees.
169. Bequest of a third, when the remainder perishes.
170. Bequest of a third, when testator had no property.
171. Bequest to the sons of another, how construed.
172. Bequest of a specific thing not in existence is void.
173. Bequest to one with a right of participation by another.
174. Bequest how to be paid when the estate consists of ready money and debts to realize.
Bequest to neighbours.
175. ,, , usufructuary.
176. ,, , pious.
177. ,, , revocation of.
178. ,, of a thing already bequeathed to another.
179. When testator denies his bequest.
180. Testator's desire to suspend execution is not retraction.
181. 'Executor' defined.
182. Who may be appointed executors.
183. Acceptance of office by executor.
184—187. Two or more executors.
188. Executor may appoint his successor.
189. Where testator appointed no executor.
190. Powers of executors.
191. ,, of executors of one's relatives.
192. Leading difference between the two schools.
193. Inapplicability of the Indian Succession Act.
Provisions of Act V. of 1881 apply to Mahomedans.

Chapter X.—Wakf.

194. Definition of *wakf* according to different doctors.
195. The *wakif*.
196. Legal effect of *wakf*.
197. Conditions of a valid *wakf*.
198. Use of special terms.
199. Extension of the term *wakf*.
200. Religious endowments.
201—207. Family settlements.
208—210. *Wakf* made in death-illness.
211. Disbursement of the income of *wakf* property.
SEC.
212, 213. Participation by *wakif* and his children.
214, 215. Appointment of *mutawalli*.
216. Powers and duties of *mutawalli*.
217, 218. Specialities of the *Shiah* school.

Chapter XI.—Pre-emption.

219. Definition of '*Shufa*.'
220—225. Conditions attached to the right of pre-emption.
226. How the pre-emptor can obtain possession.
227. Procedure where some of the pre-emptors are absent.
228, 229. Who can claim the right.
230. Effect of relinquishment.
231. When the right can take effect.
232. How the right is to be claimed.
233. When pre-emptor shall pay purchase-money.
234. How much he should pay.
235. When limitation begins to run.
236. Assertion of right against a part of the property sold.
237. Relinquishment of the right by father or guardian.
238, 239. Decay of the property, and improvements made by first purchaser.
240. How the right becomes void, and the legal devices by which it can be evaded.
241. The *Shiah* doctrines upon the subject.

Chapter XII.—Inheritance.

(*Sunni school*).

242. Distribution of the estate of a deceased person.
243. Devolution of succession.
244—250. General principles of succession.
251—254. Sharers and their shares.
255. Chart of inheritance among sharers.
256. The son is not a sharer.
257. Sharers who are never excluded.
258, 259. Succession of the father.
260, 261. ,, of the mother.
262. ,, of daughters.
263. ,, of husband.
264. ,, of widows.
265. ,, of true grandfathers.

SEC.
266. Succession of uterine brothers and sisters.
267—269. ,, of son's daughters.
270—272. ,, of whole sisters.
273, 274. ,, of half sisters by same father.
275. Exclusion of brothers where sisters are excluded.
276, 277. Succession of true grandmothers.
278. The Increase.
279. The Return.
280. Order of succession among residuaries.
281—283. Classification of the residuaries.
284—288. Succession of descendants.
289. ,, of ascendants.
290. ,, of father's children.
291—292. ,, of P. uncles and aunts and their children.
293—295. ,, of residuaries in another's right.
296. ,, of residuaries together with another.
297. ,, of several classes occurring together.
298. ,, of residuary for special cause
299. The Distant Kindred.
300, 301. Their classification.
302, 303. Their succession by classes.
304. Rules of succession among the *first* class.
305. ,, among the *second* class.
306. ,, among the *third* class.
307, 308. ,, among the *fourth* class.
309. ,, among children of fourth class.
310. Order of succession among Distant kindred.
SEC.
311. Succession in default of distant kindred.
312. Succession of the Successor by contract.
313. Succession of the acknowledged kindred.
314. Succession of legatee to whom more than a third was bequeathed.
315. Succession according to *Shafi* on failure of distant kindred.
316. The Public Treasury
317. Vested inheritance.
318. Impediments to succession.
319—322. Exclusion from inheritance.
323—327. Succession of unborn persons.
328, 329. Missing person.
330. Persons dying together.

Chapter XIII.—Inheritance.

(Shiah school).

331. Causes of inheritance.
332, 333. Classification of consanguineous heirs.
334—336. Succession among consanguineous heirs.
337. Succession of heirs by affinity.
338. Succession of heirs by *Vala*.
339. Sharers and residuaries.
340. Succession of the father.
341. ,, of the mother.
342. ,, of the daughter.
343. ,, of the sister.
344. ,, of mother's children.
345. ,, of husband.
346. ,, of widows.
347. The sharers are also residuaries.
348. Succession of grand-fathers and grand-mothers.
349, 350. Succession of brothers and sisters and their children.
351. Succession of uncles and aunts.
352. ,, of children of uncles and aunts.
353. *Aul* or the increase, not recognized.
354. The Return.

CASES OF INHERITANCE WORKED OUT.
INDEX.

TABLE OF CASES CITED

PAGE.

A.

A. v. B., I. L. R. 21 Bom. 77 54
Abadi Begam v. Inam Begam, I. L. R. 1 All. 521 ... ... 160, 168
Abasi v. Dunne, I. L. R. 1 All. 598 10
Abbas Ali v. Maya Ram, I. L. R. 12 All. 229 169
Abbasi Begam v. Afzal Husen, I. L. R. 20 All. 457 159
Abdool Futteh v. Zabunnessa, I. L. R. 6 Cal. 631; 8 C. L. R. 242 ... 68
Abdul Ali, In re; I. L. R. 7 Bom. 180 68
Abdul Azim v. Khondker Hameed Ali, 2 B. L. R. (A. C.) 63; 10 W. R. 356 157
Abdul Bari v. Rash Behari Pal, 6 C. L. R. 413 11
Abdul Cadur Haji v. Official Assignee, I. L. R. 9 Bom. 158 105
Abdul Gafur v. Nizamudin, I. L. R. (P. C.) 17 Bom. 1 139
Abdul Ganne v. Hussen Miya, 10 Bom. 7 ... ... 125, 134
Abdul Jabel v. Khelat Chandra Ghose, 1 B. L. R. (A. C.) 105; 10 W. R. 165 152
Abdul Jubbar v. The Collector of Mymensingh, 11 W. R. 65 ... 35
Abdul Kadir v. Salima, I L. R. 8 All 149 ... ... 5, 40
Abdullah v. Amanat, I. L. R. 21 All. 292 166
Abdul Rahim v. Kharag Singh, I. L. R. 15 All. 104 157
Abdul Razak v. Aga Mahomed, I. L. R 21 Cal. 666 61
Abdul Wahid v. Nuran Bibi, I. L. R. 11 Cal. 597; L. R. 12 I. A. 91 ... 173
Abdur Rohoman v. Sakhina, I. L. R. 5 Cal. 558; 5 C. L. R. 21 ... 66, 67
Abdus Salam v. Wilayat Ali, I. L. R. 19 All. 250 163
Abedoonissa v. Ameeroonissa, 9 W. R. 257 ... ... 75, 102
Abid Husen v. Bashir Ahmad, I. L. R 20 All. 499 159
Abraham v. Abraham, 9 Moo. I A. 195 4
Abul Fata Mahomed Ishak v. Rasamaya Dhur, I. L R. 22 Cal. 619 ... 137
Achurbur v. Bukshee Ram 2 W. R. 38 162
Addoyto Chunder Das v. Woojan Beebee, 4 C. L. R. 154 68
Administrator-General v. Anandachari, I L. R. 9 Mad. 466 24
Advocate General v. Fatima, 9 Bom. 19 145
Agar Singh v. Raghuraj Singh, I. L R. 9 All. 471 163
Agha Ali Khan v. Altaf Hasan Khan, I L. R. 14 All. 429 120
Ahmedbhoy v. Vullebhoy, I. L R 6 Bom. 703 118
Ahmed Hossain v. Khadija, 3 B. L R. (A. C.) 28 (note); 10 W. R. 369 43
Ahmud Hossein v. Mohioodeen, 16 W. R 193 144
Aizunnissa Khatoon v. Kurimunnissa, I. L. R. 23 Cal. 130 24
Ajaib Nath v. Mathura Prasad, I. L. R. 11 All. 164 168
Ajoodhya v. Sohun Lal, 7 W. R. 428... 161
Akbar Husain v. Abdul Jalil, I. L. R. 16 All. 383 159
Akhoy Ram v. Ram Kant, 15 W. R. 223. ... ... 150, 157
Alabi Koya v. Mussa Koya, I. L. R. 24 Mad. 513 ... ... 77, 82
Alimodeed v. Syfoora, 6 W. R. Mis. 125 11
Ali Muhammad Khan v. Muhammad Said Husain, I. L. R. 18 All. 309 ... 159, 160
Ali Muhammad v. Taj Muhammad, I L. R 1 All. 283 ... ... 158, 161

	PAGE.
Ali Muhammed *v.* Azizullah, I. L. R. 6 All. 50	43
Amanatunnissa *v.* Bashirunnissa, I. L. R 17 All. 77	42
Ameena *v.* Zeifa, 3 W. R. 37	82
Ameer Ali *v.* Pearun, W. R. 1864, 239	151
Ameeroonissa, In the Matter of, 11 W. R. 297	9
Ameeroonissa *v.* Abadoonissa, 15 B. L. R. 67; 23 W. R. 208; L. R. 2 I. A. 87	81, 85
Amina Bibi *v.* Khatija, 1 Bom. H. C. R. 157	77
Aminooddowlah *v* Roshun Ali, 5 Moo. I. A. 199	97
Amir Dulhin *v.* Baij Nath, I. L. R. 21 Cal. 311	171
Amir Hasan *v.* Rahim Bakhsh, I. L. R. 19 All. 466	150, 157
Amiruddaula *v.* Nateri, 6 Mad. 356	79
Amjad Hossain *v.* Kharag Sen, 4 B. L. R. (A. C.) 203; 13 W. R. 299 ...	161
Amrutlal Kalidas *v.* Shaikh Hussein, and others, I. L. R. 11 Bom. 492 ...	138
Amtul Nissa *v.* Mir Nurudin, I. L. R. 22 Bom. 489	79
Anwari Begam *v.* Nizamuddin, I L. R. 21 All. 165	77
Anwerul-Huq *v.* Jwala Prasad, I. L. R 20 All. 358	152
Asgar Ali *v.* Muhabat Ali, 22 W. R. 403	31
Ashabai *v.* Taib Haji, I. L. R. 9 Bom. 115	4
Ashadoollah *v.* Shaeba, 2 Hay 345	86
Asheerooddeen *v.* Drobo Moyee, 25 W. R. 557	145
Ashruf Ali *v.* Ashad Ali, 16 W. R. 260	48, 61
Ashruffooddowlah *v.* Hyder Hossein, P. C. 7 W. R. 1	19
Ashruffunnissa *v.* Azeemun, 1 W. R. 17	19, 86
Assamathem Nessa *v.* Roy Lutchmiput, I. L. R. 4 Cal. 142	170
Ataullah *v.* Azimullah, I. L. R. 12 All. 494	140
Azeezunnissa *v.* Ruhmanoollah, 10 W. R. 306	174
Azimunnissa *v.* Dale, 6 Mad. H. C. R. 445	78

B.

Baba *v.* Shivappa, I. L. R. 20 Bom. 199	11
Baboojan *v.* Mahomed Nurul Huq, 10 W. R. 375	103
Bachun *v.* Hamid, 10 B. L. R. 45; 14 Moo. I. A. 377; 17 W R. 113 ...	43
Badaranissa *v.* Mafiattala, 7 B. L. R. 442; 15 W. R. 555	48
Bai Baiji *v.* Bai Santok, I. L. R. 20 Bom. 53	4
Bakhshi Kishen *v.* Thakur Das, I. L. R. 19 All. 375	27
Balund *v.* Janee, 2 N.-W. P. 319	43
Batul Begam *v* Mansur Ali, I L. R. 20 All. 315	164
Bava Saib *v.* Mahomed, I. L. R. 19 Mad. 343	78
Bazayet Hossein *v.* Dooli Chand, I. L. R. 4 Cal. 402	43, 44
Bedar *v.* Khurrum, 19 W. R. (P. C) 315	39
Begum *v.* Muhammad Yakub, I. L. R. 16 All. 344	150
Beharee Ram *v.* Shoobhudra, 9 W. R. 455	152
Benarsee Doss *v.* Phool Chand, 1 Agra 243	153
Bhairon Singh *v.* Lalman, I L. R. 7 All 23	168
Bhoocha *v* Elahi Bux, I. L. R. 11 Cal. 574	9, 11
Bhowanee Dutt *v.* Lokhoo Singh, W. R. 1864, 60	160
Bhowanee Pershad *v.* Purshunno Singh 11 W. R 282	152
Bhurruck Chundra *v.* Golam Shurruf, 10 W. R. 458	145
Bhutnath *v.* Ahmad Hossain, I. L. R. 11 Cal. 417	14
Bikani Mia *v.* Shuk Lal, I. L. R., 20 Cal. 116	136
Boodhun *v.* Jan Khan. 13 W. R 265	203
Braja Kishor *v.* Kirti Chandra, 15 W. R. 247	168
Budrunnissa *v.* Nufeerutoollah, 15 W. R. 555	25
Buksh Ali *v.* Ameerun, 2 W. R. 208	47

PAGE.

Buksha Ali *v.* Tofee Ali, 20 W. R. 216 151
Bukshan *v.* Maldai, 3 B. L. R. A. C. 423 ... ... 11, 12
Buldeo Pershad *v.* Mohun, 1 Agra. 30 163
Bussunteram *v.* Kamaluddin, I. L. R. 11 Cal. 421 170
Busunt Koomaree *v.* Kali Persad, Marsh, 11; 1 Hay 32 151
Butoolun *v.* Koolsoom, 25 W. R. 444 62
Buzl-ul-Ruhmee *v.* Luteefutoonnissa, 1 W. R. (P. C.) 57 54
Byjnath *v.* Kopilmon Singh, 24 W. R. 95 151
Byj Nath Singh *v.* Dooly Mahtoon, 11 W. R. 215 155

C.

Cazee Ali *v.* Mussseeutoollah, 2 W. R. 285 165
Chamroo *v.* Puhlwan, 16 W. R. 3 159
Chand Khan *v.* Naimat Khan, 3 B. L. R. (A. C.) 296; 12 W. R. 162 ... 156
Chekkonekutti *v.* Ahmed, I. L. R. 10 Mad 196 79
Cherachom v. Valia, 2 Mad. 350 103
Chowdhry Joogul Kishore *v.* Poocha Singh, 8 W. R. 413 157
Chuhi Bibi *v.* Shamsunnissa, I. L. R. 17 All. 19 44
Curreemunnissa Begum *v.* Ahmed, 10 C. L. R. 293 19

D.

Daim *v.* Ashooa, 2 N.-W. P. 360 5
Dehan Bibi *v.* Lalon Bibi, I. L. R. 27 Cal. 801 61
Dewan Munar Ali *v.* Ashurooddeen, 5 W. R. 270 154
Dewanutulla *v.* Kazem, I. L. R. 15 Cal. 184 151
Din Muhammad, In the Matter of the Petition of, I. L. R. 5 All. 226 ... 66, 67
Doyal Chand *v.* Keramut Ali, 16 W. R. 116 ... ... 125, 144, 145, 146
Dulbood Singh *v.* Mahadeo Dutt, 2 W. R. 10 163
Durga Prasad *v.* Munsi, I. L. R. 6 All. 423 165

E.

Ejnash Kooer *v.* Amjud Ally, 2 W. R. 261 157
Ekin Bibi *v.* Ashruf Ally, 1 W. R. 152 ... ... 86, 174, 185
Emnabai *v.* Hajiabai, I. L. R. 13 Bom. 352 82
Enaet Hossein *v.* Khoobunnissa, 11 W. R. 320 93
Enaet Hossein *v.* Kurreemoonissa, 3 W. R. 40 86
Enayet Hossein *v.* Ramzan Ali, 1 B. L. R. (A. C.) 172; 10 W. R. 216 ... 171

F.

Faiz Muhammad *v.* Muhammad Said, I. L. R. 25 Cal. 816 104
Fakir Rawot *v.* Emambaksh, B. L. R. Sup. Vol. 35; W. R. (F. B.) 143 ... 153
Fatima Bibi *v.* Arif Ismailjee, 9 C. L. R. 66 ... ... 103, 124, 134
Fatma *v.* Shaik Essa, I. L. R. 7 Bom (O. J.) 266 118
Fatma Bibi *v.* Sadruddin, 2 Bom 307, 2nd Edn. 291 39
Fatma Bibi *v.* The Advocate-General of Bombay, I. L. R. 6 Bom. 42 ... 137, 145
Fegredo *v.* Mahomed Mudessur. 15 W. R. 75 146
Fida Ali *v.* Muzaffar, I. L. R. 5 All. 65 151
Fultoo Bibee *v.* Bharrut Lall, 10 W. R. 299 146
Furzund *v.* Janu, I. L. R. 4 Cal 588 47
Futteh Ali *v.* Mahomed Mukeem, W. R. 1864, 131 9
Fuzeelutoonissa *v.* Hoormutoonissa, Marsh, 281; 1 Hay 559 ... 171
Fuzooloonnissa *v.* Nawabunnissa, 2 Hay 479 19

PAGE.

G.

Gangbhai *v.* Thavar Mulla, 1 Bom. 71 112
Gholam Hossein *v.* Abdool Kadir, 5 N.-W. P. 11 161
Ghulam Ali *v.* Sagir-ul-nissa, I. L. R. 2 All. 432 42
Ghulam Mustafa *v.* Hurmat, I. L. R. 2 All. 854 83
Girdharee Lall *v.* Deanut Ali, 21 W. R. 311 161
Girdharee Singh *v.* Rajun Singh, 24 W. R. 462 160
Gobind Chunder *v.* Raj Kishore, 14 W. R. 365 155
Gobind Dayal *v.* Inayatullah, I. L. R. 7 All. 775... 153
Golakram *v.* Brindaban, 6 B. L. R. 165; 14 W. R. 265 159
Golam *v.* Hafeezoonnissa, 7 W. R. 489 174
Golam Ali *v* Agurjit Roy, 17 W. R. 343 156
Golam Ali *v.* Sowlutoonnissa, W. R., 1864, 242 146
Golam Mostofa *v* Goburdhun, 8 C. L. R. 441 96
Gooman Singh *v* Tripool Singh, 8 W. R. 437 152
Gopal Sahi *v.* Ojoodhea, 2 W. R. 47 ... ... 155, 156
Gordhandas *v.* Prankor, 6 Bom. (A. C.) 263 154
Government of Bombay *v.* Ganga, I. L. R. 4 Bom. 330 24
Gowhur *v.* Ahmed, P. C. 20 W. R. 214 47
Gujadhur *v.* Abdoollah, 11 W. R. 220 174
Gulam Hussain *v.* Agi Ajam, 4 Mad 44 ... ... 93, 145
Gulam Jafar *v.* Masludin, I. L. R. 5 Bom. 238 81
Gulam Rahumtulla *v* Mohommad Akbar, 8 Mad. 63 145
Gurdayal *v.* Jhandu, I. L. R. 10 All. 585 154
Gurdial *v.* Teknarayan, B. L. R. Sup. Vol. 166; 2 W. R. 215 ... 152
Gureebollah *v.* Kebul Lall Mitter, 13 W. R. 124 155
Gyasooddeen *v.* Fatima Begum, 1 Agra 238 85

H.

Habeeboollah *v.* Gouhur Ally, 18 W. R. 523 62
Habib-unnissa *v.* Barkat Ali, I. L. R. 8 All. 275 168
Hadi Ali *v.* Akbar Ali, I. L. R. 20 All. 262 43
Hafeez-oor-Rahman *v.* Khadim Hossein, 4 N.-W. P. 106 118
Hajra Begum *v.* Khaja Hossein, 4 B. L. R (A. C.) 86; 12 W. R. 498 ... 146
Hakim Khan *v.* Gool Khan, I. L. R. 8 Cal. 826 174
Hameeda *v.* Buldon, 17 W. R. (P. C.) 525 43
Hamid Ali *v.* Imtiazan, I. L. R. 2 All. 71 54
Hamidoolla *v.* Faizunnissa, I. L. R. 8 Cal. 327; 10 C. L. R. 291 ... 48
Hamidunnissa *v* Zohiruddin, I. L. R. 17 Cal. 670 40
Hamir Singh *v.* Zakia, I. L. R. 1 All. 57 171
Harihar Dat *v.* Sheo Prasad, I. L. R. 7 All. 41 160
Harjas *v.* Kanhya, I. L. R. 7 All. 118 158
Hasan Ali *v.* Mehdi, I. L. R. 1 All. 533 13
Hayatun-nissa *v.* Muhammad Ali Khan, I. L. R. 12 All. 290 ... 174
Hera Lall *v.* Moorut Lall, 11 W. R. 275 162
Hidaitoonnissa *v.* Afzul, 2 N.-W. P. 420 ... ... 145, 147
Hidayutollah *v.* Rai Jan Khanum, 3 Moo. I. A. 295 19
Himmut *v.* Shahibzadi, 14 W. R. 125 15
Himmut *v.* Shahibzadi, 13 B. L. R. 182; 21 W. R. 113; L. R. 1 I. A. 23 63
Hosseinee *v.* Lallun, W. R. 1864. 117 158
Hosseini Begum, In the Matter of, I. L. R. 7 Cal. 434 ... ... 9, 10
Hosseinuddin *v* Tajunnissa, W. R. (1864) 199... 38
Hulasi *v.* Sheo Prasad, I. L. R. 6 All. 455 166
Hurbai *v.* Hiraji Byramji, I. L. R. 20 Bom. 116 13

	PAGE.
Hur Dyal *v.* Heera Lall, 16 W. R. 107	159
Hurmut-ool-nissa *v.* Allahdia, 17 W. R. (P. C.) 108	174
Husain Begum *v.* Zia-ul-nisa, I. L. R 6 Bom. 467	13
Huseena *v.* Husmutoonissa, 7 W. R. 495	35
Hussain *v.* Shaik Mira, I. L. R. 13 Mad. 46	80
Hussain Bibee *v.* Hussain Sherif, 4 Mad. 23	144

I.

Ibrahim *v.* Enayetur, 4 B. L. R. (A. C.) 13; 12 W. R. 460	48
Ibrahim *v* Muni Mir, 6 Mad. 26	154
Ibrahim *v.* Syed Bibi, I. L. R. 12 Mad. 63	47
Idu *v* Amiran, I. L. R. 8 All. 322	9
Imam Buksh *v.* Thacko Bibi, I. L. R. 9 Cal. 599	11
Imamooddeen *v.* Abdool 5 N.-W. P. 170	152
Imdad Hossein *v.* Mahomed Ali, 23 W. R. 150	145
Inder Narain *v.* Mahomad Nazeerocddeen, 1 W. R. 234	154
In re Abdul Ali, I. L. R. 7 Bom. 180	68
In re Ismail, I. L. R 6 Bom. 452	4
In re Kasam Pirbhai 8 Bom (Cr.) 95	66
In the Matter of Ameernoonissa, 11 W. R. 297	9
In the Matter of Hosseini Begum, I. L. R. 7 Cal. 434	9, 10
In the Matter of Mahin Bibi, 13 B L R. 160	31
In the Matter of Ram Kumari, I. L. R. 18 Cal. 264	24
In the Matter of Tayheb Ally, 2 Hyde 63	9
In the Matter of the Petition of Din Muhammad, I. L. R. 5 All. 226 ...	66, 67
In the Matter of the Petition of Najibunnissa, 4 B. L. R. (A. C.) 55 ...	61, 62
Ismail, *In re*, I. L R. 6 Bom. 452	4
Ismal *v.* Ramji, I. L. R 23 Bom 682	75
Ismal, V. V. *v.* Beyakutti, O., I. L. R. 3 Mad. 347	54

J.

Jaafar *v.* Aji, 2 Mad. 19	146
Jadunundun *v.* Dulput, I. L. R. 10 Cal. 581	159
Jadu Singh *v.* Rajkumar, 4 B. L. R. (A. C.) 171; 13 W. R. 177 ...	160
Jafri Begam *v.* Amir Muhammad, I. L. R. 7 All. 822	171
Jahangeer Buksh *v.* Bhickaree Lall, 11 W. R. 71	156
Jai Kuar *v.* Heera Lal, 7 N.-W. P. 1	153
Jameelah *v.* Pagul Ram, 1 W. R. 251	154
Jamilan *v.* Latif Hossein, 8 B. L. R. 160; 16 W. R. (F. B.) 13 ...	161
Janger Mahomed *v.* Mahomed Arjad, I. L R. 5 Cal. 509; 5 C. L. R. 370	159
Jarfan Khan *v.* Jabbar Miah, I. L. R. 10 Cal. 383	159
Jariutool Butool *v.* Hosseinee Begum, (P. C.) 10 W. R. 10; 11 Moo. I. A 194	20
Jaun Beebee *v.* Beparee, 3 W. R. 93	54
Jehan *v.* Mandy, 1 B. L. R. 16 (S. N.); 10 W. R. 185	118
Jesmut *v.* Shoojaut, 6 W. R. (Cr.) 59	67
Jeswunt Singhjee *v.* Jet Singhjee, 6 W. R. (P. C.) 46; 3 Moo. I. A. 245	76
Jhotee Singh *v* Komul Roy, 10 W. R. 119	159
Jiwan *v.* Imtiaz, I. L. R. 2 All. 93	80
Joy Koer *v.* Suroop Narain, W. R. 1864, 259	153
Jugatmoni *v.* Romjani, I. L. R 10 Cal. 533	140
Jumoonoodeen *v.* Hossein Ali, 2 W. R. (Mis.) 49	102
Jumula *v.* Mulka, 1 Ind. Jur. (New series) 26	35

PAGE.

K.

Kadarnath Chuckerbutty v. Donzelle, 20 W. R. 352 19
Kadir Ali v. Nowsha Begum, 2 Agra 154 102
Kalee Khan v. Jadee, 5 N.-W. P. 62 240
Kaleloola Saheb v. Nuseeruddeen, I. L. R. 18 Mad. 201 ... ... 139, 140
Kali Dutt Jha v. Abdul, I. L. R. 16 Cal. 627; L. R. 16 I. A. 96 ... 13
Kalub v. Mehrum, 4 N.-W. P. 155 147
Kaloo v. Garibollah, 13 B. L. R. 163 (note); 10 W. R. 12 31
Kamarunnissa v. Husaini Bibi, I. L. R. 3 All. (P. C.) 266 95
Karim Bakhsh v. Khuda Bakhsh, I. L. R. 16 All. 247 156
Karim Buksh v. Kamr-uddin, 6 N.-W. P. 377 157
Kasam Pirbhai *In re*, 8 Bom. (Cr.) 95 66
Kasim Husain v. Sharifunnissa, I. L. R. 5 All. 285 81
Kasum v Shaista, 7 N.-W. P. H. C. R. 313 76
Kedarnath v. Donzelle, 20 W. R. 352 62
Khadeja Bibee v. Suffur Ali, 4 W. R. 36 103
Khader Hussain v. Hussain Begum, 5 Mad. H. C. R. 114 77
Khaja Mahomed v. Manija, I L. R. 14 Cal. 420 35
Khajcorunissa v Roheemunnissa, 17 W. R. 190 104
Khajooroonissa v. Rowshan, I L. R. 2 Cal. (P. C.) 184; 26 W. R. 36; L. R. 3 I. A. 291 ... ... 75, 96, 102, 111
Khem Kurun v. Seeta Ram, 2 N.-W. P. 257 157
Khoffe Jan v. Mohomed, 10 W. R. 211 162
Khojah Gouhur Ali v. Khojah Ahmed, (P. C.), 20 W. R. 214 ... 22
Kodai Singh v. Jaisri Singh, I. L. R. 13 All. 376 163
Kudratulla v. Mahini Mohan Shaha, 4 B. L. R. (F. B). 134; 13 W. R. (F. B.) 21 153
Kulsoon v. Ameerunnissa, 1 Hyde 150 ... ... 93, 96
Kulsum v. Fakir Muhammad, I. L R. 18 All. 298 160
Kummuroolnissa v Mahomed, 1 Agra 287 44
Kuneez Fatima v. Saheba, 8 W. R. 313 134
Kunhi v. Moidin, I. L. R. 11 Mad. 327 40
Kureemoonnissa v. Attaoollah, 2 Agra 211 20
Kureemun v. Mullick Enaet, W. R. (1864) 221 86

L.

Labbi Beebee v. Bibbun Beebee, 6 N.-W. P. 159 86
Ladun v. Bhyro Ram, 8 W. R. 255 151
Lala Prag Dutt v. Bandi Hossein, 7 B. L. R. 42 156
Lalla Nowbut Lall v. Lalla Jewan Lall, I. L. R. 4 Cal. 831; 2 C. L. R. 319 157
Lall Mahomed v. Lalla Brij Kishore, 17 W. R. 430 ... ... 145, 146
Land Mortgage Bank v. Bidyadhari Dasi, 7 C. L. R. 460 171
Land Mortgage Bank v. Roy Luchmiput, 8 C. L. R. 447 171
Lardli Begum v. Mahomed Amir Khan, I. L. R. 14 Cal. 615 ... 10
Liaqat Ali v. Karimunnissa, I. L. R. 15 All 396 61
Luchmee Narain v. Bheemul Doss, 8 W. R. 500 161
Luddon Sahiba v. Kamar Kudar, I. L. R. 8 Cal. 736; 11 C. L. R. 237 ... 66, 67
Lutchmiput v. Amir Alum, I. L. R. 9 Cal. 176; 12 C. L. R. 22 ... 134
Luteefoonissa v. Rajaoor, 8 W. R. 84 86

M.

Madhub Chunder v. Tamee Bewah, 5 W. R. 279 154
Mahadeo Singh v. Zitannissa, 7 B. L. R. 45 (note); 11 W. R. 169 ... 155

	PAGE.
Maharaj Singh *v.* Lallah Bhuchook, W. R. 1864, 294	161
Mahar Ali *v.* Amani, 2 B. L R. (A. C.) 306	236
Maharana Shri Fatesangji v. Kuvar Harisangji, I. L. R. 20 Bom. 181 ...	4
Mahin Bibi, In the Matter of, 13 B. L. R. 160	31
Mahomed *v.* Musseehooddeen, 2 N.-W. P. H. C. R. 173	67
Mahomed Abed *v.* Ludden Sahiba, I. L R. 14 Cal 276	68
Mahomed Akul Beg *v.* Mahomed Koyum Beg. 25 W. R. 199 ...	174
Mahomed Ali *v.* Gobar Ali, I. L. R 6 Bom. 88	140
Mahomed Altaf *v.* Ahmed Buksh, 25 W. R. (P. C.) 121	97
Mahomed Altaf *v.* Ahmed Buksh, 25 W. R. 121...	104
Mahomed Ashanulla Chowdhry *v.* Amarchand Kundu, I. L. R. (P. C) 17 Cal. 498	135
Mahomed Bauker *v.* Shurfoonissa, 3 W. R. (P. C.) 37; 8 Moo. I. A. 136	19, 62
Mahomed Hamidulla Khan *v.* Lotful Huq, I. L. R. 6 Cal. 744; 8 C. L. R. 164	134
Mahomed Haneef *v.* Mahomed Masoom, 21 W. R. 371	202
Mahomed Hossein *v.* Mohsin Ali, 6 B. L. R. 41; 14 W. R, (F. B.) 1 ...	156
Mahomed Modun *v* Khodezunnissa, 2 W. R. 181	102
Mahomed Noor Khan *v.* Hur Dyal, 1 Agra 67	80
Mahomed Sidick *v.* Ahmad, I. L. R. 10 Bom. 1	4
Mahomed Ussudoollah *v.* Ghasheea Beebee, 1 Agra 150	43
Mahomed Wares *v.* Hazee Emamooddeen, 6 W. R. 173	161
Mahomed Zuheerul *v.* Butoolun, 1 W. R. 79	85
Mansha Devi *v.* Jiwan Mal, I. L. R 6 All. 617	67
Masthan Saheb *v.* Assan Bibi, I. L. R. 23 Mad. 371	39
Md. Abdul Majid *v.* Fatima Bibi, I. L. R. 8 All. 39; L. R. 12 I. A. 159 ...	159
Meer Mahomed Israil *v.* Sashti Churn Ghosh, I. L. R. 19 Cal. 412 ...	135
Meerun *v.* Najeebun, 2 Agra 335	43
Meherali *v.* Tajudin, I L. R. 13 Bom. 156	75
Mogul Begum *v.* Fukeerun 3 Agra 288	104
Mogulsha *v.* Mohamad Saheb, I. L. R. 11 Bom. 517	95
Moharaj Singh *v.* Lalla Bheechuk Lal, 3 W. R. 71	156
Moheeooddeen *v.* Elahee Buksh, 16 W. R. 277	144
Moheshee Lall *v.* Christian, 6 W. R. 250	154, 157
Mohesh Lall *v.* Christian, 8 W. R. 446	150
Mohinudin *v.* Manchershan, I. L. R. 6 Bom. 650	75, 85
Mohiuddin v. Sayiduddin, I. L R. 20 Cal. 810	144
Mohno Bibee *v.* Juggurnath, 2 W. R. 78	151
Mohomuddy Begum *v* Oomdutoonissa, 13 W. R. 454	11
Mohumdi Begum *v.* Bairam, 1 Agra 130	31
Mona Singh *v.* Mosrad Singh, 5 W. R. 203	161
Moneeruddin *v.* Ramdhun, 18 W. R. (Cr.) 28	15
Monowar Khan *v.* Abdoollah, 3 N.-W. P. H. C. R. 177	19
Moti Chand *v.* Mahomed Hossein, 7 N.-W. P. 147	153
Muhamad Mumtaz *v* Zubaida, I L. R., 11 All. 460; L. R. 16 I. A. 195	78
Muhammad *v.* Imamuddin, 2 Bom. 53	102
Muhammad Allahdad *v.* Muhammad Ismail, I. L. R, 10 All. 289 ...	61, 62
Muhammad Azizuddin *v.* The Legal Remembrancer, I. L. R. 15 All 321	120
Muhammad Esuph *v.* Pattamsa, I. L. R 23 Mad. 70	95, 96
Muhammad Ibrahim *v.* Ghulam Ahmed, 1 Bom. H. C. R. 236 ...	20
Muhammad Faiz *v.* Ghulam Ahmad, I. L. R. 3 All. 490; L. R. 8 I. A. 25	95
Muhammad Gulshere *v.* Mariam Begam. I. L. R. 3 All. 731 ...	87
Muhammad Husain *v.* Niamutunnissa, I. L. R. 20 All. 88	168
Muhammad Karimullah *v.* Amani Begum, I L R 17 All. 93 ...	42
Muhammad Mumtaz *v.* Zubaida, I. L. R. 11 All. 460	82
Muhammad Munawar *v.* Rasulan Bibi, I. L. R. 21 All. 329	137

PAGE.

Muhammad Nasiruddin *v.* Abdul, I. L. R. 16 All. 300 168
Muhammad Yunus Khan *v.* Muhammad Yusuf, I. L. R. 19 All. 334 ... 160
Mujavar Ibrambibi *v.* Mujavar Hussain, I. L. R. 3 Mad. 95 144
Mulka Jehan *v.* Mahomed Ushkurree, 26 W. R. 26; L. R. I. A. Sup. Vol. 192 ... ... 21, 185
Mulkah *v.* Jehan, 2 W. R. (P. C.) 55; 10 Moo. I. A. 252 43
Mulleeka *v.* Jummeela, 11 B. L. R. 375; L. R. I. A. Sup. Vol. 135 ... 35
Mullick Abdool *v.* Mulleka, I L. R. 10 Cal. 1112 ... ... 76, 80
Munnoo Bibee *v.* Jehandar Khan, 1 Agra 250 85
Murtaza Bibee *v.* Jumna Bibee, I. L. R. 13 All. 261 137
Mussummut Butoolun *v.* Mussamut Koolsum, 25 W. R. 444 ... 19
Mutty Jan *v.* Ahmed Ally, I. L. R. 8 Cal. 370; 10 C. L. R. 346 ... 170
Muzhurool Huq *v.* Puhraj Ditarey Mohapattur, 13 W. R. 235 ... 134, 135

N.

Najibunnissa, In the Matter of the Petition of, 4 B. L. R. (A. C.) 55 ... 61, 62
Nancy *alias* Zahoorun *v.* Burgess, 1 W. R. 272 203
Narbhase *v.* Luchmee, 11 W. R. 307 159
Nasir Hussain *v.* Sughra Begam, I. L. R. 5 All. 505 79
Nawab Ibrahim *v.* Ummat-ul, I. L. R. 19 All. 267 77
Nawabunnissa *v.* Fuzooloonnissa, Marsh. 428 19
Nizam-uddin *v.* Zabeda, 6 N.-W. P. 338 86
Nizamudin *v.* Abdul Gofur, I. L. R. 13 Bom. 264 138
Noor Bibi *v.* Naivas, 1 Ind. Jur. (N. S.) 221 47
Nornarain *v.* Neemaee Chand, 6 W. R. 303 236
Nubee Buksh *v.* Kaloo Lushker, 22 W. R. 4 162
Nujeemoodeen *v.* Hosseinee, 4 W. R 110 35
Nundo Pershad *v.* Gopal Thakur, I. L. R. 10 Cal. 1008 ... 156, 159, 162
Nuraddin *v.* Asgar Ali, 12 C. L. R. 312 159
Nur Kadir *v.* Zuleikha Bibi I. L. R. 11 Cal. 649 9
Nuseeb-onissa *v.* Danush Ali, 3 W. R. 133 44
Nusrut Ali *v* Zeinunnissa, 15 W. R. 146 103
Nusrut Reza *v.* Umbul Khyr, 8 W. R. 309 150
Nussebun *v.* Ashruff Ally, Marsh. 315; 2 Hay 163 87
Nuzmoodeen *v.* Kanye Jha, Marsh. 555; 2 Hay 651 151

O.

Obedur *v.* Mahomed Muneer, 16 W. R. 88 75
Oheed Khan *v.* Collector of Shahabad, 9 W. R. 502 203
Ojheoonissa *v.* Rustum Ali, W. R, 1864, 219 ... ... 151, 160
Oomutoonnissa *v.* Ooreefoonnissa, 4 W. R. 66 103
Ossuff *v.* Shama, I. L. R. 5 Cal. 558; 5 C. L. R. 21 67

P.

Pathukutti *v.* Avathalakutti, I. L. R. 13 Mad. 66 139
Pershadi Lal *v.* Irshad Ali, 2 N.-W. P. 100 152
Phul Chand *v.* Akbar, I. L. R. 19 All. 211 137
Pirthipal Singh *v.* Husaini Jan, I. L. R. 4 All. 361 171
Poorno Singh *v* Hurry Churn 10 B. L. R., 117; 18 W. R. 440 ... 153
Prokash Singh *v.* Jogeswar Singh, 2 B. L. R. (A. C.) 12 160
Punna *v.* Juggur Nath, 1 Agra 236... 151

PAGE.

Q.

Queen v. Judoo Mussulmanee, 6 W. R. (Cr.) 60 15

R.

Raham Ilahi v. Ghasita, I. L. R. 20 All. 375 164
Rahim Bakhsh v. Muhammad Hasan, I. L. R. 11 All. 1 ... ... 76, 96
Rajabai v. Ismail, 7 Bom. (O. C.) 27 ... 79, 81, 82
Raj Begum v. Reza Hossein, 2 W. R. 76 ... ... 9, 10
Rajjub Ali v. Chundi Churn, I. L. R. 17 Cal. 543 159
Ram Beharee v. Sitara Khatoon, 10 W. R. 315 173
Ram Churun v. Narbir Mahton, 4 B. L. R. (A. C.) 216; 13 W. R. 259 161
Ramcoomer v. Faqueerunissa, 1 Ind. Jur. (O. S.) 119 103
Ramdular Misser v. Jhumack Lal, 8 B. L. R. 455; 17 W. R. 265 ... 160
Ram Golam v. Nursing Sahoy, 25 W. R. 43 151
Ram Kumari, In the Matter of, I. L. R. 18 Cal. 264 24
Ranchoddas v. Jugaldas, I. L. R. 24 Bom. 414 155
Rasamaya Dhur v. Abul Fata, I. L. R. 18 Cal. 399 135
Razeeooddeen v Zeenut Bibee, 8 W. R. 463 159
Razza Hossein v Ifatoonnissa, 2 Hay 564 36
Reasut Ali v. Abbott, 12 W. R. 132 145
Rook Begum v. Shahzadah, 3 W. R. 187 19
Roshun v. Enaet, 5 W. R. 4 79
Roshun v. Mahomed Kuleem, 7 W. R. 150 156
Rowshun Koer v. Ram Dihal, 13 C. L. R. 45 105
Rup Chand v. Shamshul-jehan, I. L. R. 11 All. 346 163
Rutton v. Doomee Khan, 3 Agra 21 11

S.

Sadakat Hossein v. Mahomed Yusuf, I. L. R. (P. C.) 10 Cal. 663; L. R. 11 I. A. 31 61
Sahiba Begum v. Atchamma, 4 Mad. 115 95
Sahib-un-nissa v. Hafiza, I. L. R., 9 All. 213 ... ... 77, 79, 82
Sajid Ali v. Ibad Ali, I. L. R., 23 Cal. 1 102
Sajjad Ahmad v. Kadri Begam, I. L. R. 18 All. 1 89
Saligram v. Raghubardyal, I. L. R. 15 Cal. 224 156
Sedamut v. Mowla Buksh, 5 W. R. 194 43
Shahebzadi v. Himmut Bahadur, 12 W. R. 512 203
Shahjan Bibi v. Shib Chunder, 22 W. R. 314 75
Shaikh Bhugun v. Shaikh Rumjon, 24 W. R. 380 15
Shaikh Ibrahim v. Shaikh Suleman, I. L. R. 9 Bom. 146 ... ... 78, 88
Sharifa Bibi v. Gulam Mahomed, I. L. R. 16 Mad. 43 87
Sheopargash v. Dhanraj, I. L. R. 9 All. 225 162
Sheraj Ali v. Ramjan Bibee, 8 W. R. 204 152
Shumsoonnissa v. Rai Jan Khanum, (P. C.) 6 W. R. 52 19
Shurbo Narain v. Ally Buksh, 2 Hay 415 125
Shurfoonnissa v. Koolsoom, 25 W. R. 447 121
Sitanath Dass v. Roy Luchmiput, 11 C. L. R. 268 171
Sitaram v. Amir Begum, I. L. R., 8 All. 324 14
Skinner v. Orde, 14 Moo. I. A. 309; 10 B. L. R. 125; (P. C.) 17 W. R. 77 ... 25
Sobhan v. Shubraton, I. L. R. 5 Cal. 558; 5 C. L. R. 21 67

	PAGE.
Solah Bibee v. Kirun Bibee, 16 W. R. 175	95
Soojat Ali v. Zumeerooddeen, 5 W. R. 158	146
Soondur Kooer v. Lalla Rughoobur, 10 W. R. 246	151
Suddurtonnessa v. Majada, I. L. R. 3 Cal. 694	4
Sugra v. Masuma, I. L. R. 2 All. 573	37
Sukoomut Bibi v. Warris Ali, 2 W. R. 400	103
Suleman v. Mehdi Begum, I. L. R. 21 Cal. 135 (P. C.)	37
Surdharee Lall v. Laboo Moodee, 25 W. R. 500	165
Syedun v. Allah Ahmed, W. R. 1864, 327	144
Syedun v. Velayet Ali, 17 W. R. 239	13

T.

Tadiya v. Hasanebiyari, 6 Mad. H. C. R. 9	39
Tameez Begum v. Furhut Hossein, 2 N.-W. P. 55	97
Tara Kunwar v. Mangri Meah, 6 B. L. R. (Ap.) 114	152
Taufik-unnissa v. Ghulam, I. L. R. 1 All. 506	39
Tayheb Ally, In the Matter of, 2 Hyde 63	9
Teeka Dharee v. Mohur Singh, 7 W. R. 260	157
Toral Komhar v. Auchhi, 9 B. L. R. 253; 18 W. R. 401	168

U.

Umed v. Saffihan, 3 B. L. R. (A. C.) 175	43
Umjad Ally v. Mohumdee Begum, 10 W. R. (P. C.) 25; 11 Moo. I. A. 517	85
Umrao Bibi v. Jan Ali, I. L. R., 20 All. 465	78
Ussud Ali v. Olfut Bibi, 3 Agra 237	95

V.

Valayet Hossein v. Maniram, 5 C. L. R. 91	87
Valimia v. Gulam Kadar, 6 Bom. (A. C.) 25	80
Vellai Mira v. Varisai Mira, 2 Mad. 414	175
V. V. Ismal v. O. Beyakutti, I. L. R., 3 Mad. 347	54

W.

Wahid Ali v. Ashruff Hossain, I. L. R. 8 Cal. 732; 10 C. L. R. 529 ...	144, 146
Wahidunnissa v. Shubrattun, 6 B. L. R. 54; 14 W. R. 239	43
Waj Bibi v. Azmut, 8 W. R. 23	47
Wajeed Ali v. Abdool Ali, W. R. (1864) 121	82, 85, 93
Wajid Ali Khan v. Lala Hanuman Prasad, 4 B. L. R. (A. C.) 139; 12 W. R. 484	160
Wajid Khan v. Ewaz Ali, I. L. R. 18 Cal. 545	80
Waliulla v. Miran, 2 Bom. H. C. R. 285	62
Wazir Jan v. Sayyid, I. L. R. 9 All. 357	87
Wazir Khan v. Kale Khan, I. L. R. 16 All. 126	163
Wuheedun v. Wusee, 15 W. R. 403	62

PAGE.

Y.

Yakoob *v.* Luchmun, 6 N.-W. P. 80 140
Yasin *v.* Md. Yarkhan, I. L. R. 19 All. 504 44
Yusof *v.* Collector of Tipperah, I. L. R. 9 Cal. 138 79
Yusoof Ali *v.* Fyzoonissa, 15 W. R. 296 67

Z.

Zahuruddin *v.* Baharulla, W. R. 1864, 26th April 4
Zakeri *v.* Sakina, I. L. R. 19 Cal. 689 35
Zamir Husain *v.* Daulat Ram, I. L. R. 5 All. 110 160

Case-noted

MAHOMEDAN LAW.

CHAPTER I.—Introductory.

§1. **Origin of Mahomedan Law.**—The Mahomedan law is said to be of divine origin, and is part of the Mahomedan religion. The primary source of the law is the **Kuran** which was revealed to Muhammad himself, the Founder of the Mahomedan Faith. As the social relations of the Mahomedans became more and more extended, the provisions of the *Kuran* were found insufficient to cover all cases, and recourse was had to the **Sunnat**, and to the **Hadis**. These were considered to supplement the *Kuran*, and to be of almost equal authority. The *Sunnat* and the *Hadis* are the traditions of what Muhammad had done, said, or upheld in silence. These traditions of the prophet's doings and sayings were borne in memory, and handed down from generation to generation, until at length they were reduced into writing. The third source is the **Ijmaa**, which consists of the decisions and determinations of the Prophet's companions, their disciples, the pupils of such disciples, and other learned men. When the *Kuran*, the *Sunnat* and the *Hadis*, and the *Ijmaa* were insufficient to meet any particular case, deductions were drawn from these sources by their comparison, applying rules of analogy. These deductions were termed the **Kiyas**, and formed the fourth source of the Mahomedan Law.

§2. **Different Sects.**—Although all Mahomedans acknowledged, and believed in, the *Kuran* as the fountain-head of the Mahomedan faith, yet the different interpretations of different expositors, the admission of particular *Hadis* by some and their rejection by others, and the acknowledging of a particular person as the *Imam*, created a number of different sects among them. These sects are said to be *seventy-three* in number. Of these, again, the **Sunnis** and the **Shiahs** are the two principal. "The *Sunnis* or *Ahli Sunnat* (people of *Sunnat*) are the Mussalmans who assume to themselves the distinction of being orthodox, and are such as maintain the obligatory force of the *traditions*, in opposition to the innovations of the sectaries; whence they are termed *Sunnis* or traditionists."—(The *Hidaya.*) The *Sunnis*, again, are divided into various orders, of which *four* are principal. These four sects of the *Sunnis* are—(1) the Hanifi, (2) the Maliki, (3) the Shafii, and (4) the Hanbali, so called according to the name of the founder of each sect. The followers of Abu Hanifa are known as the **Hanifi School** of the Sunni sect, and form the bulk of the Mahomedans in India. The *Shiahs* are the followers of Ali, Muhammad's son-in-law, and are otherwise called the "**Imamiyas.**"

§3. **Text-books of authority.**—The authorities mostly revered in India by the *Sunni* sect are—the Hidaya, the Sirajyyiah (the highest authority on the law of Inheritance), the Sharifiyya (a commentary on the Sirajyyiah), Fatwa Sirajyyiah, Fatwa Alamgiri, and Durr-ul-mukhtar. The chief authority of the Imamiya School in India is the Sharaya-ul-Islam. Other authorities of this school are—Rauzat-ul-Aukham, Shara-i-Luma, Maftahi, and others. The principal seat of the *Shiah* School in India, is at Lucknow.

§4. **Application of the Mahomedan Law.**—It was enacted by Statute 21, Geo. III. Cap. 70, that in matters of

inheritance, succession to lands, rents and goods, and all matters of *contract* and dealing between party and party shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans. By section 15, Regulation IV. of 1793, it was also provided that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan law with regard to Mahomedans are to be considered as the general rules by which the Judges are to form their decisions. But the Mahomedan law as now enforced in the Courts in British India is only a fraction of what was administered in Mahomedan times. The effect of several legislative enactments has been to restrict and largely to modify that law in its present application. For example, excepting the contract of marriage, and the contract of sale with reference to the right of pre-emption, all other contracts between Mahomedans are now to be regulated by the Indian Contract Act. The Indian Limitation Act fixes the time for enforcing the right of pre-emption, for recovering dower, and for the restitution of conjugal rights. These modifications and restrictions will be noted under the respective subjects dealt with in the following chapters. But, where there is no such direct prohibition or restriction, the Courts are to decide according to equity and good conscience. By section 37, Act XII. of 1887, the Bengal, N.-W. P., and Assam Civil Courts Act, it has been enacted:—(1) where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. (2) In cases not provided by sub-section (*1*), or by any other law for the time being in force, the Court shall act according to justice, equity, and

good conscience. Similar provisions have also been enacted in Act III. of 1873, the Madras Civil Courts Act, and in the Lower Burma Courts Act of 1889.

Case-law.

In *Zahuruddin* v. *Baharulla*, W. R., 1864, 26th April, it was objected that a question of gift should not be decided according to Mahomedan law, as it was not included under the denomination of inheritance, marriage, and caste; but the Court decided that the Mahomedan law has been invariably applied in practice to cases other than those coming under the said denominations, because in doing so the Courts have administered justice according to equity and good conscience.

Extent of application, and custom.—The Mahomedan law, though part of the Mahomedan religion, does not as a rule bind all who adopt that faith: *Mahomed Sidick* v. *Ahmad*, I. L. R. 10 Bom. 1.

A Mahomedan family may adopt the customs of Hindus subject to any modifications. But a Judge is not bound to apply to a Mahomedan joint family all the rules and presumptions applicable to Hindu joint families. It rests with him to decide how far those rules and presumptions are applicable: *Suddurtonnessa* v. *Majada*, I. L. R. 3 Cal. 694.—*The Cutchi Memons* are Mahomedans to whom the Mahomedan law is to be applied unless when an ancient and invariable special custom to the contrary is established: *In re Ismail*, I. L. R. 6 Bom. 452; but the Hindu law of inheritance applies to them: *Ashabai* v. *Taib Haji*, I. L. R. 9 Bom. 115.—The Hindu law of inheritance and succession applies to *Molesalam Girasias*, who were originally Rajputs, but who subsequently became Mahomedans: *Maharana Shri Fatesangji* v. *Kuvar Harisangji*, I. L. R. 20 Bom. 181;—and, also to the Suni Borahs in Gujarat. The law governing Hindu converts to Mahomedanism are that the Mahomedan law generally governs converts to that faith from Hinduism, but a well-established custom of such converts following the Hindu law of inheritance would override the general presumption, and this custom should be strictly confined to cases of succession and inheritance. If any particular custom of succession be set up which is at variance with the general law applicable to such communities, the burden of proving it lies upon him who alleges it. It was further held (following the principle in *Abraham* v. *Abraham*, 9. Moo. I. A. 195) that Hindu converts to Mahomedanism, such as *Khojas* and *Cutchi Memons* can retain or abandon, either wholly or in part, the old Hindu usages: *Bai Baiji* v. *Bai Santok*, I. L. R. 20 Bom. 58.

Rules of interpretation.—Where a point of law is admitted to be doubtful by the authorities, the practice of the Court is to be followed: *Daim* v. *Ashooa*, 2 N. W. 360.—Where there is a difference of opinion amongst Abu Hanifa and his two disciples, Abu Yusuf and Muhammad, the opinion of the majority is to be followed. The opinion of Abu Yusuf is entitled to the greatest weight in the application of legal principles to temporal affairs: *Abdul Kadir* v. *Salima*, I. L. R. 8 All. 149.

CHAPTER II.—Minority and Guardianship.

§5. **Majority.**—According to the Mahomedan law a person becomes an adult on the expiration of his or her *fifteenth* year, unless symptoms of puberty appear at an earlier age. The earliest age which the law can presume for the appearance of the symptoms of puberty is twelve years for boys, and nine years in the case of girls. Below those ages puberty cannot be presumed to have appeared in the respective cases.

"The puberty of a boy is established by his becoming subject to nocturnal emission, his impregnating a woman, or emitting in the act of coition; and that of a girl, by her becoming subject to nocturnal emission, menstruation, or pregnancy. But if none of these be known to exist in them, then until they complete the *fifteenth* year."—The *Durr-ul-Mukhtar*. These symptoms of puberty are also corroborated by the opinion of Abu Hanifa and his two disciples, Abu Yusuf and Muhammad. The earliest age for the appearance of these symptoms of puberty cannot be, in legal presumption, less than 12 years in the case of a boy, nor 9 years in the case of a girl. The declaration of a boy or girl regarding the appearance of these signs should be credited, provided the outward appearance does not indicate to the contrary.

§6. These provisions of the Mahomedan law are not affected by the Indian Majority Act (IX. of 1875). Section 2 of that Act

provides—"Nothing herein contained shall affect (*a*) the capacity of any person to act in the following matters, namely,—Marriage, Dower, Divorce, and Adoption; (*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India." For other purposes the limit of minority is as defined by the Act, viz., the end of the seventeenth year where no guardian has been appointed, and the end of the twenty-first year in any other case.

§7. Minors are divided into two classes. Those who are in their infancy are called *Sabi*, and those who have nearly attained puberty are termed *Murahik*.

§8. **Capacities, incapacities, and liabilities of Minors.**—A minor is not competent *Sui juris* to do any civil act. Such act is unlawful if done without authority from the guardian, but valid if done with such authority or assented to by the guardian. Accordingly, a minor is not competent *Sui juris* to contract marriage, to pass a divorce, to make a loan, to contract a debt, or to engage in any other transaction which is not manifestly to his benefit. But minors are not incompetent to do such acts as are manifestly for their benefit. They can receive gifts and become the proprietor of the property bestowed, but the right to take possession for them belongs to their guardians. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others.

§9. Guardianship over a minor is for three purposes—(1) for the purpose of marriage, (2) for the care of the minor's person, and (3) for the management of his property. The guardianship in matrimonial affairs will be discussed in the chapter on marriage. The guardianship for the care of an infant's person is called "*Hizanat*."

§10. **Hizanat or custody of infants.**—The mother is entitled to the custody of her infant child, not only during marriage,

but also after separation from her husband. But she cannot be trusted if she be an apostate, or wicked (such as, guilty of adultery, or theft, or her being a professional singer), or unworthy of the trust. Upon the mother's death, the maternal grandmother* succeeds to the *hizanat* of the infant; next comes the full sister, then the half sister by the mother, then the daughter of the full sister, then the daughter of the half sister, then the maternal aunts, and, lastly, the paternal aunts. The rights of these females (including the mother) to the custody of the infant are annulled by their marrying a stranger†, but revive on the marriage being dissolved. Failing all female relatives, the custody of the infant devolves upon the male agnates, such as, first, the father; next, the paternal grandfather; next, full brother; the half brother by the father; then brother's sons; then paternal uncles, and then their sons in the same order; with this restriction that no male has any right to the custody of a female child, unless he is within the prohibited degrees of relationship to her. A girl should not be entrusted to the son of a paternal uncle.

A *female's* custody of a *boy* terminates when the boy is of *seven* years, and of a *girl* on her attaining *puberty*. A *male* relation's custody of a *boy* continues till puberty, and of a *girl* till she can safely be left to herself. At the end of the period of *hizanat*, a boy or girl must remain with the father or any other guardian entitled by law to his or her guardianship. "The right of *hizanat* with respect to a male child appertains to the mother, grandmother, and so forth, until he become independent of it

* According to the Hidaya, after the maternal grandmother, the custody of an infant devolves upon the paternal grandmother who is said to have a right prior to any other relation, *she being as one of the children's mothers.*

† But if they are married to relations of the infant within the prohibited degrees, as, when his grandmother marries his grandfather, or his mother marries his paternal uncle, the right is not invalidated. When a woman is repudiated revocably, her right does not revive till after the expiration of her *iddat*, because till then the husband's power over her still exists, (and she is not in a position to resume the custody).—*Fatwa Alamgiri.*

himself, that is to say, become capable of shifting, eating, drinking, and performing the other natural functions without assistance; after which, the charge devolves upon the father, or next paternal relation entitled to the office of the guardian, because when thus far advanced, it then becomes necessary to attend to his education, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are best qualified. But the right of *hizanat* with respect to a girl appertains to the mother, grandmother, and so forth, until the first appearance of the menstrual discharge, that is to say, until she attain the age of puberty, because a girl has occasion to learn such manners and accomplishments as are proper to women, to the teaching of which the female relations are most competent; but after that period the charge belongs to the father, because after she attains maturity some person is required to superintend her conduct, and to this the father is most completely qualified."—The *Hidaya.*

§11. The guardians have a right to retain in custody an adult virgin of tender age, though there should be no apprehension of her doing anything wrong. But if more advanced in years, and of ripe discretion, and chaste, they have no right to retain her, and she may reside where she pleases. In the absence of male agnates, or where the agnate is profligate, the Judge should take care of her; and if the female can be trusted to take care of herself, he should allow her to live alone, whether she be a virgin or a *Shayyiba* (one who has been enjoyed), otherwise he should place her with some female trustee. An illegitimate child's putative father is excluded from its custody. The Mahomedan law does not allow the father to interfere with his illegitimate child, even for the purpose of education.

§12. When a separation has taken place between a husband and wife, and her *iddat* has expired, she may take her child to her

city if the marriage took place there. But she cannot do so if the marriage did not take place in her own city, unless it be so near the place of separation that if the husband starts in the morning to visit the child, he can return to his own house before night. Nor can she go to any other city than that in which the contract took place, on any other conditions. The same rule is applicable to different places in the same city.—(*Fatwa Alamgiri*). But she cannot remove with her child to a place which is not the place of her nativity, even if her marriage contract was executed there.—(*Hidaya*). During the subsistence of marriage, and in the case of a divorced woman, before completion of her *iddat*, the proper place of *hizanat* is that where the husband and wife live. So that, the husband cannot leave the city where they are residing, and take the child with him out of the custody of the woman. There is no objection to the mother's removing from the village to the city or chief town of the district, as this is in no respect injurious to the father, and is advantageous to the child, since he will thereby become known and acquainted with the people of that place. But she cannot remove the child from the city to the village, as it would be injurious to the child.

Case-law.

As to the mother's preferential right to the custody of her infant children under seven years of age in the case of male children, and under puberty in the case of female children—see *Futteh Ali* v. *Mahomed Mukeem*, **W. R. 1864, 131**: *Raj Begum* v. *Resa Hossein*, **2 W. R. 76**: *Idu* v. *Amiran*, **I. L. R. 8 All. 322**: *In the Matter of Tayheb Ally*, **2 Hyde 63**: *In the Matter of Ameeroonissa*, **11 W. R. 297**; and also according to the Shiah School, *In the Matter of Hosseini Begum*, **I. L. R. 7 Cal. 434**.—The mother is entitled to the custody of a female minor who has not attained her puberty, in preference to the husband of such minor: *Nur Kadir* v. *Zuleikha Bibi*, **I. L. R. 11 Cal. 649**; and, in the absence of the mother, the maternal grandmother would be entitled to the guardianship of a minor female child, in preference to the child's paternal uncle, where such child, although married to a minor, has not attained puberty: *Bhoocha* v. *Elahi Bux*, **I. L. R. 11**

Cal. 574.—A prostitute cannot be entrusted with the custody of her minor sister, although she may be legally entitled to it: *Abasi* v. *Dunne*, **I. L. R. 1 All. 598.**

A Mahomedan father of the Shiah sect is entitled to the custody of his daughter who is above seven years in age, as against the mother of such minor: *Lardli Begum* v. *Mahomed Amir Khan*, **I. L. R. 14 Cal. 615**; the mother's custody of her female child extending up to the seventh year: *Raj Begum* v. *Reza Hossein*, **2 W. R. 76.** See also, *In the Matter of Hosseini Begum*, **I. L. R. 7 Cal. 434.**

§13. Guardians.—Guardians are of three kinds: (1) Natural; (2) Testamentary; and (3) Appointed. The natural guardians are, again, either *near* or *remote*. A father, his executor father's father, and his executor, and the executors of such executors are all *near* guardians. The distant paternal kinsmen are termed *remote* guardians. For the management and preservation of a minor's property, the guardianship devolves first on his or her father, then on the father's executor, next on the paternal grandfather, then on his executor, then on the executors of such executors; for, it is stated in the Fatwa Alamgiri, the executor of a father is in the place of a father, that of a grandfather is in the place of a father's executor, and the executor of a grandfather's executor is in the place of the latter. Next, it devolves on the ruling power or its representative, and the Government is to appoint a guardian of the minor's property. The remote paternal kinsmen and the mother next succeed in guardianship according to proximity, but their guardianship extends to the education and marriage of minors. They have no control over the minor's property, unless empowered by the ruling power or by the will of the late proprietor. The mother's right is forfeited upon her being remarried to a stranger, but reverts on her again becoming a widow or getting a divorce. Maternal relations are the lowest species of guardians, and they succeed to the guardianship in default of the paternal kindred and the mother, for the purposes

of education and marriage, but not for the management of his property, unless so appointed by the ruling power or by the will of the deceased. A legally constituted executor, being any relation of the minor, may become a guardian for all the purposes.

Case-law.

The mother has a preferential right over the paternal uncle to the guardianship of minors: *Alimodeed* v. *Syfoora*, 6 W. R. Mis. 125; and the maternal grandmother is also entitled to the guardianship in preference to the child's paternal uncle: *Bhoocha* v. *Elahi Bux*, I. L. R. 11 Cal. 574.—The mother's brother of a female minor, whose parents are dead, is entitled to the guardianship in preference to a stranger, unless he is unfit to take charge of the property: *Imam Buksh* v. *Thacko Bibi*, I. L. R. 9 Cal. 599.—An elder brother is not in the position of a guardian having any power as such over the property of his minor sisters: *Bukshan* v. *Maldai*, 3 B. L. R. A. C. 423.—The remote guardians, among whom are brothers, cannot alienate the property of a minor, their guardianship extending to matters connected with the education of their wards, and the near guardians alone have limited power over immoveable property: *Rutton* v. *Doomee Khan*, 3 Agra. 21.—The fact that an uncle cannot be the guardian of his minor nephew's property, does not prevent him representing his infant nephew as his next friend in a suit under the Civil Procedure Code: *Abdul Bari* v. *Rash Behari Pal*, 6 C. L. R. 413.—A mother, not being the legal guardian of her minor child, cannot do any act relating to the property of the minor, so as to bind him: *Baba* v. *Shivappa*, I. L. R. 20 Bom. 199.—According to the *Shiah* school of Mahomedan law, a mother can neither be herself the guardian of her children, nor can she appoint a guardian to them by will: *Mohomuddy Begum* v. *Oomdutoonissa*, 13 W. R. 454.

§14. Authority of Guardians.—It is lawful for a guardian, having care of the minor's person and property, to enter into any contract which is likely to be advantageous to his ward. He may sell or purchase moveable property on account of his ward, but he must avoid losses in as great a degree as possible. He may also contract necessary debts for the support and education of his ward, even by pawning the minor's moveable property,

and such debt must be paid out of the minor's estate, or by himself on his attaining age. But a guardian cannot pawn his ward's moveable property to himself for debts due to himself. A father, however, is empowered to pawn his child's goods into his *own* hands or that of a stranger, for debts due to himself, or for *his own* debts, or debts due by both, and the minor on attaining age cannot annul the contract of pawn. When the father pawns the minor's goods for *his* own debts, and the latter has redeemed the same, he has a claim on the father for that sum. A father may lawfully sell his minor child's moveable property for an equivalent or at a *slightly* reduced price.

§15. A minor's immoveable property cannot be sold by the guardian except under certain circumstances, *viz.*—(1) where double the value of the property is obtained; (2) where there is no other property; (3) for the ward's maintenance; (4) for the liquidation of debts due by the late incumbent; (5) for the execution of the general provisions in the will of the late incumbent; (6) where the produce of the property is less than the expense of keeping it; (7) where the property is in danger of being destroyed or damaged, or is in the hands of a usurper, and there is no chance of its recovery. A guardian cannot sell his ward's immoveable property to himself. According to the Durr-ul-Mukhtar, if a father or grandfather sell a minor's immoveable property for a *proper price* and with no fraudulent intentions, such sale is valid.

Case-law.

Guardian's power to sell minor's property.—Under the Mahomedan law a sale by a guardian of property belonging to a minor is not permitted otherwise than in case of urgent necessity or clear advantage to the infant; and a purchaser from such guardian cannot defend his title on the ground of the *bona fides* of the transaction: *Bukshan* v. *Maldai*, 3 B. L. R. A. C. 423.—What constitutes "*legal necessity*" is a matter for consideration when the conduct of a guardian is called in question; a sale made to carry on

important litigation was held *bona fide* and for the benefit of the minor, as the Mahomedan law permits the guardian to dispose of moveable property for the minor's benefit: *Syedun* v. *Velayet Ali*, **17 W. R. 239.**—Where an elder brother disposed of immoveable property belonging to himself and his minor brother, with the approval of the agent of the Government, who was acting as the representative of the ruling authority in the management of the estate, *held* that the sanction of the ruling power constituted a sufficient authority for the act of the guardian, *provided that the transaction was one which according to Mahomedan law* a *duly constituted guardian might have entered into on behalf of his ward.* That law permits a guardian to sell the immoveable property of his ward when the late incumbent died in debt, or when the sale of such property is necessary for the maintenance of the minor: *Husain Begum* v. *Zia-ul-nisa*, **I. L. R. 6 Bom. 467.**—Where disputes existed as to the title to revenue-paying land, of which part formed the shares of minors whose guardian sold those shares, whereby the disputes ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was: *Kali Dutt Jha* v. *Abdul*, **I. L. R. 16 Cal. 627**; **L. R. 16 I. A. 96.**—Where a Mahomedan female, being in possession of certain real property on her own account, and on account of her nephew and niece who were minors, and of whose persons and property she had assumed charge in the capacity of guardian, sold the property in good faith and for valuable consideration in order to liquidate ancestral debts and for other necessary purposes and wants of herself and the minors, *held* that, according to Mahomedan law and according to equity and good conscience, the sale was binding on the minors: *Hasan Ali* v. *Mehdi*, **I. L. R. 1 All. 533.**

Mortgages.—To authorize a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor; and, since *mortgages* are unknown to Mahomedan law, and when they exist among Mahomedans they must be governed by the rules applicable to sales, money raised by the guardian by the mortgage of the minor's property not being shown to have been raised for any purpose authorized by Mahomedan law or for the benefit of the minor, *held* the guardian had no authority to mortgage the minor's property: *Hurbai* v. *Hiraji Byramji*, **I. L. R. 20 Bom. 116.**—Where the co-heirs of a deceased Mahomedan mortgaged property which descended to them in common with certain minors as heirs of

the deceased, for the purpose of paying off arrears of rent of a putni talook forming part of the property so inherited, and there was no evidence to show that any other expenses connected with the deceased's estate had to be met, nor what that estate consisted of, nor whether the arrears could or could not have been paid without having recourse to the mortgage, *held* that the shares taken by the infants as heirs of the deceased were not bound by the mortgage: *Bhutnath* v. *Ahmad Hossain*, I. L. R. 11 Cal. 417.—Where the revenue-paying property of a deceased Mahomedan descended to his widow and children, some of whom were minors, and the widow in connection with the son (who was of age) of the deceased mortgaged portions of the property including the shares of the minors—the widow's name being alone recorded in the revenue registers—*held* that the position of the widow in respect of her husband's estate was nothing more or less than that of any other heir, and though she may act as guardian of the persons of her minor children till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. The entry of her name in the revenue registers in place of her deceased husband would probably be a mere mark of respect and sympathy, and the mortgage effected by her did not affect the minors' shares: *Sitaram* v. *Amir Begum*, I. L. R. 8 All. 324.

CHAPTER III.—Marriage.

§16. 'Marriage' Defined.—Marriage is a particular civil contract used for the purpose of legalizing generation. The marriage with a virgin is called *shadi*; and the Marriage with a woman who was married before to another husband, is called *Nikah*.

Case-law.

A suit to enforce a contract of marriage cannot be entertained in the Civil Courts of this country: *Shaikh Bhugun* v. *Shaikh Rumjon*, 24 W. R. 380. The *Nikah* form of marriage is well known and established among Mahomedans, and the issue of such a marriage is legitimate according to Mahomedan law: *Moneeruddin* v. *Ramdhun*, 18 W. R. Cr. 28.—The Nikah marriage falls within the purview of sections 494 and 495 of the Indian Penal Code: *Queen* v. *Judoo Mussulmanee*, 6. W. R. Cr. 60.—According to both the **Shia** and **Sunni** Schools, any connection between the sexes which is not sanctioned by some relation founded upon contract or upon slavery, is denounced as *Zina* or fornication: *Himmut* v. *Shahebsadi*, 14 W. R. 125.

§17. Its Nature.—According to the *Sunni* School, the marriage contract is a permanent one. *Mutah*, or usufructuary marriage, and *Mawakka*, or temporary marriage, are void.

§18. Its essentials.—The essentials of a valid marriage are two: (1) Declaration or proposal (*ijab*), and (2) Acceptance or consent (*kabul*), both expressed in the same meeting (*majlis*). If the parties contract while walking together, or riding together, the contract is not lawful; but if they are in a boat which is in motion, the contract is lawful.—*Fatwa Alamgiri*. The proposal and acceptance may be expressed in plain words (*Sarih*), or in words ambiguous or metaphorical (*Kinayat*). Words expressing gift (*hibah*), sale (*bayi*), transfer (*tamlik*), alms (*sadkat*), or the like, are examples of the latter. Marriage is not contracted, in the *Sunni* School, by the use of words meaning "hiring," or "lending," or "permitting," or "engaging," or the like, as they

signify temporary connection. Nor is marriage contracted by writing between the parties when they are both present. The plain words are *Nikah* and *Tajbij*. Dumb persons may contract a marriage by means of intelligible signs. A modest virgin is permitted to express her consent by indirect means, even without words, such as, silence, smile, a laugh (when not in jest), and gestures. A proposal may be made by means of a guardian, or an agent, or by a letter, but the acceptance of the message or letter and the consent of the person addressed must both be in the presence of valid witnesses. The proposal and consent are "the pillars of marriage."

§19. Its principal conditions.—The principal requisites of marriage are the following:—

1. That both the contracting parties be *adult*, *sane*, *free*. and *discreet*. Marriage contracted by slaves and discreet *minors* is valid, provided it is ratified by their masters or guardians. A marriage contracted by an *indiscreet* minor, or a *lunatic*, is void *ab initio*.

2. That they should together hear the words of each other. This is possible when the parties contract without the intervention of a guardian or messenger.

3. That the parties to be married be known to each other. They must be identified individuals.

4. *That there should be equality of the contracting parties.* This is with regard to freedom and possession of the Mussalman faith. As slavery no longer exists in British India, questions of freedom cannot arise in this country. As for the possession of *Islam* (Mussalman faith), it should be noted that a Mahomedan can marry any person believing in one God, and having a revealed religion. Equality of lineage and of property are not material.

5. That there should be no legal incapacity on the part of the woman. The following women are prohibited in marriage, and cannot be lawfully married:—(*a*) *Those prohibited by reason of consanguinity*: These are enumerated as, the mother, step-mother, paternal and maternal grandmothers (how high soever), daughters and grand-daughters in the direct line of descent, sisters (full or half), sisters' daughters, (full or half) brothers' daughters, paternal and maternal aunts (whether full or half sisters of the father and mother). (*b*) *Those prohibited by reason of affinity*: Such as, the mothers and the paternal and maternal grandmothers of wives, and the daughters and other female descendants of wives. But marriage with any of these relations is not prohibited when consummation has not taken place with the wife, with the exception of the wife's mother who is prohibited whether he may have consummated his marriage with her daughter or not. The wife of a son, of a son's son, or of a daughter's son, how low soever, whether the son have consummated with her or not, and the wives of fathers and paternal and maternal grandfathers, are also prohibited in marriage by reason of affinity. The wife of an adopted son is not prohibited to the adoptive father. (*c*) Foster-mothers, foster-sisters, and all other relations by fosterage, who would be prohibited if they were kindred relations, are prohibited. [For exceptions, see below the section on fosterage.] (*d*) Those prohibited by reason of slavery or being infidels. (*e*) It is prohibited to marry two women at the same time (that is during the lifetime of both) who stand in such a degree of affinity to each other that if one of them were a male they could not have intermarried. Thus, a man cannot marry two sisters by one contract, which would be void. Or, having married one of them, he cannot marry the other sister during the lifetime of the first, whether the two women are sisters by consanguinity or by fosterage. If such a

marriage take place, the marriage of the second one is null and void. But if a man, after marrying one sister, separates from her before consummation, he is entitled to marry her sister; and where consummation has taken place with the first, and he repudiates her subsequently, he can marry the other sister after the period of *iddat* has elapsed. (*f*) Another prohibition is, that a man cannot marry a woman who was his wife, and who has been repudiated by him *three* times. But he can marry her after consummation of her marriage with another husband, as will be explained under *Rajat*.

6. That there should be witnesses to the contract. There must be at least *two* male witnesses to a valid marriage, or one male and two female witnesses. A marriage cannot be contracted with women only as witnesses. It is necessary that the witnesses should be sane, adult, and Mussulman. Minors, idiots, and infidels are incapable of becoming witnesses.

7. That the proposal and acceptance should be made at the same time and place.

8. That a man may not have more than *four* wives at one time. If a man having four wives living should marry a *fifth*, his marriage with the fifth woman would be void. If he marry five women in one contract, the marriage with all of them is void.

§20. Marriage may be presumed where there has been continual cohabitation, even without the testimony of witnesses regarding their marriage. "When a person has seen a man and woman dwelling in the same house, and behaving familiarly with each other in the manner of married persons, it is lawful for him to testify that the woman is the man's wife—in the same way as when he has seen a specific thing in the hands of another."—*Fatwa Alamgiri*. Such presumption is rebuttable,

and would not arise where the marriage between the parties will not be valid according to Mahomedan law. The law ordains it to make a publicity of the marriage—to read the *Khutba* before the marriage contract takes place, and to cause the contract to be entered into by a sensible man in the *masjid* before competent witnesses.

Case-law.

Presumption of Marriage.—The celebration of the seventh month of pregnancy, and the celebration of the birth of a son, are sufficient to prove the marriage of the parties and the legitimacy of the son : *Curreemunnissa Begum* v. *Ahmed*, 10 C. L. R. 293.—The fact of a woman having constantly lived as a married woman with her husband, and the fact of her children having lived as legitimate children with their parents, would be presumptive evidence of marriage and legitimacy : *Ashruffunnissa* v. *Azeemun*, 1 W. R. 17 (following *Mahomed Baker* v. *Shurfoonnissa*, 8 Moo. I. A. 136, and *Nawabunnissa* v. *Fuzooloonnissa*, Marsh. 428). So also, where there has been continued open cohabitation, accompanied by declaration that the woman is the man's wife, and that the issue of such cohabitation are his children, or by conduct showing that he regarded the children as his own : *Fuzooloonnissa* v. *Nawabunnissa*, 2 Hay 479. Or, where there is a public acknowledgment of paternity : *Rook Begum* v. *Shahzadah*, 3. W. R. 187. See also, *Hidayutollah* v. *Rai Jan Khanum*, 3 Moo. I. A. 295 ; and *Shumsoonnissa* v. *Rai Jan Khanum*, P. C. 6 W. R. 52 ; also, *Monowar Khan* v. *Abdoollah*, 3 N.-W. P. H. C. R. 177. But mere cohabitation, without proof of marriage or of acknowledgment, is not sufficient to raise such a legal presumption of marriage as to legitimate the offspring ; an acknowledgment may be presumed, but the presumption must be one of fact, and as such, subject to the application of the ordinary rules of evidence. A subsequent marriage *primâ facie* excludes the presumption of a prior one : *Ashruffooddowlah* v. *Hyder Hossein*, P. C., 7 W. R. 1. See also *Mussummut Butoolun* v. *Mussamut Koolsum*, 25 W. R. 444.—The acknowledgment of a wife which the Mahomedan law requires as proof of marriage, should be specific and definite. The mere keeping of a woman behind a *purdah*, and treating her to outward semblance as a wife does not, in the absence of express declaration, constitute the *factum* of marriage : *Kadarnath Chuckerbutty* v. *Donzelle*, 20 W. R. 352. So also, the mere residence of a woman in the house of a Mahomedan as a menial servant, and the circum-

stance that she had a son, do not raise the presumption of marriage. *Cohabitation means something more than mere residence in the same house.* It should be shown that the cohabitation continued, that children were born, and that the woman was treated as a wife, and lived as such, and not as a servant: *Kureemoonnissa* v. *Attaoollah*, 2 Agra 211; and, mere lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in the woman, are not sufficient to raise the presumption that she was a lawful wife.—*Jariutool Butool* v. *Hosseinee Begum*, P. C., 10 W. R. 10; 11 Moo. I. A. 194.

§21. *The Consent of the Woman.*—A woman who is an adult and of sound mind, may be married by virtue of her own consent, even though the contract may not have been made or acceded to by her guardians, and this, whether she be a virgin or a *shayyiba*, that is one who has had commerce with a man. Such a woman cannot be compelled by her guardian to marry. If any one contracts a marriage for her, it is lawful if assented to by her; if rejected, it is null and void. "No one, not even the father, or the Sultan, can lawfully contract a woman in marriage who is an adult and of sound mind, without her own permission, whether she be a virgin or a *shayyiba*."—The *Hidaya* and *Fatwa Alamgiri*.

Case-law.

According to the doctrine of Abu Hanifa, a Mussulman female, after arriving at the age of puberty and not having been married by her father or other guardian, becomes legally emancipated from all guardianship, and can select a husband without reference to the wishes of the father or other guardian. But according to the doctrine of *Shafi*, a virgin, whether before or after puberty, cannot give herself in marriage without the consent of her father or guardian. After attaining puberty, a female can elect to belong to whichever of the four sects she pleases, and consequently, the legality of her subsequent acts will be governed by the tenets of the *Imam* whose follower she may have become. Thus, an unmarried girl of the school of *Shafi* may, after attaining puberty, change her sect from that of *Shafi* to that of *Hanifa*, so as to render valid her marriage subsequently entered into by her without the consent of her father.—*Muhammad Ibrahim v. Ghulam Ahmed*, 1 Bom. H. C. R. 236.

Where the marriage of an infant fatherless girl was contracted by her paternal grandmother in the *Fasooli* or nominal form, and the girl subsequently died after attaining the age of puberty, but without ever meeting or communicating with her husband, and without ever expressing her assent to, or her dissent from the marriage, *held* that according to the Shiah law the marriage was imperfect for want of ratification, and did not create any rights or obligations. According to the Sunni law, the girl's option of dissent must be declared by her as soon as she attains her age of puberty (*and her not doing so may signify her tacit assent*) ; but under the Shiah law, the girl should be informed of her marriage, and her express assent would alone ratify the marriage in such a case.—*Mulka Jehan* v. *Mahomed Ushkurree*, 26 W. R. 26 ; L. R. I. A. Sup. Vol. 192.

§22. *Equality of the parties.*—It is also ordained that equality in respect of lineage, virtue, and property should also be observed. According to the *Sharh-ul-vikaya*, the guardian is competent to object to the marriage of a free, sane, and adult woman with her unequal. With regard to equality in point of *Islam*, it is lawful for a Mussulman, according to the Sunni school, to marry a *Kitabiah* woman, that is, one believing in a revealed religion, such as the Jews and Christians. A Mussulman may also marry a *Sabean* woman, if she believes in the Scriptures and has faith in the Prophets. But, it is unlawful for a Mussulman to marry a pagan woman, a *Majusia*, or an idolatress.

§23. *Witnesses to the Marriage Contract.*—The witnesses are required to be free, sane, adult, and Mussulmans. It would not matter if they have not established integrity of character, or if they be profligates, or even blind, or have undergone punishment for slander or adultery or fornication. It is necessary that the witnesses should be present together at the time of the declaration and acceptance ; so that if both the witnesses should hear both the parties, but hear them separately, as, for instance, if the marriage should first take place in the presence of one

witness, and should then be repeated in the presence of the other, who was absent on the first occasion, it would not be valid. Marriage cannot be contracted in the presence of two sleepers who have not heard both the parties, nor in the presence of two deaf persons who cannot hear. A person who is partially deaf, and does not hear the words of the parties, but to whom the words are spoken aloud by the other witness or by a third party, cannot be a competent witness. A person who cannot speak but who is not deaf, is a competent witness. It is also necessary, according to the approved opinion, that the witnesses should understand the meaning of the words of the contracting parties. If the witnesses were drunk at the time of the contract, but apprehended the matter at the time, and had no recollection of the transaction when they were sober, the marriage is valid. The witnesses must be persons besides the contracting parties. Where the father of an infant girl desires another to contract a marriage for his daughter, and that person contracts the marriage upon the spot with a third person who is present in the meeting, and there is no other witness, the marriage would not be valid; for, here, the father is acting in the capacity of one of the contracting parties, and cannot be taken for a witness, so that there is practically one witness to the transaction—the person who has been requested by the father to contract his daughter's marriage.

Case-law.

If a *Kasi* was present at a Mahomedan marriage which is disputed with a show of probability, he should be called as a witness when the marriage is to be proved.—*Khojah Gouhur Ali* v. *Khojah Ahmed*, P. C, 20 W. R. 214.

§24. *The rule regarding the joining of women.*—In the first place, it is not lawful, as already stated, to marry two women within such degree of affinity as would render marriage between them illegal, if one of them were a man, because this would

occasion a confusion of kindred (*Hidaya*). The conditions regarding the marriage of two sisters to the same man, have been already stated. Further examples are, that a man cannot join together by marriage two women, one of whom is the aunt, or niece, or paternal or maternal aunt, of the other. Such marriages being unlawful, it is incumbent upon the husband to separate from the women who were joined subsequently, as, when a man married to a woman who is living as his wife, marries the maternal aunt of that woman, he must separate from the latter. But if he did not consummate with the first, he may separate from her, and then his marriage with the aunt would subsist. But if a man marries two women together by one contract, the union of them to the same man being unlawful, the marriage with both would be void *ab initio*, and he must separate from both. The only exception to this rule is, that a man may marry together a widow and a daughter of her former husband by another wife, for here there is no bar by reason of consanguinity or fosterage. The prohibition against the joining of more than four women as wives, has already been stated.

Further, it is unlawful for a man who has already married a free woman, to marry a slave, according to the saying of the Prophet: "Do not marry a slave upon a free woman." But it is lawful to marry a free woman having previously married a slave. Moreover, it is not unlawful to marry together a woman and her female slave. If a man commit *Zina* or fornication with a woman, her mother and daughter are prohibited to him, and the woman herself is prohibited to his father and grandfather how high soever, and to his sons how low soever. But if a man marry a woman by invalid marriage, her mother does not become prohibited to him by the mere contract of marriage; she becomes prohibited to him if there has been sexual intercourse with her daughter, for affinity is established by sexual intercourse, whether

witness, and should then be repeated in the presence of the other, who was absent on the first occasion, it would not be valid. Marriage cannot be contracted in the presence of two sleepers who have not heard both the parties, nor in the presence of two deaf persons who cannot hear. A person who is partially deaf, and does not hear the words of the parties, but to whom the words are spoken aloud by the other witness or by a third party, cannot be a competent witness. A person who cannot speak but who is not deaf, is a competent witness. It is also necessary, according to the approved opinion, that the witnesses should understand the meaning of the words of the contracting parties. If the witnesses were drunk at the time of the contract, but apprehended the matter at the time, and had no recollection of the transaction when they were sober, the marriage is valid. The witnesses must be persons besides the contracting parties. Where the father of an infant girl desires another to contract a marriage for his daughter, and that person contracts the marriage upon the spot with a third person who is present in the meeting, and there is no other witness, the marriage would not be valid; for, here, the father is acting in the capacity of one of the contracting parties, and cannot be taken for a witness, so that there is practically one witness to the transaction—the person who has been requested by the father to contract his daughter's marriage.

Case-law.

If a *Kazi* was present at a Mahomedan marriage which is disputed with a show of probability, he should be called as a witness when the marriage is to be proved.—*Khojah Gouhur Ali* v. *Khojah Ahmed*, P. C, 20 W. R. 214.

§24. *The rule regarding the joining of women.*—In the first place, it is not lawful, as already stated, to marry two women within such degree of affinity as would render marriage between them illegal, if one of them were a man, because this would

occasion a confusion of kindred (*Hidaya*). The conditions regarding the marriage of two sisters to the same man, have been already stated. Further examples are, that a man cannot join together by marriage two women, one of whom is the aunt, or niece, or paternal or maternal aunt, of the other. Such marriages being unlawful, it is incumbent upon the husband to separate from the women who were joined subsequently, as, when a man married to a woman who is living as his wife, marries the maternal aunt of that woman, he must separate from the latter. But if he did not consummate with the first, he may separate from her, and then his marriage with the aunt would subsist. But if a man marries two women together by one contract, the union of them to the same man being unlawful, the marriage with both would be void *ab initio*, and he must separate from both. The only exception to this rule is, that a man may marry together a widow and a daughter of her former husband by another wife, for here there is no bar by reason of consanguinity or fosterage. The prohibition against the joining of more than four women as wives, has already been stated.

Further, it is unlawful for a man who has already married a free woman, to marry a slave, according to the saying of the Prophet: "Do not marry a slave upon a free woman." But it is lawful to marry a free woman having previously married a slave. Moreover, it is not unlawful to marry together a woman and her female slave. If a man commit *Zina* or fornication with a woman, her mother and daughter are prohibited to him, and the woman herself is prohibited to his father and grandfather how high soever, and to his sons how low soever. But if a man marry a woman by invalid marriage, her mother does not become prohibited to him by the mere contract of marriage; she becomes prohibited to him if there has been sexual intercourse with her daughter, for affinity is established by sexual intercourse, whether

lawful or illicit. And, if a woman touch a man with lust, her mother and daughter are prohibited to him.

Case-law.

Under the Mahomedan law, marriage with the sister of a lawfully wedded wife is void, and the children of such marriage are illegitimate, and cannot inherit.—*Aisunnissa Khatoon* v. *Kurimunnissa*, I. L. R. 23 Cal. 130.

§25. According to the *Hidaya*, a man may lawfully marry a woman pregnant by whoredom, but he cannot cohabit with her until after her delivery; if, however, the descent of the child in the womb be known and established, the marriage is null and void according to all the doctors.

A man cannot marry the wife of another, nor the wife or widow of another while she is in her *iddat*.

A pagan woman, or an idolatress, can be lawfully married by a Mussulman, after she has been converted to the religion of *Islam*.

Case-law.

The conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve her marriage with her husband. She cannot, therefore, during his lifetime, enter into any other valid contract of marriage, and her going through the ceremony of *nikah* with a Mahomedan is an offence under section 494 of the Indian Penal Code.—*Government of Bombay* v. *Ganga*, I. L. R. 4 Bom. 330. See also, *Administrator-General* v. *Anandachari*, I. L. R. 9 Mad. 466; and, *In the Matter of Ram Kumari*, I. L. R. 18 Cal. 264, in which case a woman originally a Hindu and duly married according to Hindu rites, afterwards became a convert to Mahomedanism, and then married a Mahomedan. There was no evidence of any notice having been given to her former husband, previous to the second marriage, calling on him to become a Mahomedan. It was held that there is no authority in Hindu law for the proposition that an apostate is absolved from all civil obligations, and that, so far as the matrimonial bond is concerned, such a view would be contrary to the spirit of that law. Further that, as the validity of the second marriage depended on the Mahomedan law, and as that law does not allow a plurality of husbands, it

would be void or valid according as the first marriage was or was not subsisting at the time it took place. Also, that no notice having been given to her former husband as required by Mahomedan law, and no recourse having been had to the Courts for the purpose of obtaining a declaration that the former marriage was dissolved, the previous marriage was not dissolved under the Mahomedan law, and the subsequent one was therefore void.—Where a Christian husband, having a living Christian wife, cohabited for some time with a woman, and he and this woman became Mahomedans and contracted a Mahomedan marriage, the validity of such marriage was doubted.—*Skinner* v. *Orde*, 14 Moo. I. A. 309; 10 B. L. R. 125; P. C., 17 W. R. 77.

§26. *The legal effects of marriage are:—*

(*1*) To legalize the mutual enjoyment of the parties:

(*2*) To subject the wife to the restraint of her husband's control:

(*3*) To impose on the husband the obligation of dower and maintenance:

(*4*) To establish the prohibitions of consanguinity, affinity, and fosterage on both sides, as also their rights of mutual inheritance:

(*5*) To compel the husband to be just and kind to his wives, and to correct them when they are disobedient.

Case-law.

An agreement entered into by a Mahomedan with his wife at the time of marriage, that if he entered into a second marriage during her lifetime without her consent she would be entitled to divorce herself and take a second husband, was held to be in consonance with the Mahomedan law: *Budrunnissa* v. *Nufeeutoollah*, 15 W. R. 555.

§27. *Difference in the Shiah School.*—The *Shiah* doctrine recognises both permanent and temporary (*muta*) marriages. The declaration and acceptance of the parties must always be expressed in words of the past tense, unless either or both of the parties are dumb. The words are to be spoken in Arabic unless they are unknown to the parties. The words used must be

direct—"I have married thee." Marriage will not be contracted by the use of words expressing sale, gift, or lease. Presence of witnesses is not mentioned as an essential condition. It is not a condition that the declaration should invariably precede the acceptance. Marriage is not contracted by writing.

In marriage, the expressions of declaration and acceptance used by minors either for themselves or for others are not taken into account. The marriage contracted by a drunk person would also be invalid, unless he or she confirmed it after becoming sober. No guardian is required in the marriage of a discreet female. The presence of witnesses is not necessary.

The marriage contracted by a sickman becomes valid by consummation; if the man dies before consummating the marriage, the marriage becomes invalid, and the woman will not be entitled to either dower or inheritance.

Muta or the temporary marriage is contracted for a fixed term, as, for a day or for a year, or for a certain number of years. The parties should be Mussulmans. The declaration and acceptance are as well necessary in this form as in the permanent marriage, as also dower upon failure of which the contract becomes void, though it may be as little as a handful of wheat. The period for which the marriage is contracted should also be stipulated, as it is a necessary condition in this form. A wife married in the *muta* form cannot be divorced. The marriage-tie is dissolved at the expiration of the period for which the marriage was contracted. There is no maintenance provided for a wife married in this form, nor is a habitation to be assigned to her. The marrying parties do not inherit from each other, unless it was so expressly stipulated in the contract. In this form, a man can have more than four wives. An adult and discreet female is competent to contract in the *muta* form.

If no period is fixed in the contract, the marriage becomes permanent, if dower is mentioned. The prohibitions in marriage on account of consanguinity and affinity, are the same as in the other school with a few exceptions; for instance, *Zina* or illicit intercourse with the relation of a woman after she was taken to wife does not vitiate her marriage; and, if a paternal or maternal aunt gave her consent, her niece could be married in conjunction with her. If a man commit adultery with a woman who has a husband, or who is in her *iddat* for a revocable divorce, she is rendered perpetually unlawful to him, even though he was ignorant of the fact. Further, it is unlawful for a man to cohabit with his wife before she is *nine* years old, but if he has committed the unlawful act, and ruptured the parts, there must be a separation between them, and never again shall she become lawful to her husband, who will be liable to pay the fine to maintain her as long as she lives.

Prohibition arising from fosterage will be discussed in the section on fosterage.

According to the *Shiahs*, a Mussulman cannot contract a permanent marriage with a Jewess or a Christian woman. But they can be married in the temporary or *muta* form.

Case-law.

A Mahomedan woman of the *Shiah* sect cannot contract a valid marriage with a Christian husband according to Mahomedan rites: *Bakhshi Kishen* v. *Thakur Das*, I. L. R. 19 All. 375.

Guardianship and Agency in Marriage.

§28. **Authority of guardians.**—A sane and adult woman may contract a valid marriage without the intervention of a guardian; and a guardian, even if he be her father, cannot compel such a woman to marry against her consent or without her will. When the marriage of such a woman is contracted by her

guardian, her express consent (in words) is essentially necessary to the validity of the marriage in case she is a *Sayyibah* (a woman who has been already enjoyed); but, if she be a virgin, her tacit consent (such as is presumed from her silence, smile, and the like) will do, provided the name of the husband and the amount of the dower are both mentioned to her. When an adult woman marries, without the consent of her guardian, for less than her proper dower, the guardian has a right to obtain a cancellation of the marriage, and separate her from her husband by a decree of the Court, unless the full amount of the dower is made up. When she marries without the guardian's consent and the match is unequal, the guardian may similarly obtain a cancellation of the marriage. In all such cases, where the guardian obtains a cancellation of the marriage, if the separation takes place before consummation, the wife is not entitled to any portion of the dower; if consummation took place, the husband will be liable for the whole amount specified as dower. But a guardian who has taken possession of the dower, cannot object, as his conduct amounts to consent and acquiescence. Nor can a guardian raise any objection on the ground of inequality of the match, or of improper dower, after the woman has actually borne a child to her husband. The guardians competent to raise objections are the *asabah* or agnates.

§29. A minor or insane boy or girl is incompetent to marry without their guardian's intervention. A marriage contracted by such minor or lunatic would, therefore, be invalid. But a marriage contracted by a minor who has attained the age of discretion, may become valid if ratified by the minor's guardian. A guardian is competent to contract a marriage for a minor boy or girl, or for a lunatic, without consulting their will, or against their will. But in such cases, the minor upon attaining majority, and the lunatic upon regaining sanity, can at option rescind the marriage,

unless it was contracted by a father or grandfather. If the marriage of infants and lunatics was contracted by a father or grandfather, no option is allowed to the infants or lunatics to rescind the marriage, for the law presumes the affection and good motive of these guardians. According to the Fatwa Alamgiri, an insane woman can be contracted in marriage by her son, and she has no option of rescinding on her regaining sanity. A minor wishing to cancel a marriage contracted by a guardian must do so immediately upon attaining majority—(see chapter on minority); and the marriage can be dissolved by a decree of the Court and not otherwise. A girl's assent, after attaining puberty, to a marriage contracted during her minority by a guardian, can be inferred from her conduct, such as silence, smile, or allowing her husband to have connection with her. A boy's option to cancel or ratify a marriage must be expressed by words or by deed, such as presenting her dower, or cohabiting with her. A *Sayyiba* must express her approval or disapproval by express terms.

§30. The order in which the guardians are to exercise their authority in marriage, is, first, the *asabah* or agnates. These are the residuaries related without the intervention of a female: They are, the son, son's son, how low soever; the father, father's father, how high soever; next, the brother and his sons, how low soever; next, the paternal uncle and his sons, h. l. s.; then, the next higher ancestor's descendants, and so on. Of these, again, relations by full blood are preferred to those of half blood. Secondly, the guardianship devolves upon the mother. Thirdly, upon distant kindred; and, lastly, upon the king. According to the Fatwa Alamgiri, between the mother and the distant kindred come those near uterine relatives, both male and female, who have a right to inherit from the minor; such as, the daughter, son's daughter, daughter's daughter, full sisters and half sisters,

half brothers, and their children. And the successor by contract (Mowla-ul-Mowalat) comes in before the ruling power.

The order of precedence among guardians of the same class is regulated upon strength of consanguinity, the nearer excluding the more remote. Consequently, a marriage contracted by a remote guardian when a nearer one is present and is competent to do so, is valid when assented to by the latter. But when the nearer guardian is incompetent or at a distance and cannot act, the action of the remote guardian is valid.

An executor, unless he is a natural guardian as well, cannot exercise the authority of a guardian in marriage. A minor, a lunatic, an infidel, or an apostate cannot become a guardian.

According to the *Shiah* doctrine, an executor cannot act as a guardian in marriage, not even if the father had authorized him to do so. But an executor can contract in marriage one who is of unsound mind, and the marriage is required for his or her benefit. Similarly, the Judge is not held to be competent to marry a minor or a discreet adult, but he can contract a marriage for one who is adult but without discretion, as also for one of unsound mind, if marriage is required for his or her benefit. According to this school, the mother has no right of guardianship in the marriage of her child. The only relatives who are competent to act as guardians in the marriage of minors, are the father and the paternal grandfather how high soever. No other lineal relatives, such as the brother or paternal uncle, can exercise control in the marriage of a minor boy or girl. A marriage contracted by the mother or any other relative except a father or paternal grandfather, or by a stranger, would become valid if assented to by the party for whom it is contracted, when he has become an adult.

Case-law.

The father is competent to set aside a marriage of his daughter on the ground of inequality between the parties, where it was contracted without his consent, the consent of the bride's mother notwithstanding: *Mohumdi Begum* v. *Bairam*, **1 Agra 130.**—But where the father was an apostate from the Mussulman faith, his consent was held not necessary to the marriage of his infant girl, and the consent of the mother was held to be sufficient in the case: *In the Matter of Mahin Bibi*, **13 B. L. R. 160.** And, where the nearest guardian of a minor was precluded from giving his consent to the marriage of his minor child, it was held that the marriage contracted by the minor's mother was valid in law: *Kaloo* v. *Garibollah*, **13 B. L. R. 163** (note); **10 W. R. 12.**

Where the plaintiff having failed in his suit for the establishment of conjugal rights on the ground that at the time of marriage the girl was of age, and had not consented to the contract, sued the father to recover as damages the value of the presents made, as he had given the girl in marriage to the plaintiff alleging that she was an infant, *held* that the presents being made voluntarily could not be recovered as damages, but that the plaintiff could claim compensation for the loss of the girl as his wife; if, however, fraud were established, and the plaintiff could show that the presents were a natural consequence of the negotiations and in conformity with general custom, he might recover damages to be determined by the circumstances: *Asgar Ali* v. *Muhabat Ali*, **22 W. R. 403.**

§31. Agents in marriage.—According to the Mahomedan law, a marriage may be contracted by or through agents.

A man or woman wishing to marry may appoint one or more agents for the purpose. Such appointment does not require the presence of witnesses, but the contract entered into by an agent should be witnessed as required for a valid marriage. An agent may be either the carrier of a proposal or acceptance, or, he can contract the marriage of his principal with an undefined person, but according to the directions of the principal. A female is also competent to act as agent. When there are more than one agent, the action of one is not valid. If an agent acts in contra-

vention of the principal's direction, and the principal does not approve of it, the act is invalid. An agent cannot marry the principal to himself or herself or to any of his or her own relations unless especially empowered to that effect by the principal. An agent is discharged from his office by the principal's contracti ng the marriage himself or herself, and the agent becoming acquainted with such marriage. The agent cannot delegate his authority to another, but, if he appoints one, and the delegate acts in the agent's presence, that would be valid. One person can act as agent or guardian or principal for both the contracting parties, or as agent or guardian or principal on one side and as principal or agent on the other. If an unauthorized person contracts a marriage for any person, such marriage becomes valid if ratified by the person for whom it is contracted, either by words or by deed.

§32. **Fosterage.**—In marriage, whatever relations are prohibited by consanguinity are also prohibited by reason of fosterage. Relationship by fosterage is induced by sucking within the usual period of infants subsisting at the breast. This period is thirty months according to Abu Hanifa, but it is two years according to his two disciples. This relationship is of two kinds: *first*, fosterage is established between the infant suckled and the family of the woman who nurses it; *secondly*, it is established between two infants suckled by the same nurse. Foster relations of blood relations, and foster relations of foster relations are also foster relations. Fosterage will be induced by sucking for the shortest period even, or even for once only, if the milk reaches the child's stomach.

§33. The foster-parents, and their ascendants and descendants either by blood or by fosterage, are prohibited in marriage to the child suckled. And, a male and a female suckled by the same nurse are prohibited to each other in marriage. Thus, a man

cannot lawfully marry the wife of his foster-father or of his foster-son, or the husband's sister of his foster-mother, nor can a woman marry the sons, or son's sons, of her foster-mother.

§34. The exceptions to the general rule of prohibition in marriage by reason of fosterage are:—Brother's or sister's mother by fosterage (*i.e.*, brother's or sister's foster-mother, foster brother's or sister's mother, foster-brother's or sister's foster-mother); and similarly, son's sister by fosterage, son's sister's mother by fosterage, brother's foster-sister, foster-brother's sister, nephew's mother by fosterage, uncle's or aunt's mother by fosterage, son's and daughter's aunt and grand-mother by fosterage, son's or daughter's brother's daughter by fosterage, are not prohibited in marriage to a man. And, a female may marry her sister's foster-father, foster-sister's father, or foster-sister's foster-father; similarly, her son's brother, or niece's father, child's grand-father or maternal uncle, by fosterage, are not prohibited to her. In all such cases, the relationship by fosterage is to be calculated by taking into account the foster relations of blood relations, blood relations of foster relations, and foster relations of foster relations.

According to the *Shia* school, in order to establish the relationship by *fosterage* to create a prohibition in marriage, it is necessary that the milk must proceed from marriage; for, it does not occasion a prohibition when its source is *zina* or illicit intercourse. Secondly, the acts of suckling by the same woman must not be less than *fifteen*, or it must be continued for at least a day and night, otherwise illegality will not be induced. Thirdly, the suckling should take place within two years from the birth of the child. Fourthly, the milk should arise from the intercourse of *one* husband. Consequently, if a woman suckle two children on the milk caused by intercourse of different men, such children would not be unlawful to

each other. The effect of a prohibiting fosterage is that the nurse or her husband, or *their* parents or grand-parents or children or brothers or sisters cannot marry the child, nor can the child marry any of them. The foster-father's and the foster-mother's natural children are prohibited to the foster-child. The foster father's foster children are also prohibited to it, but those who are the *nurse's foster relations* only are not so prohibited. The natural father of the child suckled cannot intermarry with any of the children (either by natural descent or by fosterage) of the child's foster-parents. But the other children of the natural father, who have not been suckled by the same nurse, can intermarry with the children of their brother's or sister's foster parents. The marriage of parties between whom there was a prohibiting fosterage, ought to be cancelled; and, an existing marriage may be vitiated by reason of a prohibiting fosterage attaching to it. Thus, if a man marry an adult woman and an infant at the breast, and the former suckles the latter, both of them would be prohibited to him if he had consummated with the adult wife. If he had not consummated with her, she (the adult one) alone would be prohibited.

CHAPTER IV.—Dower.

§35. **Dower.**—Dower or *Mohr* is defined to be an effect of the marriage contract, which is imposed upon the husband as a mark of respect for the wife, and as a consideration for the carnal use of her. But the mention of a dower is not absolutely necessary to the validity of a marriage, and a marriage would be all the same valid although no mention of dower is made in the marriage contract, or even if there is a stipulation in the marriage contract that there should be no dower. But though a marriage is legally valid without any mention of dower, the

payment of a dower is always incumbent on the husband. An addition made to the original dower by the husband or his guardian, during the subsistence of the marriage, is also binding on the husband and his representatives as dower.

Case-law.

The Dower-deed.—A deed of dower is not in all cases indispensable to the truth and validity of a claim for it, although there is no reason why a *mukzernama* or statement made by parties in a position to know the facts should not have a certain weight: *Jumula* v. *Mulka*, 1 Ind. Jur. (*New series*) 26; see also *Mulleeka* v. *Jumeela*, 11 B. L. R. 375; L. R. I. A. Sup. Vol. 135.—But the very best description of oral evidence is absolutely necessary where no *kabinama* is produced: *Huseena* v. *Husmutoonissa*, 7 W. R. 495; see also *Abdul Jubbar* v. *The Collector of Mymensingh*, 11 W. R. 65.—A verbal contract of dower for a large sum is admissible only if proved by most clear and satisfactory evidence. A customary dower must be proved by showing a custom of the women of the wife's family to receive, rather than of the men of the husband's family to pay, a certain dower: *Nujeemoodeen* v. *Hosseinee*, 4 W. R. 110.—A register of marriages kept by the *istahad* who celebrated the marriage, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty, under section 32, clause 2, of the Evidence Act, 1872: *Zakeri* v. *Sakina*, I. L. R. 19 Cal. 689.—Where a suit for dower alleged to be due under a *kabinama*, which was not proved at the hearing, was decreed, it was held on appeal that the Court was wrong in decreeing the case upon an oral contract not alleged in the plaint, nor admitted by the defendant, the suit being based upon a written agreement which the plaintiff failed to prove: *Khaja Mahomed v. Manija*, I. L. R. 14 Cal. 420.

§36. A dower is a debt like all other debts at the responsibility of the husband. It must be paid first, before the distribution of shares among the heirs and the payment of legacies. When the wife dies before realization, it devolves upon her heirs. She may in her lifetime make a gift or sale of the whole or any portion of her dower either to her husband or to any other person, and such transfer is lawful. She may exonerate her husband

from the whole or any portion of it. A dower may be made a consideration for a transfer of property by the husband to the wife.

Case-law.

If a Mahomedan widow assents to any person's taking a legacy without putting forward her claim to dower, she cannot afterwards retract her assent: *Rassa Hossein* v. *Ifatoonnissa*, **2 Hay 564.**

§37. **The subject of dower.**—Anything which is property and which has a value, can be the subject of dower, and can be stipulated as such. It is not necessary that dower should be in coin or metal. But carrion, blood, wine, and a hog are no property with a Mahomedan, and cannot become the fit subject of dower. Similarly, the free man's own labour cannot be the subject of dower. Any property assigned as dower must be something in existence, specified, and in the husband's possession, at the time of the assignment.

§38. The amount of dower cannot be less than *ten dirms*, but there is no legal limit to its maximum. The value of a *dirm* is about two pence. If the dower is fixed below ten *dirms*, the law will raise it to that amount. Where no amount has been specified as dower, or where it has been stipulated that no dower will be payable, still the law will presume the dower, as it is indispensable. In such cases, the woman is entitled to receive a sum equal to the average rate of dower granted to women of her father's family who were on a footing of equality with her in age, beauty, virginity, and other qualifications. Such dower is called *Mohri-Misl* (dower of her equals) or '*proper dower*'. A woman's proper dower is not to be estimated by the dower of her mother or her maternal aunt, where they are not descended of her father's family. But if her mother should be descended of her father's family, a judgment may be formed from her dower according to the precept of Ibnu Masud—"To the woman be-

longs such a dower as is usually assigned to her female paternal relatives ;" and here, the mother *is* a female paternal relative as well, being descended from the girl's father's family, as where she is the daughter of the father's paternal uncle. And, in *Shaghar* marriage, that is, where women are married in exchange for one another, without any specification of dower, the 'proper dower' for each can be realized by law. When the whole of the dower is by law unlawful, the 'pro per dower' is payable. But, if a portion is lawful and the rest unlawful, the former only is payable even if it be less than the woman's 'proper dower.'

Case-law.

Amount of dower.—A Mahomedan widow was held to be entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married her, or had not left assets sufficient to pay the dower-debt: *Sugra v. Masuma*, I. L. R. 2 All. 573.—According to the law prevalent in Oudh (Oudh Laws Act, XVIII. of 1876, s. 5), the Court can alter the amount of dower, which is an excessive one, to a reasonable sum, though the former had been entered in a *nikanama*: *Suleman* v. *Mehdi Begum*, I. L. R. 21 Cal. 135 (P. C.).

§39. The dower may be left to be fixed after the marriage at the discretion of the husband, or the wife, or a stranger. If it be left at the husband's discretion, the wife cannot get more than her 'proper dower' unless the husband assents to it, nor can the husband fix it at less than the proper dower. If left at the discretion of the wife or a stranger, not more than the 'proper dower' can be realized unless with the assent of the husband ; but less can be fixed and would be lawful.

§40. When two women are married to one man on one dower, it should be rateably divided among them in proportion to their 'proper dower.'

§41. **Different kinds of dower.**—Dower is usually divided into two portions:—1. '*Muajjal* or *prompt*' dower is payable immediately upon the marriage taking place. 2. '*Mowajjal*' or '*deferred*' dower is payable after the husband's death, or dissolution of marriage. The *Muajjal* or prompt portion is generally fixed at half the whole dower; and it is customary to postpone its realization. If left unrealized, the wife's right to it is not extinguished by lapse of time. The object of keeping the prompt portion unrealized is to insure good treatment towards the wife by her husband. The husband's obligation to pay it on demand continues, and even if the wife does not sue for it during the husband's lifetime, her right to claim it is not extinguished. The limitation for a suit for *exigible dower* is *three years* from the time when the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce; and the limitation for a *deferred dower* is also *three years* from the time the marriage is dissolved by death or divorce.—*Limitation Act, 1877*, The second schedule, articles 103 and 104.

Case-law.

But when shares of dower are received by the legal inheritors thereof they cease to be dower, and become part of the recipient's estate. Consequently, if a suit is preferred by heirs for their mother's prompt dower, it will be in time if brought within 12 years of the mother's death (provided the mother did not make a demand for it in her lifetime, in which case the limitation would be 3 years only under the present law): *Hosseinuddin* v. *Tajunnissa*, W. R. (1864) 199.

§42. Where a dower is named in the marriage contract without specifying how much of it should be prompt, or that the whole should be deferred, a portion of it should be considered as prompt, according to the position of the woman, the amount of the dower, and the prevailing custom.

Case-law.

According to Mahomedan Law, dower being the consideration for marriage, is presumed to be prompt and exigible on demand, unless the payment of the whole or part of it is expressly postponed: *Masthan Saheb* v. *Assan Bibi*, **I. L. R. 23 Mad. 371**, following *Tadiya* v. *Hasanebiyari*, **6 Mad. H. C. R. 9.**—Where no specific amount has been declared exigible, and there was no clear evidence of what was customary, it was held that one-third of the whole might be considered as exigible during the lifetime of the husband, the remaining two-thirds being claimable on his death: *Fatma Bibi* v. *Sadruddin*, **2 Bom. 307.**—According to the finding of the Allahabad High Court, where it is not specified whether a wife's dower is prompt or deferred, the nature of it is *not* to be determined with reference to custom, but a *portion* of it must be considered prompt. The amount to be considered prompt must be determined with reference to the position of the wife and the amount of the dower, what is customary being also taken into consideration: *Taufik-unnissa* v. *Ghulam*, **I. L. R. 1 All. 506.**—The Calcutta rulings are to the same effect as those of Madras, it being held by the Privy Council that where it is not expressed whether the payment of dower is to be prompt or deferred, the rule is to regard the whole as due on demand: *Bedar* v. *Khurrum*, **19 W. R. (P. C.) 315.**

§43. Effect of non-payment of the dower.—The wife may refuse her husband to admit him to carnal intercourse until she receives the *muajjal* or prompt portion of the dower. If she be a minor, the person in whose custody she was before marriage would be entitled to take her back to his house, and to refuse her to her husband until the prompt dower is paid. But, where the wife, or her guardian in marriage, has purposely allowed it to be postponed, she cannot refuse to her husband. Similarly, where one part of the dower is prompt and the other part deferred, and the prompt part has been paid, the wife cannot refuse consummation. And, where the whole of the dower is *mowajjal* or deferred, she has no right to deny herself. Where dower is deferred to a definite term, and the term arrives, she cannot deny herself for the purpose of obtaining payment.

Case-law.

The cases in which it was held that a suit for the restitution of conjugal rights cannot be maintained, have been overruled. The Court held that according to the Mahomedan law, marriage is a civil contract, upon the completion of which by declaration and acceptance of the parties, all rights and obligations created by the contract arise immediately and simultaneously. Dower can only be regarded as the consideration for connubial intercourse, just as price under a contract of sale. The wife may plead non-payment of prompt dower in a suit for restitution, but the husband's right of cohabitation is *antecedent* to her plea, and her right to resist her husband so long as dower remains unpaid is analogous to the lien of a vendor upon sold goods still in his possession and not paid for. *The wife's right to resist ceases after consummation*, unless she has been a minor or insane, or has been forced, in which case her father may refuse to surrender her. But the non-payment of prompt dower cannot be pleaded to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other. It can, however, operate in modification of the decree for restitution, by rendering the enforcement of the decree *conditional upon payment of so much of the dower as may be regarded as prompt.* That is, the decree for restitution cannot be stopped on the ground of non-payment of prompt dower, but the decree will provide that the prompt dower should be paid before execution can be granted : *Abdul Kadir v. Salima*, I. L. R., 8 All. 149 (followed in *Kunhi* v. *Moidin*, I. L. R. 11 Mad. 327, and approved in *Hamidunnissa* v. *Zohiruddin*, I. L. R. 17 Cal. 670, in which case it has been held that the non-payment of prompt dower is not a sufficient plea in bar of a suit for the restitution of conjugal rights.

§44. Confirmation and payments.—Dower, whether named in the contract or not, is confirmed by (1) consummation, (2) valid retirement, and (3) the death of either party. By a valid retirement is meant such retirement of the husband and wife where there is no natural or legal impediment to consummation. It is also called "complete retirement."

When the dower is confirmed no portion of it is dropped, unless relinquished by the wife or her legal representative. Confirmation makes the dower payable at any time, but the *Mowajjal*

portion is not payable until after dissolution of the marriage by divorce, separation, or death of either party.

§45. When a dower is named in the marriage contract and the wife is divorced *before* consummation or valid retirement, the dower is not confirmed, and the wife is entitled to half of the amount. But where she is divorced *after* consummation or valid retirement then she becomes entitled to the whole. If the husband or the wife dies before consummation the whole of the dower would be payable, as dower is confirmed by death of either party.

§46. When no dower has been mentioned in the contract, or where there is an express condition that no dower will be paid, and the wife is divorced before consummation or valid retirement, she is entitled to get a present only from the husband. Such present is called a *mutat*, and it consists of three articles of dress, the value of which should be according to the position of the parties, but which is not to exceed half the "proper dower" nor be less than five *dirms*. If she is divorced after consummation or valid retirement, or if the husband or herself dies before or after the consummation or valid retirement, she would get her proper dower.

§47. A dower not specified in the contract, but assigned *after* the contract by the husband or a Court of Law, is payable in full if the same has been confirmed. But if the marriage is dissolved by divorce or death of either party before the dower is confirmed, the wife is entitled to a *mutat* or present only, and not to half the dower so assigned. And if the wife be the cause of separation without any fault of the husband, she will not be entitled to such present even.

§48. When a dower is "confirmed" and a separation then takes place for any cause proceeding from the wife, the dower is not dropped, but is payable in full. If, however, such separation

(from any cause proceeding from the wife, such as her becoming an apostate, or having carnal desire towards her husband's son, or her exercising the option of puberty) takes place before the dower is "confirmed," the whole of it is dropped, and nothing is payable.

§49. If a wife transfers her dower to her husband for consideration, and the husband repudiates her before consummation, he would be entitled to get back from her half the amount of the dower. If she exonerates her husband from the whole dower, and she is repudiated before consummation, her husband has a claim against her for half the dower. If she had received the whole, and is divorced before consummation, she must refund a half of it.

Case-law.

Lien for unpaid dower:—The lien obtained by a Mahomedan widow on her husband's lands for unpaid dower, is a purely personal right, and does not survive to her heirs: *Hadi Ali* v. *Akbar Ali*, I. L. R. 20 All. 262.—A Mahomedan widow who is entitled to dower, cannot lawfully obtain a lien over her deceased husband's property by taking possession adversely to the other heirs of her husband; in order to her obtaining such a lien, she must have obtained possession of her husband's property *lawfully*—that is, (1) by contract with her deceased husband, (2) by the heirs of the deceased consenting to her taking such possession after his death in lieu of dower, or (3) by her being put into possession by the husband before his death: *Amanatunnissa* v. *Bashirunnissa*, I. L. R. 17 All. 77.—Where she is in undisturbed possession of her husband's property, and dower is admitted or proved to be due to her, the burden of proving that she was not let into possession by her husband in lieu of dower, or that she did not obtain possession after her husband's death with the consent or acquiescence of the heirs, lies upon the heir claiming partition without payment of his share of the dower-debt: *Muhammad Karimullah* v. *Amani Begum*, I. L. R. 17 All. 93.—A widow in possession of her late husband's property in lieu of dower is not precluded from suing to recover her dower from the heirs: *Ghulam Ali* v. *Sagir-ul-nissa*, I. L. R. 23 All. 432.—Where she is not in possession or her possession is unlawful, her right is to demand the

amount of her dower from the heirs; such amount being realizable from their shares of the estate, like other debts, in the usual course of law: *Meerun* v. *Najeebun*, 2 Agra 335.—Where the widow is in possession of her husband's estate under a certificate of administration, she has a lien for dower on the estate against the heirs suing to recover possession: *Ahmed Hossain* v. *Khadija*, 3 B. L. R. (A.C.) 28 (*note*); 10 W. R. 369.—So, also, where she is in possession under a claim of dower: *Mulkah* v. *Jehan*, 2 W. R. (P.C.) 55; 10 Moo. I. A. 252.—And, where the widow is in possession in lieu of dower, the heir dispossessing her takes the estate subject to her lien: *Umed* v. *Saffihan*, 3 B. L. R. (A.C.) 175.—A Mahomedan widow in possession of her husband's property is entitled to a lien for whatever dower remains unpaid, although the actual amount of it may be in dispute. An heir is not entitled to recover possession from her so long as the dower is not satisfied, nor to recover any mesne-profits, but his proper course is to bring a suit for an account of what is due as dower, and to pray that, in satisfaction of that amount, he may be put into possession of his share of the estate. Payment of the widow's dower, like every other debt, must be made before the estate can be distributed among the heirs: *Balund* v. *Janee*, 2 N. W. 319. See also *Bachun* v. *Hamid*, 10 B. L. R. 45; 14 Moo. I. A. 377; 17 W. R. 113.—But the widow's claim for dower under the Mahomedan law being only a debt against the husband's estate, does not give her a lien on any *specific* property of the deceased husband so as to enable her to follow that property into the hands of a *bonâ-fide* purchaser for value: *Wahidunnissa* v. *Shubrattun*, 6 B. L. R. 54; 14 W. R. 239. This ruling holds good in cases where the widow was not in lawful possession of her husband's property. Where she is in possession with the consent of the husband or his heirs, she *has a lien*, as decided in the cases cited above. Where she did not get into such possession, she has no lien over any *specific* property, as in the above cited case, nor can she take possession of her husband's estate against the heirs, but in such case *she must sue them for the amount of her dower*: *Sedamut* v. *Mowla Buksh*, 5 W. R. 194.—For a widow's claim for unpaid dower, when not a charge upon the estate, constitutes a debt payable *pari passu* with the demands of other creditors: *Hameeda* v. *Buldon*, 17 W. R. (P. C.) 525.—A Mahomedan widow in possession of the share of her deceased husband's heirs in lieu of dower is not competent to alienate it, and the heirs can sue for the avoidance of such transfer made by the widow: *Mahomed Ussudoollah* v. *Ghasheea Beebee*, 1 Agra 150. See also *Ali Muhammed* v. *Azizullah*, I. L. R. 6 All. 50; and, *Basaet* v. *Dooli Chand*, I. L. R. 4 Cal. 402.—Nor can she mortgage such property:

Chuhi Bibi v. *Shamsunnissa*, I. L. R. 17 All. 19.—But she can sell what belonged to her by right of inheritance: *Kummuroolnissa* v. *Mahomed*, 1 Agra 287.—Where a deed of bye-mokasa is executed by the husband in lieu of dower, possession under that deed is not necessary to its validity: *Nuseeb-oonissa* v. *Danush Ali*, 3 W. R. 133.

A suit was brought by the heir of a Mahomedan widow for her dower debt. While that suit was pending, the heirs of the deceased husband of the widow mortgaged the property which had belonged to the deceased husband in his life-time, and the heirs of the widow got a decree which could only be executed against the assets of the husband which the heirs of the husband had in their possession. *Held* that the decree obtained by the widow's heirs took priority over the mortgagee's decree: *Yasin* v. *Md. Yarkhan*, I. L. R. 19 All. 504. This case was decided on the principle laid down by the Privy Council in *Bazayet Hossein* v. *Dooli Chand*, I. L. R. 4 Cal. 402, where it was held that the creditor of a deceased Mahomedan 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, whether the alienation has been by absolute sale or by mortgage. But *where the alienation is made during the pendency of a suit* in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held *to take with notice*, and be affected by the doctrine of *lis pendens*.

§50. A wife is not entitled to any dower under an invalid marriage which has been judicially dissolved before consummation. If the marriage was dissolved after consummation took place, she would be entitled to her "proper dower," and if there be a specified dower which is less than the "proper dower," she can get the specified dower only. In case of invalid marriages, valid retirement is not equal to consummation, so that if dissolved after valid retirement there would be no dower.

§51. The **Shiah School** divides dower into *three* kinds: —1. The *Mohr-us-Sunnat* or the traditional dower, which the Prophet bestowed on each of his wives, and which amounts to 500 *dirhams*; 2. The *Mohr-ul-Misl*, or the "proper dower" as defined before; 3. The *Mohr-us-Sahih*, or the valid dower, which is anything capable of being owned by a Mussulman,

whether it be itself a substance or the usufruct of something else. Hence, the usufruct of a free man, that is, the service to be rendered by him—such as the teaching of an art, or of the *Kuran* or any other useful business—can be a valid dower. There is no limit to the amount or quantity of the valid dower—it may be very little such as a grain of wheat, or it may be very large—but it should be that which is mutually agreed upon by the husband and wife, so long as it is not destitute of any legal value. If the dower is not fixed and specified, but left undetermined, the proper dower only becomes due upon consummation, while only a present in case of divorce before consummation. If one dower is fixed in private, and another in public, the former only becomes payable. The non-mention of dower in a marriage-contract of the *muta* form renders the contract void.

§52. If the time for payment of dower is mentioned in general terms, the dower is taken to be prompt. But if the time for payment is left *undetermined*, then, according to this School, the specification of the amount becomes void, and "proper dower" is only due, which would not be promptly payable. The wife is entitled to refuse to surrender her person till she has received her prompt dower. But she cannot refuse herself after connubial intercourse has once taken place. If the dower is deferred, or a time is fixed for payment, she has no right of denial. Says the *Sharaya-ul-Islam*:—"If she has withheld herself till the period when payment is stipulated, a question may arise whether she can lawfully deny herself till the dower is paid. To this question some of the doctors have answered in the affirmative, but others in the *negative*, by reason of her being bound to surrender herself before the arrival of the period agreed upon. The latter opinion is agreeable to the principles of the law."

In other points, the law is essentially the same as in the Hanifite School.

CHAPTER V.—Divorce.

§53. **Talak or Divorce** means dissolution of marriage, or the annulment of its liability by the use of certain words. The words may be express, or ambiguous or metaphorical, and they may be used to take effect immediately or referred to a future time. A divorce cannot be qualified by words expressing option on the husband's part to take back the wife; in such case, the option would be void, and the divorce would take effect.

§54. A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause. In order that a divorce may be effective, the husband must be sane and an adult. It does not matter whether he is acting in free will or under compulsion. But though a divorce under compulsion is valid, a compulsory acknowledgment of the divorce is not valid. A divorce by a youth under puberty, though possessed of understanding is not valid; and that by an insane person, or one asleep or in faint, or by a lunatic with lucid intervals while a fit is on him, is not effectual. The divorce of a dumb person is effectual, if expressed by positive and intelligible signs. Repudiation by a drunken man is effective. Divorce may be effected by writing as well as by word of mouth.

§55. A sick man may divorce his wife even on his death bed.

§56. Repudiation by a husband apostatized from the Mahomedan religion and who has joined a foreign country has no effect, but becomes effective if he returns as a Moslem before the wife completes her *iddat*. Also, there can be no repudiation of a wife who has apostatized to join herself to a foreign territory.

§57. The husband may confer upon the wife the option or power of repudiating herself, as also he can delegate the power

of repudiating her to a stranger. Where the power is delegated to the wife, she must strictly conform to the husband's intention, and if she divorce herself in any other mode than she has been desired to do, that mode of divorce takes place which was desired by the husband.

§58. There can be no more than three divorces effected, although a thousand may be repeated.

Case-law.

Evidence of divorce.—The Mahomedan law does not provide for the nature of the evidence required to prove a divorce: *Buksh Ali* v. *Ameerun*, **2 W. R. 208.**—But, although a writing is not necessary to the validity of a divorce under that law, yet where it takes place between persons of rank and property, and where valuable rights are affected by the divorce, the parties may be expected for their security to have some document affording satisfactory evidence of their action: *Gowhur* v. *Ahmed*, **P. C. 20 W. R. 214.**—Where the husband signed an instrument of divorce in the presence of the wife's father, and gave it to him, it was held to be valid, notwithstanding that it was not signed in the presence of the wife: *Waj Bibi* v. *Asmut*, **8 W. R. 23.**—Divorce should not be presumed only from the fact of the husband having taken another woman to live with him, in consequence of which the wife left his house and went to live with a relative; nor from the fact of his having stated in his will that he had no wife, lawful or *Nikah*: *Noor Bibi* v. *Naivas*, **1 Ind. Jur. (N. S.) 221.**

Expression.—The mere pronunciation of the word "*talak*" three times by the husband, without its being addressed to any person, is not sufficient to constitute a valid divorce under the Mahomedan law: *Furzund* v. *Janu*, **I. L. R. 4 Cal. 588.**—No special expressions are necessary to constitute a valid divorce, nor it is necessary that the words should be repeated three times except when the repudiation is final: *Ibrahim* v. *Syed Bibi*, **I. L. R. 12 Mad. 63.**

Agreement for divorce.—Where at the time of marriage, the husband entered into an agreement with the wife authorizing her to divorce him upon his marrying a second wife during her life and without her consent, it was *held* that the Mahomedan law sanctioned such an agreement, and that the wife was, on proof of the husband having married a second wife without the consent of the

first, entitled to a divorce: *Badaranissa* v. *Mafiattala*, 7 B. L. R. 442; 15 W. R. 555.

Compulsion.—According to the Mahomedan law, the divorce of one acting upon compulsion from threats is effective: *Ibrahim* v. *Enayetur*, 4 B. L. R. (A. C.) 13; 12. W. R. 460.

Divorce by wife.—The husband may give his wife the power to divorce herself from him according to the form prescribed for a divorce by the husband: *Hamidoolla* v. *Faisunnissa*, I. L. R. 8 Cal. 327; IO C. L. R. 291.

The wife may exercise such power without reference to any particular period unless it was so agreed between the parties: *Ashruf Ali* v. *Ashad*, 16 W. R. 260.

§59. **Different forms.**—When the words of a divorce are express, it is called *Sarih;* it is *Kinayait*, when the words are ambiguous or metaphorical. Again, a divorce may be effected in the *Sunni* or in the Badai form. The *Sunni* form is that which is in accordance with the *Sunnat* or traditions. The *Sunni* divorce is divided into two kinds: 'Ahasan' or the best, and 'Hasan' or good. The *Badai* form is that which is new or heretical and irregular.

§60. There is again separation caused by *lian*, *ila*, or the husband being impotent or eunuch, as also by *Khula*. *Lian* means an oath. A divorce by *lian* takes place where the husband accuses his wife of adultery, and denies his having begotten the child in her womb or born of her, and a Court upon proof of such charge passes a decree for the dissolution of the marriage. Such a divorce is irreversible. The term *Ila* means a 'vow'. A divorce by *Ila* takes place where the husband makes a vow of abstinence (that is, not to have carnal connection with his wife) and maintains his vow inviolate for a period of four months. It effects an irreversible divorce even without the decree of a Court. *Khula* means the release from the marriage tie obtained by a wife upon payment of a consideration. Allied to the *Khula* form of divorce is another form called *Mubarat*, or 'mutual dis-

charge.' By the *Mubarat* form, the husband and wife can mutually discharge themselves, and their mutual discharge leaves each party without any claim upon the other. Another form of divorce is known as the *Zihar*, as where a man compares his wife to any of his female relations within the prohibited degrees, or he compares her to any of the parts of such relation's person which is improper to be seen; as, where the husband says to his wife, "You are like my mother," not meaning to show respect to his wife; or, "You are to me like the *Zihar* (back part) of my mother." If the husband's intention in so comparing his wife was to divorce his wife, an irreversible divorce takes place. Otherwise, the effect of *Zihar* is a temporary prohibition of carnal intercourse between the parties, which holds until the performance of expiation.

§61. Divorce is either revocable or irrevocable. A revocable or reversible divorce is called '*Rajai*'; an irrevocable or irreversible one, '*Bain*'.

§62. *Tuhr*, or the period of purity, means the space between two occurrences of a woman's courses.

§63. *Iddat*, or the term of probation, means the time during which a woman is to abstain from sexual intercourse, or uniting in marriage with another man, upon the dissolution of marriage.

§64. The *Ahasan* or the most laudable divorce takes effect where the husband repudiates his enjoyed wife by a single sentence, within a *tuhr* (or, the period of purity, that is the space between two occurrences of a woman's courses), during which period he had no carnal connection with her, and then leaves her to complete her *iddat* (the prescribed term of probation) without having sexual intercourse with her in the interim. The single utterance effects an irreversible divorce after the completion of

the *iddat*, but the husband can revoke the divorce at any time before it becomes irrevocable. The requisites of this form are:— That the sentence of divorce be uttered only once; that the wife be an enjoyed one; that she be not at the time in her menses; and that she be not pregnant. The *Ahasam* is a single revocable divorce.

§65. The *Hasan* or laudable divorce is where the husband repudiates his wife, by three sentences of divorce uttered in three *tuhrs*, and has no carnal connection with her in the interim. Here, one sentence is uttered in each of the three *tuhrs*. Thus, he gives her one repudiation in one *tuhr*, and then another in the next *tuhr*, and a third in the third *tuhr*, without having carnal connection with her in any of the *tuhrs*. The first and second repudiations are revocable, but the third is irrevocable, and completes the divorce even without waiting for the expiration of the *iddat*, or delivery if she be pregnant. The wife may be retained after the first or second, but not after the third. Though the divorce becomes irreversible as soon as the third is pronounced, even without waiting for the *iddat*, the observance of the *iddat* is nevertheless compulsory on the wife. In this form, it is immaterial whether the wife be an enjoyed or an unenjoyed one, or be pregnant. But, with this difference, that if the wife be an unenjoyed one, she may be repudiated at any time either in a *tuhr*, or during the actual occurrence of her courses, and in her case, if she be divorced before cohabitation or valid retirement, a single divorce becomes irreversible. If the wife be not subject to courses, the husband wishing to divorce her according to the traditions, should give her one repudiation, then another after the lapse of one lunar month, and a third after the lapse of another lunar month. Similarly, if the wife be pregnant, she may be divorced in the *hasan* form by pronouncing three divorces, one in each successive month.

§66. Both the *ahasan* and *hasan* divorces belong to the *Sunni* form. The difference between the two is, that in the *ahasan* form there is one revocable divorce, which becomes irreversible after the completion of the *iddat*, whereas in the *hasan* form there are three divorces, of which the first two are revocable, and the third is irrevocable even without completion of *iddat;* an enjoyed but unpregnant wife is the subject of divorce in the former, whereas an unenjoyed, or enjoyed, or pregnant wife can be divorced in the latter form. It is essential in both that there be no sexual intercourse between the parties from the time that the divorce is pronounced till its completion.

§67. A single divorce passed upon an unenjoyed wife, that is, before consummation or valid retirement, becomes irreversibe. But if three divorces are passed in one sentence or without any intervention of time, she is divorced by three repudiations.

§68. *Badai divorce.*—First, where a husband repudiates his wife by three divorces at once, that is, either by repudiating her three times in one sentence, or by repeating the sentence separately three times within one *tuhr*; or by giving her two divorces at once in one sentence, and the third in another sentence in one *tuhr*; or by pronouncing two divorces in one *tuhr*, and the third in the next *tuhr*,—the three divorces hold good in the *Badai* or irregular form, and the third completes the divorce and makes it irreversible, but the divorcer is a sinner for the irregularity. Secondly, where a man repudiates his enjoyed wife while she is subject to the monthly courses, or he repudiates her during a *tuhr* (period between two courses) in which he had sexual intercourse with her, the divorce is a divorce in the *Badai* or irregular form, and becomes irreversible upon the wife's completing her *iddat*. It should be noted that in the first class of cases, the

Badai divorce became irreversible upon the passing of the third divorce, and therefore without waiting for the *iddat*, whereas, in the second, the repudiation amounts to irreversible divorce upon completion of the *iddat*. Moreover, it should be remembered that the repudiation of an unenjoyed wife while she is in her courses, is a divorce by the *Sunni* form, and is not irregular. *Badai* divorces, though effective, should be revoked, as the divorcer commits sin thereby.

According to the *Imamiyah* sect, the *Badai* divorce is void, and no divorce takes place if the *talak* is given in this form.

§69. If to the wording of a divorce be joined a word signifying vehemence, certainty, irrevocability, enormity, gravity, or the like, one irreversible divorce always takes place, unless the intention of the divorcer was to convey two or three divorces. Thus, where a man says to his wife "You are divorced irreversibly," "I give you the worst, or the basest, or a heavy, or a thousandfold divorce," one irreversible divorce takes place, whether the wife be enjoyed or unenjoyed. Such divorces are called *ghaliz* or aggravated, as distinguished from the *khalif* or light divorce. They are always irreversible, and belong to the *Badai* form.

§70. The *Kinayat* or ambiguous expressions used in expressing repudiations are of two kinds. The first comprises of three expressions, "Count," "Purify your womb," and "Thou art single." By each of these expressions, *one revocable* repudiation is effected. All other ambiguous expressions belong to the second order of implications, and by each of them *one irreversible* divorce is effected unless the intention of the divorcer was to pass *three* divorces, in which case three divorces take place. But his intention as to *two* divorces is not valid. The use of equivocal terms is not valid in giving a divorce in the Shiah School.

§71. Repudiations by *zihar*, *lian*, or *ila* effect one irrevocable divorce. Separation caused by impotency and like causes, and separation by *Khula*, effect one irrevocable divorce. The wife cannot demand as a right her divorce by *Khula* on payment of consideration. The compensation for *Khula* may consist of any thing which is lawful for dower. Generally this compensation consists of the wife's relinquishment of her dower or a portion of it, or her giving back the dower or something else, either in addition to the amount of the dower or as sole compensation. If a husband offers a divorce to his wife for a compensation, and she accepts the offer, divorce takes place by *Khula*, and it is a single irreversible divorce. Both *Khula* and *Mubarat* cause every right to cease, which either party had against the other on account of the contract of marriage.

§72. **Impotency.**—"An impotent person is one who is unable to have connection with a woman, though he has the natural organ; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women, but not with others, whether the disability be by reason of disease or weakness of the original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection."—*Fatwa Alamgiri.*

When a woman sues her husband for separation on the ground of impotency, the Judge should, if the husband does not admit of having had intercourse with her, adjourn the case for a year, whether the wife be an enjoyed one or a virgin. If the wife was an enjoyed woman at the time of marriage, and the husband declare at the expiration of the year of probation that he has had intercourse with her within the year, and she deny it, the husband's declaration upon oath is to be credited. If the wife was originally a virgin, then at the expiration of the year, if the husband declare that he has had intercourse with her and she

deny it, the wife is to be examined by two women; and if they declare her still to be a virgin, her word of non-intercourse is to be credited, and the case decided accordingly. Where there has been intercourse between married parties even on a single occasion, and the husband subsequently becomes weak, the wife has no choice.

Retirement with an impotent husband amounts to complete retirement, and entitles the wife to her full dower. She is also to observe the full term of *iddat*.

Where the husband is an eunuch or an old man, the case will be similarly adjourned for one year as in the case of an impotent person. If the husband be lunatic or leprous, the wife has no option as in the case of impotency.

Case-law.

Khula divorce.—The non-payment by the wife of the consideration for a divorce does not invalidate the divorce: *Buzl-ul-Ruhmee* v. *Luteefutoonnissa*, **1 W. R. (P. C.) 57.**—A khula divorce is valid even though it is granted under compulsion: *V. V. Ismal* v. *O. Beyakutti*, **I. L. R. 3 Mad. 347.**

Lian.—A charge of adultery by a Mahomedan against his wife does not operate as a divorce: *Jaun Beebee* v. *Beparee*, **3 W. R. 93.**

Zihor.—Where the wife insisted on leaving the husband's house, and the latter said that if she went, she was his paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship, nor take her back as wife, *held* that the expression used by the husband, being used with intention, constituted a divorce and became absolute if not revoked within the time allowed by Mahomedan law: *Hamid Ali* v. *Imtiazan*, **I. L. R. 2 All. 71.**

Impotence.—A wife having sued the husband for dissolution of marriage on the ground of his impotency and malformation, the Court adjourned the hearing of the suit for one year in order that the parties might resume cohabitation for that period. The wife refusing to live with him and only paying him occasional visits, her suit was dismissed, and she was not allowed to get alimony: *A.* v. *B.*, **I. L. R. 21 Bom. 77.**

§73. **Iddat.**—The observance of the *iddat* is incumbent on the wife married by a lawful contract, upon the dissolution of the marriage by the husband's death, or by a divorce after consummation or valid retirement. If the marriage is invalid and is dissolved after actual consummation, the *iddat* would be incumbent, but not otherwise, even if there be valid retirement. In case of divorce, the *iddat* commences immediately from the repudiation; that of widowhood from the death of the husband; and that of an invalid marriage, from the separation by the Judge. Where events are not known until the expiration of the period of *iddat*, the *iddat* is held to have expired.

§74. Four descriptions of women are not liable to observe the *iddat:* 1. A woman repudiated before consummation; 2. An alien coming under the protection of a Moslem country having left her husband in a foreign and hostile country; 3. Two sisters married under one contract; and, 4. More than four women married under one contract which has been dissolved. There is no *iddat* for *Zina* or illicit intercourse.

§75. The period of *iddat*, both in the case of reversible and irreversible divorce, is the period of three terms of the woman's courses, if she be subject to courses, and three months for one who is not subject to courses. The *iddat* of a pregnant woman continues till her delivery. The *iddat* due upon the husband's death is four months and ten days, whether the marriage has been consummated or not. The *iddat* for a revocable divorce repeated by the husband in his death-bed, is four months and ten days; if an irreversible divorce, the *iddat* is for three terms of her courses. If a man has by mistake carnal intercourse with a repudiated wife whilst in her *iddat*, a fresh *iddat* becomes incumbent upon her. If a woman whilst counting the *iddat* by months, menstruates, she must begin anew, and count by the terms of her courses prescribed for her. The *iddat* of a female

slave is *two* terms of her courses; and if she is not subject to menstruation, her *iddat* is a month and a half. The *iddat* of a woman whose marriage was invalid, and that of one enjoyed erroneously, are counted by her courses, here the object of the *iddat* being to find out whether she was pregnant or not.

§76. **Rajat & remarriage.**—The husband may retain or take back a wife whom he had repudiated by one or two *revocable* divorces at any time before the expiration of her *iddat*, whether the wife be willing or not to such retaking. This is called *rajat*. *Rajat* may be effected by words as also by act. A wife repudiated by one or two *irreversible* divorces cannot be simply retained. The husband wishing to take her back, must remarry her either within the *iddat* or after its expiration. If a man pronounce three divorces upon a wife, it is not lawful for him to remarry her till she has been married by a lawful contract to another husband, who has repudiated her after consummation, or died after consummation, and the woman's *iddat* due thereupon has expired. But a woman married under an invalid contract, and repudiated three times, can be lawfully married by her first husband even without such intermediate marriage to a third person. *Rajat* or retention need not be attested by witnesses, though the presence of witnesses is recommended.

§77. *Legal effects of divorce as to the wife's inheritance from her husband.*—If a wife is repudiated thrice or irrevocably by her husband while in his health, or in an illness from which he recovers, the wife is not entitled to inherit from him. Where she has been repudiated under a revocable divorce, either in health or in illness, and either party dies before the expiration of the *iddat*, they are entitled to inherit reciprocally. According to the *Hidaya*, a wife *revocably* divorced by her husband in his death-bed, is always entitled to inherit. A wife divorced three times or irrevocably by the husband while on his death-bed, is

entitled to inherit if the husband dies before the completion of her *iddat*, provided the repudiation was given without any request on her part. If the husband made a vow of abstinence while he was in his health, and the wife is divorced thereby while he was in his death-bed, the wife does not inherit.

§78. **The Shiah School.**—The *Imamiyah* sect does not recognise the *Badai* or irregular form of divorce, the *Sunni* or regular form alone being accepted by them. The utterance of the divorce must always be given with *intention*, in express or unequivocal terms, pronounced in the Arabic (if the husband is able to do so), entirely free from any condition or description, and attested by two witnesses who shall be together present, and shall hear the words of the divorce when they are expressed by the husband, the testimony of women being entirely disregarded. A dumb person is allowed to pass a divorce by signs.

§79. According to this School, a wife has option to cancel a marriage on the ground of her husband being insane, whether he was so *before* the marriage or *after* it, or his becoming a eunuch *before* the marriage, or his being impotent *before* the marriage. If the husband becomes a eunuch after the marriage, or impotent after consummation, the marriage will not be cancelled. Similarly, the husband has power to cancel or dissolve a marriage if the wife was insane, blind, or leprous, or had white leprosy, or a fleshy protu'berance preventing coition, provided the defect existed *before* the contract was entered into, though they may be discovered after consummation. If occurring after the contract, either before or after consummation, they would not vitiate the marriage. The option of cancellation should be exercised without delay, and it is not necessary that the marriage should be dissolved by the Judge, either party being competent to do so of his or her own authority.

§80. According to this School, there is another form of divorce called the *talak-ul-iddat*, in which the wife is divorced in the ordinary way, but the husband recalls her and has intercourse with her before the expiration of *iddat*, and then divorces her in a *tuhr*, in which he *has no* intercourse with her. The wife divorced in this way would not be lawful to the divorcer till after her marriage with another husband. But if a wife is *twice* divorced in this form, and *twice* retaken after her marriage with another person, and she is given a *talak-ul-iddat* for the third time, she then becomes unlawful to him for ever.

§81. Regarding the divorce by a sick man of the *Shiah* sect, it is laid down that the husband will inherit from the wife if she was recalled during her *iddat*; but where the divorce was irrevocable, he shall not inherit in any case. The wife will inherit from the husband, whether the divorce was revocable or irrevocable, during one year from the date of the divorce,—provided she did not marry in the meantime, or her husband did not recover. But if he recovered, again fell sick, and died within a year, she will not inherit.

CHAPTER VI.—Parentage.

§82. The descent of a child from its mother admits of positive proof, and can be established by the testimony of a single woman.

§83. Paternity is established by proof of marriage, or the presumption of marriage, or by the relation of master and slave subsisting between the parents, or by acknowledgment by the father.

§84. The parentage of a child born of a lawfully married wife, after the expiration of six months from the date of marriage, is established in the husband of its mother, unless repudiated by the husband by *lian* or formal imprecation.

§85. The parentage of a child born of a wife, whose marriage though invalid has been consummated, *after* six months from the date of marriage, is also established in the husband of its mother, unless repudiated by the husband by imprecation. For the purposes of the establishment of parentage, an invalid marriage, after consummation, is counted with valid ones.

§86. If a man marry a woman, and she bring forth a child *within* six months from the date of marriage, the parentage of the child is not established in the husband, for under the Mahomedan law the shortest period of gestation is six months.

§87. If a woman becomes pregnant by fornication (*Zina*), is then married to the man by whom she became pregnant, and a child is born within six months of such marriage, the parentage of such child would be established in the husband, *provided* he claims it as his child, and does not say that it is born of fornication.

§88. The parentage of a child born of a woman observing the *iddat*, will not be established unless its birth be proved by

two male witnesses, or *one* male and *two* female witnesses. But if the pregnancy be apparent before the husband's death, or it was acknowledged by the husband, then no such testimony will be necessary. If the *iddat* was from the death of her husband, the parentage of the child will be established in the deceased husband if the woman declares it to be his, and the heirs confirm it, without any other testimony

§89. *Lian* or imprecation means testimony confirmed by oath, and is administered when the husband accuses the wife of adultery, or denies the parentage of the child, which would otherwise be established in himself. The husband's denial of the parentage of the child born of his wedded wife must be made immediately after he becomes acquainted with its birth. Delay in doing so, as when he does deny the child at the time that he receives congratulations on the event of its birth, or the necessaries concerned with the birth being purchased, would establish the child's paternity, even though he repudiate it on *lian* being administered to him.

§90. If a man and woman cohabit as husband and wife, and there is no legal prohibition against a presumption of their marriage, the children born of such cohabitation have their parentage established from the man, if he acknowledges them to be his own children or treats them as his own.

§91. Mere acknowledgment, without proof of marriage, would suffice to establish a child's parentage from the acknowledger, under the following conditions :— (1) That the ages of the acknowledger and the child acknowledged should be such as would make it possible of their standing in the relation of parent and child: (2) That the person acknowledged should be of unknown descent, that is its paternity from any other source be unknown: (3) That the person acknowledged should believe

that he or she is the acknowledger's child: (4) That the person acknowledged, if not an infant, should consent to be made the acknowledger's child. Confirmation by the child is not necessary when the child is too young to give an account of himself.

Case-law.

No acknowledgment by the father can confer the status of legitimacy on a child begotten by a Mahomedan by a Hindu prostitute living with him: *Dehan Bibi* v. *Lalon Bibi*, **I. L. R. 27 Cal. 801.**—Nor on a child whose mother, at the time of its birth, was the wife of another man, and so could not have been married by the child's father: *Liaqat Ali* v. *Karimunnissa*, **I. L. R. 15 All. 396.**—Nor on a child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful: *Muhammad Allahdad* v. *Muhammad Ismail*, **I. L. R. 10 All. 289.**—Nor where such a conclusion would be contrary to the course of nature, and impossible: *Ashruf Ali* v. *Ashad Ali*, **16 W. R. 260.**—Nor where the child was born of a Mahomedan father by a Burmese woman whose conversion to the Mahomedan religion was not proved, and it being found upon the facts that no marriage of the parents as distinguished from concubinage had taken place: *Abdul Razak* v. *Aga Mahomed*, **I. L. R. 21 Cal. 666.**

Where acknowledgment confers legitimacy.—Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of the child is unknown (in the sense that no specific person is shown to be the father), then acknowledgment affords a conclusive presumption that the son acknowledged is the legitimate child of the acknowledger. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him: *Liaqat Ali* v. *Karimunnissa*, **I. L. R. 15 All. 396.**—Also, where there is acknowledgment and recognition of a natural son by a Mahomedan as his son, and certain conditions negativing the presumption of legitimacy do not exist: *Sadakat Hossein* v. *Mahomed Yusuf*, **I. L. R. (P. C.) 10 Cal. 663; L. R. 11 I. A. 31.**—And, when the ages of the parties admit of the relationship between them, and when the descent of the party acknowledged has not been already established from another: *In the Matter of the Petition of Najibunnissa*, **4 B. L. R. (A. C.) 55.**

Nature of the acknowledgment.—*Per* Mahmood, J.—Acknowledgment of parentage and other matters of personal status stand upon a higher footing than matters of evidence, and form a part of the substantive Mahomedan law.

So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognised by Mahomedan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger: *Muhammad Allahdad* v. *Muhammad Ismail*, I. L. R. 10 All. 239.—An acknowledgment of sonship is not *prima facie* evidence of the fact which may be rebutted, but establishes the fact acknowledged: *In the Matter of the Petition of Najibunnissa*, 4 B. L. R. (A. C.) 55.—In order to an acknowledgment of paternity legitimating children under the Mahomedan law, the declaration ought to be clear and distinct in respect to each child, and the children, or those who have reached years of discretion, ought to come forward and acknowledge their father: *Kedarnath* v. *Donzelle*, 20 W. R. 352.—The acknowledgment need not be of such a character as to be evidence of marriage: *Wuheedun* v. *Wusee*, 15 W. R. 403.—Legitimacy or legitimation of a child of Mahomedan parents may be presumed or inferred from circumstances, without any direct proof of a marriage between the parents, or of any formal act of legitimation: *Mahomed Bauker*, v. *Shurfoonissa*, 3 W. R. P. C. 37; 8 Moo. I. A. 136. See also *Habeeboollah* v. *Gouhur Ally*, 18 W. R. 523.—But in inferring legitimacy from the treatment shown during lifetime to a woman and her children, a Court would not be justified in making any presumption of fact which a rational view of the principles of evidence would exclude, as the force of presumptions of fact must vary with varying circumstances; and where the circumstances were all such as to throw the Court upon direct evidence rather than upon presumptions, it would be justified in demanding substantive evidence: *Butoolun* v. *Koolsoom*, 25 W. R. 444.

The son of a Mahomedan by a slave girl, if acknowledged by his father, is entitled to the same share as the son of a lawful wife: *Waliulla* v. *Miran*, 2 Bom. H. C. R. 285.

§92. A man may acknowledge another to be his father, or mother, or wife, provided the persons acknowledged should assent to such acknowledgment, or confirm it either in the acknowledger's

lifetime or after his death. Such acknowledgments would affect the acknowledger himself and not any other person. Thus, if *A* acknowledge *B* to be his father, and *A* has a son, *B* will not become the grandfather of *A's* son.

§93. If a man acknowledge another to be his brother or uncle, such acknowledgment will not create the relationship between the parties, but the acknowledged would be entitled to inherit from the acknowledger if he has no other heir.

Case-law.

The acknowledgment of one man by another as his brother is not valid so as to be obligatory on the other heirs, but is binding against the acknowledger: *Himmut* v. *Shahibzadi*, 13 B. L. R. 182; 21 W. R. 113; L. R. 1 I. A. 23.

§94. A woman may acknowledge another to be her father, mother, or husband, and such acknowledgment would establish valid relationship between herself and the person acknowledged, but it would not affect any other person.

§95. A woman cannot acknowledge another to be her child so as to establish its paternity in her husband. But her acknowledgment if confirmed by the husband or verified by the testimony of one midwife, would render it valid so as to establish the *paternity* of the child. If paternity is not established, the effect of a woman's acknowledgment of another as being her child, is to entitle the latter to participate in her effects as an heir along with her other heirs.

§96. The effect of a valid acknowledgment of another as being the child of the acknowledger, is that the person acknowledged becomes an heir of the acknowledger.

§97. Acknowledgment of a child or other relationship is valid even though it be made in sickness.

§98. **Shiah School.**—According to the *Shiah* doctrine, if two persons mutually acknowledge each other as relatives, they inherit from each other, and they are not obliged to prove their relationship. But they must not be generally known to have other relationship than the acknowledged one. If the acknowledger has any known heirs, the acknowledged kindred does not inherit. And, when the acknowledgment is of a relationship other than that of parent and child, the right of inheritance does not extend beyond the parties (the acknowledger and the acknowledged) to their other relatives. Thus, an acknowledged brother will not inherit from the acknowledger's father. If an insane person is acknowledged by another to be his son, the assent of the former is of no consequence.

§99. *Nasab* or descent cannot be established except by the testimony of two male witnesses, who must be just and righteous. Nothing short of valid marriage can establish descent. Descent is not established by illicit intercourse. A child born under a temporary contract of marriage belongs to the temporary husband. An illegitimate child neither inherits from, nor is inherited by, its parents. Where a man cohabits with an unknown woman, supposing her to be his wife or his slave, and she gives birth to a child, the fruit of such intercourse, the parentage of such child is established in its putative father, for here there is *semblance* of marriage, and *nasab* or descent is established by valid marriage *or the semblance of it.* If a man should have carnal connection with a woman, gets her with child, and then marries her, the parentage of such child is not lawfully established in him. When a man denies the child of his wife, *and takes the lian or imprecation*, the descent of such child is cut off from him.

CHAPTER VII.—Maintenance.

§100. *Nafkah* or maintenance includes things necessary for the support of life, such as food, clothes, and lodging. The obligation to maintain another arises from two causes,—marriage and relationship. The obligation to maintain a slave follows by reason of the latter being the *property* of the master.

§101. The persons entitled to maintenance under the Mahomedan Law are:—(1) wife; (2) a *mutadda*; (3) children; (4) parents; (5) female relatives within the prohibited degrees if they be in poverty; (6) poor male relatives within the prohibited degrees if they be infant or disabled.

§102. *Maintenance of wife.*—It is incumbent upon the husband to maintain his wife whether she be a Moslem or *Zimmi* (infidel), rich or poor, enjoyed or unenjoyed, and young or old, provided she be not too young for matrimonial intercourse. But if the husband be an infant, and the wife an adult, she would be entitled to get maintenance at his expense. If the wife becomes rebellious (such as, by going abroad without her husband's consent, or leaving her husband's house), or does not surrender herself to her husband's custody, she is not entitled to maintenance unless she returns to obedience and custody. But a refusal to abide in her husband's apartments, or opposition to conjugal intercourse, does not disentitle her, provided she resides in her husband's house. A husband should, moreover, call upon the wife to remove to his house; and, if he fails to do so, her residing elsewhere will not bar maintenance. If the wife's dower remains unpaid and she refuses to remove to her husband's house, even though called upon by the husband, she is entitled to do so, and so to her maintenance. An obedient invalid wife, incapable of matrimonial intercourse, is entitled to maintenance.

§103. There is no maintenance under an invalid marriage, or during its consequent *iddat*.

§104. *Of a mutadda or a wife observing her iddat.*—Where a man divorces his wife, her maintenance is incumbent upon him during the term of her *iddat*. A divorced pregnant wife would be entitled to maintenance until her delivery. A wife observing her *iddat* upon the death of her husband, would not get her maintenance, whether pregnant or not. Nor is a wife entitled to any maintenance during her *iddat* if the separation was caused by her own fault, such as, her becoming an apostate, or having carnal connection with the son of her husband.

§105. The obligation to maintain a wife solely devolves upon the husband, and no one else shares it with him. Maintenance must be regulated according to the rank and condition of both parties.

§106. A wife is not entitled to maintenance in the following cases:—(1) when she is so young as to be incapable of matrimonial intercourse; (2) when she refuses to surrender herself to the custody of her husband, except on the ground of her dower remaining unpaid; (3) when she is disobedient or rebellious; (4) when she has been separated for her own fault; (5) when she becomes a widow; (6) when she has been married under an invalid marriage.

Case-law.

An order passed for the maintenance of a Mahomedan wife becomes inoperative by reason of the wife being divorced lawfully, and thus the conjugal relation being put to an end; but it does not cease to be operative before the expiration of the divorced wife's *iddat*: *In the Matter of the Petition of Din Muhammad*, I. L. R. 5 All. 226 (following *Abdur Rohoman* v. *Sakhina*, I. L. R. 5 Cal. 558: *In re Kasam Pirbhai*, 8 Bom. (Cr.) 95: *Luddun* v. *Kamar*, I. L. R. 8 Cal. 736).—The inability of a husband and wife to agree to live together is no ground for decreeing a separate maintenance to the

wife: *Jesmut* v. *Shoojaut*, 6 W. R. (Cr.) 59.—It is only on proof of the existence of the relationship of husband and wife that a Magistrate can make an order granting maintenance to a wife; but not where proof has been given that such relationship has ceased to exist, in which case he may stay an order already made: *Abdur Rohoman* v. *Sakhina*: *Sobhan* v. *Shubraton*: *Ossuff* v. *Shama*, I. L. R. 5 Cal. 558; 5 C. L. R. 21.

According to the Mahomedan law, until there has been an ascertainment of the rate at which maintenance is payable, no right of maintenance accrues to a wife on which she can found a suit: *Mahomed* v. *Musseehooddeen*, 2 N. W. P. H. C. R. 173.—Where a Mahomedan wife re-conveys to her husband the property received from him in lieu of dower, and he gives a written agreement covenanting to pay her a certain annuity, he cannot avoid payment on any of the pleas on which a Mahomedan husband may avoid payment of maintenance to a wife: *Yusoof Ali* v. *Fyzoonissa*, 15 W. R. 296.—Where a Hindu embraced the Mahomedan religion, and married a Mahomedan woman whom he took to live with him, and his Hindu wife and daughter sued him after his conversion for maintenance and providing them with a seperate house for their residence, *held* that the defendant ought not to be compelled to provide residence for the plaintiffs, inasmuch as the allowance awarded to them should cover all such expenses as maintenance and house-rent; *held* further that the right of the wife and daughter to be maintained out of her husband's and father's property was undoubted, and that when the Court has made an order directing a sum to be paid as maintenance, it has undoubtedly the power to ensure the enforcement of its order by fixing the allowance to be a charge on specific property: *Mansha Devi* v. *Jiwan Mal*, I. L. R. 6 All. 617.

Muta Marriage.—Under the law of the Shiah sect of Mahomedans, a *muta* wife is not entitled to maintenance, but such a provision of the law does not interfere with the statutory right to maintenance given by the Code of Criminal Procedure: *Luddon Sahiba* v. *Kamar Kudar*, I. L. R. 8 Cal. 736; 11 C. L. R. 237. Followed in *In the Matter of the Petition of Din Muhammad*, I. L. R. 5 All. 226.—Although the ordinary law of divorce does not exist in respect of marriages by the *muta* form, they can nevertheless be terminated by the husband giving away the unexpired portion of the term for which the marriage was contracted, and the consent of the wife is not necessary for the dissolution of the marriage. In such case, the husband is not bound to maintain the *muta* wife; and if the Magistrate has ordered the wife's maintenance, the husband is entitled to ask the Magistrate to abstain from giving

further effect to his order after the Civil Court has found that the relationship of husband and wife had ceased to exist: *Mahomed Abed* v. *Ludden Sahiba*, I. L. R. 14 Cal. 276.

Borah Mahomedans.—An order of the Magistrate directing a Borah Mahomedan husband of the *Imamiya* sect to pay a sum monthly for the maintenance of his wife belonging to the *Hanifi* sect, does not deprive the husband of his right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced: *In re Abdul Ali*, I. L. R. 7 Bom. 180.

Child of Zina.—Where a suit was brought against a Hindu by a woman who was a Mahomedan, and who was the wife of a Mahomedan, for maintenance of her illegitimate child of which she alleged the defendant to be the father, it was held that such a suit would not lie: *Addoyto Chunder Das* v. *Woojan Beebee*, 4 C. L. R. 154.

§107. Arrears of maintenance are not recoverable except when it was determined and decreed by the *Kazi* before the arrears were due, or when the wife had entered into a composition with the husband respecting it, in either of which cases she is to be decreed her maintenance for the past time.—(*Hidaya.*)

Case-law.

In a suit for maintenance by a Mahomedan wife against her husband, where there was no decree or agreement for maintenance before suit—*held*, reversing the decision of the Court below, that the decree should not have awarded past maintenance, but it should have been made payable only from the date of the decree; *held* also that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life: *Abdool Futteh* v. *Zabunnessa*, I. L. R. 6. Cal. 631; 8 C. L .R. 242.

§108. *Maintenance of children.*—The father is bound to support his infant children, and no person can be his partner in the liability. But where a child is possessed of property, its maintenance should be provided from such property, and will not be incumbent on the father. A male child should be maintained till he is strong enough to work for his livelihood, though he may not have become an adult. A female child should be

maintained until she is married. An adu't male child has no right to maintenance, unless disabled by infirmity or disease. When the father is poor, and the child's mother or paternal grandfather is rich, the mother or the grandfather may be ordered for maintenance.

§109. If the child's father be poor, the mother, if in affluence, may be ordered to maintain the child, and the maintenance shall be a debt against the child. But if the child be infirm, he will not be liable. Similarly, where the child is maintained by the grandfather, or grandmother, or paternal uncle, the maintenance is recoverable as a debt, except where the child is infirm and its father is poor. The maintenance of adult sons and daughters, who are disabled, rests upon both parents,—the father meeting *two-thirds*, and the mother, *one-third*.

§110. The father may hire out his male children, who are able to work, for their livelihood, but not the females.

§111. According to the *Fatwa Alamgiri*, it is incumbent on a father to maintain his son's wife, if the son is young, or poor, or infirm.

§112. *Maintenance of parents.*—The maintenance of both parents, if they are poor, is alike incumbent upon both male and female children possessed of property, whether the parents are Moslem or not, and whether they are able or not to work for their livelihood. Like the parents, the grandparents, that is, grandfathers and grandmothers, if poor, are entitled to maintenance from their grandchildren, whether they be related by the father's side, or by the mother's side.

§113. Maintenance may be ordered out of the property of an absent person, for his parents, his children, and his wife. If the property be in the hands of these persons, they may lawfully take their maintenance out of such property; but if the property

be in hands of a third person, he cannot give out of it without an order from the Judge. For the maintenance of parents, children, and wife, a father can sell the moveable property of his adult son who is absent; but he cannot sell *Akar* or immoveable property, unless the absent son is a minor or insane.

§114. Where a person dies leaving property, the maintenance of all persons inheriting shares in such property is to be met from their respective shares.

§115. *Maintenance of other relatives.*—It is incumbent on a man to maintain his poor and infant male relations within the prohibited degrees; also, his poor female relations within the prohibited degrees, whether they are infants or adults; and his poor and *disabled* adult male relatives within such degrees. For, it is said in the Kuran, "the maintenance of a relation within the prohibited degrees rests upon his heirs."

§116. The maintenance of poor relatives within the prohibited degrees is to be shared by all persons entitled to inherit their estate, in proportion to their respective share in the inheritance, provided that the persons liable for their maintenance are equal in respect of propinquity in their relation with the person to be maintained. Thus, when a poor person has a grandfather and a son's son, they are both liable for his maintenance in proportion to their share in the inheritance, that is, the grandfather for a *sixth* of the maintenance, and the son's son for the remainder. If a man has a mother and a grandfather, they are both liable in proportion to their shares as heirs, the mother in one-third, and the grandfather in two-thirds. So, also, when with the mother there is a full brother, or the son of a full brother, or a full paternal uncle, or any other of the residuaries.

§117. But among the *asabah* or male kindred, when the degree of propinquity differs, he who is nearer in degree is liable

for the maintenance, though he himself be excluded from the inheritance either by a preferential heir, or by his disqualification. Thus, if a poor person has a father and a son's son, both in better circumstances, the father is liable for the maintenance; when there is a daughter and a son's son, the daughter alone is liable, though they both inherit in equal shares; when there is a daughter's daughter or daughter's son, and a full brother, the daughter's son or daughter is liable, though the brother is entitled to the inheritance; when there is a parent and a child, the latter is liable, though they both inherit; when there is a Christian son and a Mussulman brother, the former is liable for the maintenance, though he is himself excluded from the inheritance.

§118. When there is a maternal uncle and the son of a full paternal uncle, the former is liable for the maintenance, although the latter takes the inheritance; for, the full paternal uncle's son is *not within the prohibited degrees*, and so the condition of liability is wanting on him. Similarly, if a poor man have a rich maternal aunt and also a rich paternal uncle's son, his maintenance rests upon the *former* only, though the latter takes the inheritance.

§119. If a person who takes the inheritance in preference to others, be himself in straitened circumstances, then he is not liable for maintenance. Those who would succeed to the inheritance of the poor relative in his absence, would be liable in proportion to their respective shares they would inherit. Thus, if there be a paternal uncle and a paternal or maternal aunt, and the uncle be in straitened circumstances, the maintenance will fall upon the aunt or aunts, though they would not inherit anything—for, the law views inability in this respect as equal to death. Similarly, if there be several persons liable for the maintenance of a poor relative, and they are all entitled to inherit, but one of them be in straitened circumstances, then his inability will be

counted as his death, although he would take a share in the inheritance, and the burden of maintenance will fall upon the rest.

§120. "Maintenance is not due where there is a difference of religion, excepting to a wife, both parents, grandfathers and grandmothers, a child, and a son's child."—*Fatwa Alamgiri.* Thus, a Christian is not bound to maintain his brother who is a Mussulman, nor is a Mussulman liable for the maintenance of his Christian brother.

§121. Where maintenance is decreed by the Judge to children, or to parents, or to any other relations within the prohibited degrees, and they allow "a considerable portion of time to pass without demanding or receiving it, it is evident that they have a sufficiency, and are under no necessity of seeking a maintenance from others." In such case, their right to maintenance ceases.

CHAPTER VIII.—Gift.

§122. **Hiba** or gift is defined to be a transfer of property made immediately and without any exchange. The person making the transfer is called the *donor*, and the person to whom it is made is called the *donee*.

§123. The essentials of a valid gift are :—

(1) That the donor should relinquish his right in the thing given by declaration ; and (2) the donee should accept the tender and take possession of the property given. The donor's *relinquishment* and the donee's *acceptance* and *seizin* are therefore the necessary conditions of every gift.

§124. Other conditions of a valid gift are :—

(*a*) The donor must be sane, adult, and the owner of the thing given :

(*b*) The subject of gift must be in existence at the time of the gift, and have legal value. A gift cannot be made of anything to be produced *in futuro* :

(*c*) A gift must not depend upon anything contingent, nor can it be referred to any future time :

(*d*) The donee should take possession of the thing given, either immediately, or, if so desired by the donor, at any subsequent period ; formal delivery and seizin are not necessary when the thing is in the donee's possession, or of his guardian or trustee ; or when the donee is a minor, in which case the guardian's seizin is equivalent to possession taken by the donee. A gift by a parent to the child would therefore be valid if the thing given be in the possession of the parent, or his or her trustee :

(*e*) If the thing given be a part of something which is divisible, the part given should be divided from the rest. The gift of such part without division and separation, is not valid, because the donee cannot take possession of the thing given when it is mixed with other property belonging to the donor. But where several persons are the joint owners of a thing, and they make a joint gift of the whole to *one* person, such gift is valid without division. And, where the sole owner of a thing makes a gift of it in its entirety to two or more persons without making a division, such gift becomes valid when possession is taken by the donees. "The gift of a *musha* (or undivided part) may be made in three different ways: *First*, a person having the whole of a thing may give an undivided half or other share in it to another. Here there is confusion on both sides, and the gift unlawful, without difference of opinion. *Second*, a person having the whole of a thing may give it entire to two or more persons undividedly. Here, there is confusion on the side of the donees only, and the gift is invalid, but not void, and becomes valid by possession. And, *third*, two or more persons having a thing in undivided shares may combine in making a gift of it entire to one person. Here the confusion is only on the side of the donors, and the gift is valid without any difference of opinion."—*Baillie's Digest.* The gift of a part of an *indivisible* thing is valid, but it is necessary that the part given should be defined:

(*f*) The gift of a thing not in the possession of the donor during his lifetime, is null and void :

(*g*) A gift cannot be made subject to an option of stipulation ; as, where land is given on condition that the donee would erect a mosque upon it. In such cases, the gift becomes valid, and the conditions are void :

(*h*) A gift may be validly resumed or cancelled by the donor.

Case-law.

Possession.—According to the Mahomedan law, a registered deed of gift is not valid if it is never perfected by possession. The Mahomedan law requires that the donor should be in actual or, at least, constructive possession ; and that he should give actual or constructive possession to the donee. Registration cannot be held to be equivalent to possession : *Ismal* v. *Ramji*, I. L. R. 23 Bom. 682.—A conveyance by deed of gift without consideration is invalid unless accompanied by delivery of the thing given, so far as it admits of delivery : *Khajooroonissa* v. *Rowshan*, I. L. R. 2 Cal. (P. C.) 184.—See also *Obedur* v. *Mahomed Muneer*, 16 W. R. 88; *Shahjan Bibi* v. *Shib Chunder*, 22 W. R. 314.—In order to make a gift according to Mahomedan law, seizin is necessary ; if the donor is not in possession at the time, the gift is void : *Abedoonissa* v. *Ameeroonissa*, 9 W. R. 257.—Where the donor was simply the owner of property which was in the hands of a mortgagee, she could not make a gift of it, although she could sell the same : *Mohinudin* v. *Manchershan*, I. L. R. 6 Bom. 650.—Where the plaintiffs claimed to recover possession under a deed of gift alleged to have been passed to them by a Mahomedan donor for the use of a *Masjid*, but it appeared that neither the donor nor the donees were ever in possession before or after the gift, the gift was held to be invalid, as delivery and seizin are the essence of a gift under the Mahomedan law, and no right of any description passes without them : *Meherali* v. *Tajudin*, I. L. R. 13 Bom. 156.—Where a Mahomedan declared in a deed that he has adopted a certain person to succeed to his property, it was held to be neither a deed of gift, nor a testamentary gift to take effect after the death of the donor, as there was a complete absence of any relinquishment by the donor or of seizin by the

donce: *Jeswunt Singhjee* v. *Jet Singhjee*, 6 W. R. (P. C.) 46; 3 Moo. I. A. 245.—*Tamlik*, or assignment of ownership, is a term applying to various modes of acquisition of property recognised by Mahomedan law, and when applied to gift, it does not avoid the legal requirements of acceptance and seizin. Where a Mahomedan executed an instrument called a *tamlik-nama* purporting to give a person, in consideration of her devotion and affection to the executant of the instrument, the executant's property, provided the executant should during life enjoy the income of the property, and after her (the executant's) death the donee should have the proprietary possession and enjoyment of the same just like the executant, with powers of sale, gift, mortgage, and *tamlik*, *held* that the deed could only have validity as a will; as a deed of gift, it was wholly invalid: *Kasum* v. *Shaista*, 7 N.-W. P. H. C. R. 313.—The rule that no gift can be valid unless the subject of it is in the possession of the donor at the time the gift is made, has relation in the case of land, to cases where the donor professes to give away the possessory interest in the land itself. What is usually called possession in this country is not only actual or *khas* possession, but includes the receipt of rents and profits. There is nothing in Mahomedan law to make the gift of a zemindari, a part or the whole of which is let out on lease to tenants, invalid. Nor is there any principle by which to distinguish malikana rights from the right to receive rents or dividends upon Government securities, and gifts of such a nature may be legally conferred under the Mahomedan law: *Mullick Abdul* v. *Muleka*, I. L. R. 10 Cal. 1112.—A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Mahomedan law: *Rahim Bakhsh* v. *Muhammad Hasan*, I. L. R. 11 All. 1.—*Per* Benson, J.—"The validity of the gift was not a question regarding succession, inheritance, marriage or caste, or any religious usage or institution, as referred to in the Madras Civil Courts Act, 1873, and therefore the rules of Mahomedan law with regard to gifts were not necessarily the rules by which the question should be decided. The Mahomedan law as adopted by our Courts does not require immediate possession to be given in all cases, and it may be doubted whether even the restricted rule as to possession is any longer adapted to modern requirements, and whether the mode of transfer laid down as obligatory on Europeans and Hindus by section 123 of the Transfer of Property Act and adopted by the parties in this case, (namely, by registered instrument attested by two witnesses and signed by the donor), ought not in equity and good conscience to be held to be as efficacious as delivery of possession in the

case of Mahomedans": *Alabi Koya* v. *Mussa Koya*, I. L. R. 24 Mad. 513.

Delivery of possession.—The gift of property which had been attached by the Collector for arrears of revenue, was held to be valid. All that is necessary to a valid gift is that the donor should transfer possession of such interest as he has at the time of the gift; it is not necessary that he should transfer possession of the corpus of the property: *Anwari Begam* v. *Nizamuddin*, I. L. R. 21 All. 165.—Where Government securities were indorsed and delivered by a Mahomedan father to his son in the presence of the Treasury Officer, the question arose after the father's death whether this was intended to transfer the ownership or it was a *benami* transaction. On a review of the possession of the parties and of their conduct down to the father's death, it was held that the ownership remained with the father: *Nawab Ibrahim* v. *Ummat-ul*, I. L. R. 19 All. 267.—Where the donor made an absolute gift in writing of her undivided shares in a village, and the produce of the shares was applied after the gift during the life-time of the donor just as it had been before the gift, it was held that there was no such surrender and delivery of the property to the donee as is necessary to make a valid gift according to Mahomedan law: *Khader Hussain* v. *Hussain Begum*, 5 Mad. H. C. R. 114.—Although according to Mahomedan law, possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, *possession of a right to receive pension* could only be given by handing over the documents of title connected with the pension or assigning the right to receive the pension: *Sahib-un-nissa* v. *Hafiza*, I. L. R. 9 All. 213.—Where a Mahomedan husband executed a deed of gift without consideration in favour of his wife, comprising a house in which they were residing at the time, with its furniture, and at the same time delivered the deed and the keys of the house to his wife, and quitted the house leaving her in possession thereof—*held* that acceptance and seizin on the part of the donee, and relinquishment on the part of the donor, had been complied with, though the husband shortly afterwards returned to the house and resided there with his wife till his death; the continued occupation or residence and receipt of rents were in such circumstances to be referred to the character which the donor bears of husband, and to the rights and duties connected with that character: *Amina Bibi* v. *Khatija*, 1 Bom. H. C. R. 157.—And, in the instance of a wife who may give a house to her husband, the gift will be good, although she continues to occupy it along with her husband, and keep all her property there, because the wife and her property are both in the legal possession of the

husband. So also it has been held by some that, if a father transfer his house to his minor son, himself continuing to occupy it, and to keep his property therein, the gift is valid on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son. Reason requires that the same principle should be applied to the case of a gift by husband to wife. The wife may, according to Mahomedan law, hold property independent of her husband; and, as a husband may make a valid gift to his wife, it can only be necessary that the gift should be accompanied with such a change of possession as the subject is capable of, and as is consistent with the continuance of the relation of husband and wife: *Azimunnissa* v. *Dale*, **6 Mad. H. C. R. 445.**—But, where a Mahomedan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house, the gift was held to be null and void, as there was no entire relinquishment of the house by the donor, and the case did not fall within the exceptions allowed by Mahomedan law: *Bava Saib* v. *Mahomed*, **I. L. R. 19 Mad. 343.**—No formal entry or actual physical departure is necessary for the purposes of completing a gift of immoveable property by delivery and possession; it is sufficient if the donor and donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested: *Shaik Ibhram v. Shaik Suleman*, **I. L. R. 9 Bom. 146.**—Possession once taken under a deed of gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession: *Muhamad Mumtaz* v. *Zubaida*, **I. L. R. 11. All. 460; L. R. 16 I. A. 195.**—A Mahomedan executed a deed of gift in favour of his niece of a one-anna share in a village, and then sued for cancellation of the deed on the ground that her husband had fraudulently caused the deed to be executed in her favour, and that *possession was not made over.* The allegation of fraud being disproved, the Court held that if the deed was a nullity for lack of giving over possession, it is a document from which the plaintiff can entertain no reasonable apprehension of injury, and it was not a document which a Court can be properly called upon to cancel: *Umrao Bibi* v. *Jan Ali*, **I. L. R. 20 All. 465.**

Gifts in future.—Where a Mahomedan executed a deed of gift in favour of his wife, by which he agreed to give her and her heirs in perpetuity a certain sum per annum out of his undivided share in certain lands which he inherited from his father, *held* that the gift was invalid as it was a gift in effect of a portion of the *future revenues* of the lands, and according to the Mahomedan law a gift cannot be made of anything to be produced *in futuro*,

although the means of its production may be in the possession of the donor: *Amtul Nissa* v. *Mir Nurudin*, I. L. R. 22 Bom. 489.—Where a document contained the following words: "I have executed an *ikrar* to the effect that so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to anyone, but after my death you will be the owner, and also have a right to sell or make a gift after my death," it was held to be an ordinary gift of property *in futuro*, and so invalid under the Mahomedan law: *Yusof* v. *Collector of Tipperah*, I. L. R. 9 Cal. 138.—Gifts to take effect at an indefinite future time are void under the Mahomedan law: *Chekkonekutti* v. *Ahmed*, I. L. R. 10 Mad. 196.—Under section 7 of the Pensions Act (XXIII. of 1877), the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid: *Sahib-unnissa* v. *Hafiza*, I. L. R. 9 All. 213.

Conditional gift.—Where the donor made a gift of a house to certain persons "for their residence, and that of their heirs, generation after generation," with a condition that if the donees sold or mortgaged the house, the donor and his heirs should have a claim to it, *held* that whether under the *Shiah* or the *Sunni* School of Mahomedan law, the gift of the house was a transfer of absolute estate, the declaration by the donor regarding the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estate in the house itself: *Nasir Husain* v. *Sughra Begam*, I. L. R. 5 All. 505.—Where a Mahomedan gave certain property to his minor son, and on the delivery of possession got from him a document stipulating (1) that he would not alienate; (2) that at his death the property should return to the father,—*held* that, by Mahomedan law, as well as by general principles of law, such a restriction on alienation, especially after the gift had become complete long before, is absolutely void: *Amiruddaula* v. *Nateri*, 6 Mad. 356.

Construction.—Where a conveyance between Mahomedans, though in form a deed of sale, is in reality a deed of gift, its validity should be tested by the rules of law applicable to gifts, and not by those of sale. In determining whether a transaction is one of sale or gift, the intention of the parties, rather than the form of the instrument, should be considered: *Rajabai* v. *Ismail*, 7. Bom. (O. C.) 27.

Contingent gift.—Under the Mahomedan law, a gift cannot depend upon a contingency or be postponed, but possession must be immediate: *Roshun* v. *Enaet*, 5 W. R. 4.

Undue influence.—Where a Mahomedan widow executed an instrument whereby she set apart the rental of certain villages, belonging to her as her patri-

mony, to defray the expenses of her and her deceased husband's tombs, and gave the management of the endowment in perpetuity to her managing agent who was her sole adviser, and the residue for himself, it was held that the transaction was within the well-recognised principle that every onus is thrown upon a person filling a fiduciary character towards another, of showing conclusively that he has acted honestly and *bonâ fide*, without influencing the donor, and that the donor has acted independently of him: *Wajid Khan* v. *Ewaz Ali*, I. L. R. 18 Cal. 545.

Title passed.—A donee holding from a Mahomedan widow does not acquire a better title to the property than the donor herself had: *Mahomed Noor Khan* v. *Hur Dyal*, 1 Agra 67.

Gift of a Musha or Undivided share.—Where a Mahomedan executed a deed of gift comprising zemindari and other property, and registered the same two days before his death; and the deed recited—"I have placed the aforesaid donees in proprietary possession of the aforesaid property as my representatives" and one of the donees obtained mutation of names in his favour on the basis of the same deed, it has been held that this was a valid and effectual gift under the Mahomedan law: *Sajjad Ahmad* v. *Kadri Begam*, I. L. R. 18 All. 1.—The doctrines of Mahomedan law, which lay down that a gift of an undivided share is invalid, because of *musha* or confusion on the part of the donor, and that a gift of property to two donees without first separating or dividing their shares is bad, because of confusion on the part of the donees, apply only to those subjects which are capable of partition: *Mullick Abdool* v. *Mulleka*, I. L. R. 10 Cal. 1112.—A defined share in a landed estate is a separate property, to the gift of which the objection attaching to the gift of joint and undivided property is inapplicable: *Jiwan* v. *Imtiaz*, I. L. R. 2 All. 93.—A gift of land made by a Mahomedan is invalid if the interest of each of the donees is not defined by the gift: *Valimia* v. *Gulam Kadar*, 6 Bom. (A. C.) 25.—Where a Mahomedan father made a gift in writing to his minor daughter on her marriage of an undivided moiety of his share in certain buildings; and, on the death of that daughter, her husband marrying her minor sister, the donor similarly made a gift to her of the remaining undivided moiety; after which the husband sued to recover the share of his first wife, of which delivery had not been made, it was held that the gift was not invalid either for indefiniteness or for want of delivery of possession: *Hussain* v. *Shaik Mira*, I. L. R. 13 Mad. 46.—A deed of gift of a house to three persons, as joint tenants without discrimination of shares, is good according to Mahomedan law, as it shows an intention on the part

of the donor to give the property in the whole house to each of the donees: *Rajabai* v. *Ismail*, 7 Bom. (O. C.) 27.—Where the subjects of a gift are definite shares in zemindaris, the nature of the right in which is defined and regulated by public Acts of the British Government, so that they form for revenue purposes separate estates, each having a separate number in the Collector's registers, and each liable to the Government only for its own assessed revenue —the proprietor collecting a definite share of the rents from the ryots, and having a right to this definite share and no more,—the rule of the Mahomedan law as to *Musha*, which makes the gift of undivided property invalid, does not apply: *Ameeroonissa* v. *Abadoonissa*, 15 B. L. R. 67; 23 W. R. 208.—Where a Mahomedan lady owned a one-twelfth share of a *muafi* estate, a dwelling house, and (as owner of the dwelling house) a share in a staircase, privy, and door, held jointly with the owners of adjoining houses; and she made a gift of the whole property, transferring dominion over it to the donees, but reserving for her life the income of the share of the *muafi* estate, and stipulating against alienation; it was held that the gift of the one-twelfth share of the *muafi* estate being the gift of a specific share, was not open to objection under Mahomedan law, nor was it vitiated by the reservation of the income or by the condition against alienation. *Held*, also, that so far as it related to the staircase, privy, and door, the gift was not invalid, as these things though undivided property were incapable of division, and a gift of a part of an indivisible thing is valid under the Mahomedan law: *Kasim Husain* v. *Sharifunnissa*, I. L. R. 5 All. 285.—Where a Mahomedan bequeathed his property to his two nephews, as joint tenants, one of whom died leaving his heirs; and the other continued in exclusive possession, and executed a deed of gift of the property to his younger son, disinheriting the elder son; *held* that the gift was valid, and that the doctrine of the Hanifia, though not of the Imamiya Code, that the gift of a share in undivided property which admits of partition is certainly invalid, has no application to the gift of property so circumstanced: *Gulam Jafar* v. *Masludin*, I. L. R. 5 Bom. 238.—Where a pension was drawn by a Mahomedan, in whose name it was recorded in the Government registers for himself and the other members of the family, who received their shares from him up to the time of his death; and shortly before his death he executed a deed of gift by which he assigned to his wife the whole pension; *held* that the deed was not a good assignment of the interest of those who were not parties to it. *Held*, also, that there was no force in the contention that the gift became void, because the right was not divided, inasmuch as in the case of a right to receive a pension, the rights of the individuals who are the heirs

become at once divided and separate at the death of the sole owner; and in this case the shares were definite and ascertained, and required no further separation than was already effected upon the sole owner's death: *Shahibunnissa* v. *Hafiza*, I. L. R. 9 All. 213.—The law relating to the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules; and the authorities show that possession taken under a gift, even although the gift of *Musha* be invalid without it, transfers effectively the property given, according to both the schools: *Muhammad Mumtaz* v. *Zubaida*, I. L. R. 11 All. 460.—Where a Mahomedan inherited 14 out of 24 shares in an estate, and executed a deed of gift of his shares in favour of two persons, authorizing them to collect the assignor's shares from tenants and others in possession, and directing the donees to take as a gift to their mosque one-third of the net balance so collected, *held* that, even if the doctrine of *Musha* was in force in the Madras Presidency, the gift was a valid one: *Alabi Koya* v. *Mussa Koya*, I. L. R. 24 Mad. 513.—Where a Mahomedan made a gift, by registered instrument, to his wife of an undivided moiety of a house in which he and his wife resided, and to which he and his brother were entitled in equal shares, without making any partition before his death,—*held* that the gift was invalid, as being a gift of a *Musha*, or undivided part, in a thing susceptible of partition: *Emnabai* v. *Hajirabai*, I. L. R. 13 Bom. 352. In this case, there was confusion on the side of the donor; and so it differs from the case of *Rajabai* v. *Ismail*, 7 Bom. (O. C.) 27, cited above, where the confusion was only on the side of the donees.—The rule that an undefined gift of joint undivided property mixed with property capable of division, is invalid by Mahomedan law, does not apply to a gift by a father to a minor son: *Wajeed Ali* v. *Abdool Ali*, W. R. (1864) 121.—One of two sharers can give over his share to the other even before partition: *Ameena* v. *Zeifa*, 3 W. R. 37.

§125. A gift may be effected either orally, or by a writing.

§126. It is lawful for a man in sound health of body and mind to give the whole of his property to any child, or to any heir, or even to a stranger. Says the *Fatwa Alamgiri*: "If a man in health making gifts to children should desire to give to some of them more than to others, he may lawfully do so according to Abu Hanifa, when the child in whose favour the distinction is made is superior to others as regards religion; but when they are all equal, it is abominable to make any distinction. Accord-

ing to Abu Yusuf, an unequal distribution may be lawfully made when there is *no intention of injuring any of the children*, and as much should be given to a daughter as to a son." The *Durr-ul-Mukhtar* holds that if injury was intended, an impartial distribution should be made. The present law, however, is as enunciated by Sir W. Macnaghten, that the gift of the entire property to one heir to the exclusion of all the rest is good and valid, if at the time of making the gift the donor was in a state of health and sound disposing mind, or if he was ill he subsequently recovered from the sickness, notwithstanding the immorality of the act according to the tenets of Abu Hanifa; and an unequal distribution of property made by the father in a state of health is similarly valid in law, without any regard to the intention of injuring other heirs.

§127. But if the gift is made during his illness of which he dies subsequently, it is valid to the extent of one-third of his estate, provided the donee is a person other than an heir of the donor, and took possession in the lifetime of the donor; and it can be lawful to the extent of more than one-third in such a case, if the heirs of the donor consent to it after his death. Where a gift is made by a person in his fatal illness to any heir, such gift is not lawful even to the extent of one-third of his estate unless the other heirs consent to it after his death. The reason of such limitation in the case of gifts made in death-illness is, that such gifts are considered as testamentary bequests, and follow the rules regarding wills.

§128. A death-illness is defined to be one "which it is highly probable will issue fatally, whether it disables a man from getting up for necessary avocations out of the house or not, or whether, in the case of a woman, it does or does not disable her from necessary avocations within doors." But a sickness from which a person afterwards recovers is considered in law as health.

Consequently, a gift made during an illness from which the donor recovers, is valid to the extent of the whole of the donor's property, whether made to an heir or to a stranger. If a sick woman makes a gift of her dower to her husband, it would be valid if she recovers from the illness; but if she dies, the gift would not be valid without the sanction of the heirs. But when such gift of her dower to her husband has been made in her death-illness, and *the husband dies before her*, she has no claim against him, because the release is valid till she dies; and if she dies of the same illness, then her heirs may claim the dower. Where a person has been suffering continuously for more than one year from an illness, and makes a gift after one year's suffering and before he becomes bedridden and dying, such gift is valid even to the extent of the whole of his property.

§129. **Gift to infants.**—When the donee is a minor or insane, it is lawful for his guardian to take possession on his behalf. Such guardians are—first, his father, then his father's executor, then his grandfather, then the grandfather's executor, and then the Judge or the person appointed by the Judge. If, however, the father or grandfather or their executors be dead or absent at a '*precluding distance*', and the minor or insane person be living in the family of the brother or paternal uncle, or mother, or any other relative, then such relative, or the executor of such relative, has the power to take possession of a gift for the minor or insane person. When a minor has no relatives living, and is nourished and protected by a stranger, such stranger is entitled to take possession in his behalf. When the father is dead, and no guardian is provided, and the minor is maintained by the mother, and she makes a gift to the minor child of her own exclusive property, then if the thing be in the mother's possession, no separate seizin would be necessary, as when a gift is made by the father to his infant child, and the

thing given is in the possession of the father or his trustee ; and the same rule holds good when the minor is in the custody of any other relative, and a gift is made by such relative to the minor.

Case-law.

Gift to an heir.—Where a Mahomedan transferred certain property to his son, reserving the interest to himself for life, the object of the disposition being to give the son a larger share of the father's property than would come to him by succession *ab intesto, held* that the transaction could not be impeached on moral grounds, and that the intention of the parties did not violate any provision of the Hidaya, and the transfer was complete and the gift valid: *Umjad Ally* v. *Mohumdee Begum*, **10 W. R. (P. C.) 25; 11 Moo. I. A. 517.**—Where a mother makes a gift to her children, and one of them seeks to set it aside as fraudulent, so far as it affects the plaintiff's right of inheritance, so long as the mother is alive, and admits the execution of the deed of gift, it was held that a Mahomedan lady can sell or give away her property as she pleases, and the consent of the heir was quite immaterial: *Mahomed Zuheerul* v. *Butoolun*, **1 W. R. 79.**

When the donee is a minor, possession may be had by a trustee on his behalf: *Mohinudin* v. *Manchershan*, **I. L. R. 6 Bom. 650.**

Formal seizin not necessary.—Where there is on the part of the father or other guardian of a minor, a real and *bonâ-fide* intention to make a gift to the minor, the Mahomedan law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor: *Ameeroonissa* v. *Abadoonissa*, **15 B. L. R. 67; 23 W. R. 208; L. R. 2 I. A. 87.**—It is not necessary according to Mahomedan law that formal delivery and seizin should follow to complete and validate a gift of property by a father to his infant child: *Gyasooddeen* v. *Fatima Begum*, **1 Agra 238**; *Wajeed Ali* v. *Abdool Ali*, **W. R. (1864) 121.**—But where the gift was followed by no real change in the nature of the enjoyment of the property, and was merely nominal, the gift by the father to his son was held not valid: *Munnoo Bibee* v. *Jehandar Khan*, **1 Agra 250.**

Undivided property, "Musha."—The rule that an undefined gift of joint undivided property capable of division, is invalid by Mahomedan law, does not apply to a gift by a father to a minor son: *Wajeed Ali* v. *Abdool Ali*, **W. R.**

(1864) 121.—Where a person of somewhat weak mind executed a deed of gift of his property in favour of two of his sons, of whom one was adult and the other a minor, without division or detail of their respective shares; and a younger son and several daughters were excluded from the inheritance; the deed of gift was set aside by the Court under the general rule of Mahomedan law that anything which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent thereto and prior to the delivery to the donees, and also the special rule that a gift of undivided property is absolutely invalid where one of the donees is a minor son: *Nizam-uddin* v. *Zabeda*, 6 N.-W. P. 338.

Death-bed gifts.—According to Mahomedan law such gifts are viewed in the light of legacies: *Ashadoollah* v. *Shaeba*, 2 Hay 345.—And ordinarily convey to the legatee property not exceeding one-third of the deceased's whole property, the remaining two-thirds going to the heirs: *Ekin Bibi* v. *Ashruf Ally*, 1 W. R. 152. See also *Kureemun* v. *Mullick Enaet*, W. R. (1864) 221.—If made in favour of one who is an heir, the will or gift, so far as it relates to that heir, will be inoperative without the consent of the other heirs: *Ashrufunnissa* v. *Azeemun*, 1 W. R. 17.—A *Mokurruri* lease executed when the grantor was in contemplation of death, was held to be a death-bed gift; and the natural heirs, in whose favour it was executed, were declared incapable of taking anything under it, except their shares of the deceased's property according to rules of inheritance by Mahomedan law: *Enaet Hossein* v. *Kurreemoonissa*, 3 W. R. 40.—A person labouring under a disease likely to cause death, cannot make a valid gift of the whole of his property until a year has elapsed from the time he was first attacked by it. A gift by such a person is good to the extent of one-third of the subject of the gift, if the donee has been put into possession by the donor: *Labbi Beebee* v. *Bibbun Beebee*, 6 N.-W. P. 159. It has also been remarked in this case, that under the Mahomedan law the term "*Murg-ul-Maut*" is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person afflicted an apprehension of death.—If a Mahomedan widow delays a gift till upon her death-bed, such a gift would be looked upon as a will, and be inoperative beyond a certain limit: *Luteefoonissa* v. *Rajaoor*, 8 W. R. 84.

Consent of heirs.—Where a Mahomedan executed a deed of gift in favour of his wife, when he was suffering from a disease likely to have caused him to apprehend an early death, and he did in fact die of such illness on the same day,

and there was no evidence that any of his heirs had consented to the execution of the deed, *held* that the instrument constituted a death-bed gift or will, subject to the conditions prescribed by the Mahomedan law as to the consent of the other heirs, and those conditions not having been satisfied, it not only fell to the ground, but the parties stood in the same position as if the document had never existed at all: *Wasir Jan* v. *Sayyid*, **I. L. R. 9 All. 357.**—Where a Mahomedan executed two deeds of gift, which were found on evidence to be death-bed gifts; and by one of which, attested by all his sons, he conveyed to his daughters his share in certain property, and by the other (attested by all his daughters) he conveyed the rest of his property to his sons, and his widow took no exception to the gifts; but after his death, one of his daughters sued to set aside the gifts and to recover her share as heiress of her father, *held* on the evidence that the attestation of the heirs was regarded by all the parties concerned as evidence of consent, and that they did consent to the death-bed gifts at the time they were made, that this consent not having been revoked on the donor's death, and there having been sufficient delivery of possession, the gifts were complete: *Sharifa Bibi* v. *Gulam Mahomed*, **I. L. R. 16 Mad. 43.**

Delivery of possession.—In order to make a gift operate as a *donatio mortis causa*, the delivery must be upon the condition that it should become effectual as a gift on the death of the donor. Where, therefore, it was found that a deed of gift was executed in the last illness of the donor, and was in the possession of the donee after her death, *held* that this was not enough to make it operate as a death-bed gift, but that it was necessary to find the further fact whether the deed was delivered by the donor before her death, and whether such delivery was with the intention that it should become effectual on the death of the donor: *Nussebun* v. *Ashruff Ally*, **Marsh. 315; 2 Hay 163.**—Where the subject-matter of a deed of gift made by a Mahomedan during his death-illness was in the hands of the donee as manager or agent of the donor, it was held that the possession of the donee as such manager or agent was not such possession as would render it necessary to the validity of the gift that there should have been an actual or formal delivery to him of possession of the property: *Valayet Hossein* v. *Maniran*, **5 C. L. R. 91.**

When valid.—According to the Mahomedan law, a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, that is, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death: *Muhammad Gulshere* v. *Mariam Begam*, **I. L. R. 3 All. 731** (followed in *Shaikh Ibrahim* v. *Shaikh Suleman*,

I. L. R. 9 Bom. 146.).—The provisions of the Mahomedan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale: *Ghulam Mustafa* v. *Hurmat*, I. L. R. 2 All. 854.

§130. The gift of a thing not in existence is not valid. Hence, the gift of "the fruit that may be produced by his tree," or of "what is in the womb of a sheep or a slave" is void.

§131. The gift of a land without the crop then standing on it, or of a tree without its fruit, and *vice versa*, is unlawful. Also, the gift of a house or vessel in which there is something belonging to the donor, is not valid if made without the contents. For, in such cases, the subject of the gift is mixed with something which is not given. But if a man first makes a deposit of the effects in his house with the donee, and then makes a delivery of the mansion, the gift of the latter would be valid.

§132. If one partner make a gift to another partner of his share in the partnership stock, which is capable of division, it is invalid. But where one person makes a gift of the same thing to two persons without dividing it between them two, such gift would be valid if possession is taken by the donees, for here there is no confusion of the donor's right with the right of another. Where the confusion is on both sides, as where several persons making a gift of the same thing to several individuals, the gift would be invalid as in the case of confusion on the donor's side when his share is mixed up with that of another. The gift of an undivided part of what is not capable of partition is lawful, whether to a partner or a stranger.

§133. If a thing is given to an orphan, it is rendered valid by the seizin of his guardian. A gift to a discreet minor is rendered valid by the seizin of the minor himself. It is lawful for a husband to take possession of a thing given to his infant-wife, whether capable or not for sexual intercourse, and the gift

becomes valid by the husband's seizin in such case, provided the wife lived in the husband's house, and under his power and protection.

§134. An *Umra* or **life-grant** is lawful, but the property given, instead of reverting to the grantor after the demise of the grantee, descends to the heirs of the grantee, the condition being void and the gift valid.

§135. A gift in expectation of a future event is void. Hence, if a man says, "This house is thine, and if thou diest it is mine," the gift is void. So also, if a man says, "My house is yours, if I die before you," the gift is void. Such gifts are called "gifts by way of *rakbah*."

§136. **Gifts in charity.**—*Sadakah* or a **gift in charity** follows the ordinary rules regulating *hiba*, with this difference, that in charity the *verbal acceptance* of the donee is not necessary. There is no revocation of a *sadakah* after it has been completed.

§137. The gift of a **debt to the debtor** is a release, and is valid. It can be made to the debtor himself, or to his heirs after his death. Such a gift is complete without the donee's acceptance. But the gift of a debt if depending on a condition, or if it is to take effect at a future time, is not valid. The gift of a debt to a person other than the debtor is lawful, provided the donee is directed to take possession of the debt. The gift of a debt is cancelled if the debtor rejects the gift on the spot.

§138. The **legal effects of gift** are:—

(*1*) it establishes a right of property in the donee, subject to the donor's power of cancelling the gift and resuming the property given;

(*2*) it cannot be made subject to an option of stipulation;

(3) it is not cancelled by vitiating conditions; so that, the gift would become valid, and the conditions void. If a man gives a mansion to another saying, "This mansion is thine for thy life, and when thou art dead, it reverts to me," the gift becomes lawful, but the condition is void.

§139. The legal effects of a gift are not complete until the donee takes possession of the thing given, with the express or tacit permission of the giver. An adult child of the donor is equally bound to take possession as much as a stranger, in order to the completion of the gift and the establishment of its legal effects. In the case of infants, indiscreet minors, and lunatics, however, such possession is taken by their respective guardians; and no separate possession is necessary when the thing given is already in the possession of the donee, or of his guardian when the donee is a minor.

§140. **Revocation.**—The donor is at liberty to resume his gift, except in the following cases:—

1. Where the donee is a relation within the prohibited degrees:
2. Where the parties are husband and wife:
3. Where the donor has received anything in return for the gift:
4. Where the property given has received an accession:
5. Where the thing given is destroyed:
6. Where the donee has alienated it:
7. Where either party is dead:
8. Where the gift is of a debt due to the donor, or of an alms.

§141. Where a part of the thing given is subject to the above exceptions, the remainder can be resumed.

§142. Revocation cancels the gift, and the property reverts to the donor without his taking formal possession.

§143. Before delivery of possession to the donee, a gift may be revoked by the doner of his own authority without resort to a Court, whether the gift has been made to a relative within the prohibited degrees, or to other relatives, or to strangers. After delivery of possession, a gift cannot be revoked unless by formal decree of the Court, or by mutual consent, except in the cases in which a gift becomes irrevocable. The gift of a debt to the principal debtor or his heirs, is not revocable unless it has been rejected by the debtor on the spot, as such gift becomes complete without waiting for the donee's acceptance; and so with regard to the gift of alms.

§144. Relationship within the prohibited degrees would prevent the revocation of a gift, whether the relative be a Mussulman or an infidel, provided that the prohibition arises by reason of *consanguinity*. Thus, the father, the grandfathers, the mother, the grandmothers, brothers, sisters, sons, grandsons, daughters, grand-daughters, paternal and maternal uncles and aunts, and the lineal descendants of such relatives are all within the prohibited degrees by reason of consanguinity, and consequently a gift to any of them is not revocable after delivery of possession. But where the prohibition arises from affinity or fosterage, the gift may be resumed; as, in the case of gifts to a wife's mother, step-son, son's wife, foster-father, foster-mother, foster-brother, or foster-sister.

§145. "If a husband make a gift of anything to his wife, or a wife to her husband, it cannot be retracted, because the object of the gift is an improvement of affection; and, as the object is attained, the gift cannot be retracted. This object is to be regarded only during the existence of the contract; insomuch that,

if a person give something to a strange woman, and afterwards marry her, he may retract the gift; whereas, if a man give something to his wife, and afterwards divorce her three times, he is not entitled to retract the gift."—The *Hidaya.*

§146. The increase of or an accession to the thing given, must be of such a nature as to be incorporated with the subject, and be an addition to its value, whether the increase be in consequence of an act of the donee, or as an issue of the thing itself. When the removal of the thing from one place to another would enhance the value of it, revocation will be prevented. But a separate increase does not prevent the revocation of a gift, nor does damage or loss sustained by the subject of the gift. Where the donee has planted trees, or built a house or stable, on the land given, the gift of the land cannot be retracted.

§147. The alienation of the gift from the donee's property during his lifetime, is a bar to resumption; "because this is a consequence of the power vested in him by the gift, which power cannot then be retracted; and also because the right of property has regenerated in another person, in virtue of a fresh cause, namely, conveyance to a second donee; and as a regeneration of the right of property is equivalent to an essential change in the thing, the case is therefore the same as if the gift were to become, in effect, a different thing from what it was, and consequently not liable to retraction."—The *Hidaya.*

§148. Before revocation, the donee may use and dispose of the subject of the gift; but it is unlawful after the gift has been cancelled by the decree of the Court.

Case-law.

Where an instrument effected a transfer of moveable and immoveable property to the donees, subject to the trust of applying the profits in perpetuity to certain charitable purposes, it was held to be not revocable. The power of

revoking gifts is given under the Mahomedan law only in the case of private gifts for the donee's own use, no relationship existing between the donor and the donee: *Gulam Hussain* v. *Agi Ajam*, 4 Mad. 44.—Nor can there be revocation of a gift by a father to a son, when the donee has alienated the thing given: *Wajeeb Ali* v. *Abdool Ali*, W. R. (1864) 121.—Nor of a *hiba-bil-iwaz*, or deed of gift made in contemplation of marriage: *Kulsoon* v. *Ameer-unnessa*, 1 Hyde 150.—Where a zemindar granted a remission of rent annually for a certain number of years to the holder of a putnee taluk, who was also his sister-in-law,—*held*, in a suit for arrears of rent, that the gift (or remission of rent for the years in suit) was complete at the end of each year; in other words, delivery had been made to the donee, and it could not be recalled under the Mahomedan law, which is precise as to the impossibility of revoking a gift *after delivery* without the decree of a Judge or the consent of the donee: *Enaet Hossein* v. *Khqobunnissa*, 11 W. R. 320.

§149. **Hiba-bil-iwaz.**—Besides the gifts proper, there are two other contracts which are described under the law of gifts. These are called *Hiba-bil-iwaz* and *Hiba-ba-Shart-ul-iwaz*. *Hiba-bil-iwaz* is a gift *for an exchange*. When one person makes a gift to another, and the latter makes a gift of *some other thing* to the former, saying, "This is in *iwaz* or exchange of thy gift," or "I have made a donation of this to thee in exchange of thy gift," the transaction is called a *Hiba-bil-iwaz*. The exchange may be given at the same time and place that the first gift is made, or the second gift may take place at any subsequent time, but in all cases, to constitute *hiba-bil-iwaz*, it is absolutely necessary that the second gift must be expressly stated to be *in exchange of the prior gift*. It is necessary that the thing given in *iwaz* or exchange should not be any part of the subject-matter of the prior gift, on account of which the *iwaz* is made. But if a part of the former gift become irrevocable by the donor thereof on account of any change having taken place in the same, that part can be made an *iwaz* for the remainder. Where two things are given by *different* contracts, the donee can give back one of them as an *iwaz* for the other, for here the contracts being different,

the *iwaz* is not the identical gift-property for which the exchange is made. It is also necessary that the *iwaz* must be the property of the giver of it, and must be secured to the donor of the first gift. If after the *iwaz* is given, another person's right is established in it, the receiver of the *iwaz* may revoke the prior gift made by him. But if a part of the *iwaz* is proved to be another's property, the donor of the first gift must restore the remainder of the *iwaz* to its giver, and then revoke the gift made by him. He cannot retain the portion in which he is secured, and revoke a proportionate part of the gift made by him. On the other hand, if a part of the first gift is proved to be another's property, the giver of the *iwaz* may resume a proportionate part of the exchange given. Where the transaction of giving an exchange takes place at a subsequent period, the *iwaz* or exchange is a gift *ab initio*, so that it is valid where gift is valid, and void where gift is void, with this difference that the gift can be revoked before acceptance of the *iwaz*, while the *iwaz* cannot be revoked. After possession has been taken of the *iwaz*, the power to revoke drops with respect of the first gift. According to the *Fatwa Alamgiri*, all the conditions of gift are applicable to the *iwaz*, but Sir William Macnaghten holds that "*Hiba-bil-iwaz* resembles a sale in its proper ties. The same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary." The former is the correct view, for like property given in gift, the *iwaz* or property given in exchange for a gift is not liable to be claimed in *pre-emption*.

Case-law.

Where a Mahomedan made an oral gift of an estate in favour of his wife, in consideration of a dower of a certain amount which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage, for dower can be fixed after marriage. In this case, possession having been changed in conformity with the gift, it was further held that the change of possession would have been sufficient to sup-

port the gift even without the consideration: *Kamarunnissa* v. *Husaini Bibi*, **I. L. R. 3 All. (P. C.) 266.**—Where one of two brothers, who were co-sharers in ancestral lands, died leaving a widow who became entitled to one-fourth of her husband's share, and who instead of relinquishing her claim to such share received an allowance of cash and grain; and the surviving brother made an arrangement with her by documents, by one of which he granted to her two villages, and by the other she accepted the gift, giving up her claim to any part of the ancestral lands of her husband; it was held that the transaction was a *hiba-bil-iwaz*, granting the villages absolutely: *Muhammad Faiz* v. *Ghulam Ahmad*, **I. L. R. 3 All. 490; L. R. 8 I. A. 25.**—Where by a duly executed and registered deed of gift a Mahomedan woman gave certain property to plaintiff's father, and the deed stated that the plaintiff's father had always protected the donor, and that she gave him the property in full confidence that he would continue to do so, *held* that the gift, if not a simple gift, was at any rate a "gift on stipulation," and that such a gift, in order to be valid, required that seizin should be given to the donee—the registration of the deed not curing the want of delivery by the donor: *Mogulsha* v. *Mohamad Saheb*, **I. L. R. 11 Bom. 517.**—Where a Mahomedan husband executed a *hibanama* in favour of his wife, giving her certain specified shares in a village as a gift in lieu of dower, and it was held by the Civil Judge that the omission of the amount of the dower rendered the instrument of no validity—*held*, on appeal, that the gift was made in lieu of the whole dower, and the instrument was valid, there being no room for doubt either as to the subject of the gift or that of the consideration: *Sahiba Begum* v. *Atchamma*, **4 Mad. 115.** See also, *Muhammad Esuph* v. *Pattamsa*, **I. L. R. 23 Mad. 70**, cited below.

A *hiba-bil-iwaz* differs from an out-and-out sale as well as from a gift, while it partakes of the character of both: *Solah Bibee* v. *Kirun Bibee*, **16 W. R. 175.**—A gift is not necessarily a *hiba-bil-iwaz* by an allusion in the deed to the good behaviour of the donee: *Ussud Ali* v. *Olfut Bibi*, **3 Agra 237.**—The fundamental conception of *hiba-bil-iwaz*, or a gift for an exchange as understood in the Mahomedan law, is that it is a transaction made up of two separate acts of donation, that is, of mutual or reciprocal gifts of specific property, between two persons, each of whom is alternately the donor and donee. It does not include the case of a gift in consideration only of natural love and affection, or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-iwaz* in its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity provided by Maho-

medan law : *Rahim Bakhsh* v. *Muhammad Hasan*, I. L. R. 11 All. 1.—*A hiba-bil-iwaz*, although made on the nominal consideration of "a *than* of cloth and natural love and affection," is merely a deed of gift, and as such must be registered : *Golam Mostofa* v. *Goburdhun*, 8 C. L. R. 441.—In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration ; but there must be an actual payment of the consideration by the donee, and a *bonâ-fide* intention on the part of the donor to divest himself in *praesenti* of the property, and to confer it on the donee : *Khajooroonissa* v. *Rowshan*, I. L. R. 2 Cal. (P. C.) 184 ; 26 W. R. 36 ; L. R. 3 I. A. 291.—And where a husband executed a deed of settlement of land in lieu of dower on his wife, who left him shortly thereafter without ever acquiring possession, *held* that a *bonâ-fide* transaction by way of *hiba-bil-iwaz* (as this was found to be) is supported by proof of the actual passing of the consideration agreed to be given ; that the consideration in this case was the release by the wife of her right to dower from her husband ; and that such release was completed by her acceptance of the transfer under the settlement : *Muhammad Esuph* v. *Pattamsa*, I. L. R. 23 Mad. 70.

A *hiba-bil-iwaz*, or deed of gift made in contemplation of marriage, is not a revocable instrument : *Kulsoon* v. *Ameerunnissa*, 1 Hyde 150.

§150. *Hiba-ba-Shart-ul-iwaz* is a transaction wherein a gift is made on condition of an *iwaz* or exchange being returned for it. Here, property is not established before possession, each party being entitled to refuse delivery. "But after mutual possession has been taken, the effect is that of a sale. *Shufaa* or the right of pre-emption is established by the transaction ; and each of the parties may return for a fault the thing of which he took possession."

§151. An *iwaz* or exchange can be lawfully made by a stranger, either at the direction of the donee or not.

§152. The principal difference between the two schools in the law of gift is that the gift of an undivided share (*musha*) of a divisible thing is invalid according to the *Sunnis*, whilst it is quite lawful according to the *Shiahs*.

CHAPTER IX.—Wills.

§153. *Wasiyat* or will is lawful both according to the *Kuran* and the traditions. A will is made by the testator's expressing in words that he has bequeathed such a thing to such a person. The executor of a will is called the *Wasi*.

§154. A will may be made either verbally or by writing. A nuncupative will is equally valid as a written one, whether the property bequeathed be real or personal. Where the testator lost his power of speech, and did not regain his speech before death, a will may be validly made by him by means of intelligible signs.

Case-law.

Nuncupative will.—The rule that by Mahomedan law a will does not require to be in writing is universal. The omission to write the wish, where there was ample time for that purpose, may throw doubt on the fact of the words being used as the expression of the testator's last will. But if the Court finds that the testator expressed his will, and that this was his last will, the omission to render it into writing will not deprive it of legal effect: *Tamees Begum* v. *Furhut Hossein*, 2 N.-W. P. 55.—A nuncupative will by a Mahomedan of the Shiah sect bequeathing property less in amount than one-third of his estate, held valid under Mahomedan law, and effect was given to the bequests: *Aminooddowlah* v. *Roshun Ali*, 5 Moo. I. A. 199.—No particular form of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained: *Mahomed Altaf* v. *Ahmed Buksh*, 25 W. R. (P. C.) 121.

§155. The legal effect of a bequest is that it establishes property in the legatee *de novo*, as in the case of gift, and the bequest vests in him by acceptance. The difference between property vesting by inheritance and that which is vested by legacy, is that in the former case the inheritance is vested in the heir by mere operation of law, and does not depend upon his acceptance, whereas in the case of the legacy the legatee's acceptance of it is the cause of the property vesting in him.

§156. The conditions of a valid will are:—

(1.) The testator must be a person capable of passing the property—that is, he must be adult, sane, and free. A will made by a minor, an insane person, or a slave, is void. A will made by a minor becomes valid upon his ratifying it after attaining maturity. A woman is also competent to make a valid bequest.

(2.) The legatee must be a person capable of receiving the bequest.

(3.) The thing bequeathed must be in existence at the time of the testator's death, and in his possession. It is not necessary that the thing should be in existence at the time of the execution of the will. If the testator is not possessed of any property at the time of making a bequest, *but* leaves property at his death, the bequest is to be paid out of such property.

(4.) The legatee must accept the bequest after the testator's death. Such acceptance may be express or implied. When the legatee dies before acceptance, such death amounts to his *implied* acceptance, and his heirs take the legacy. The legatee's property in the thing bequeathed is established by his acceptance, which means his express or implied consent to it. The legatee's acceptance or rejection *before* the testator's death is of no importance, and he can validly accept after the testator's death, though he rejected the bequest in his life-time. If the legatee reject a bequest, it is cancelled. The legatee's seizin is not necessary as in the case of gift *inter vivos*.

(5.) A bequest to a person other than an heir of the testator is valid to the extent of one-third of the testator's property, even without the consent of his heirs. But if made exceeding one-third, it is not valid unless his heirs consent to it.

(6.) A bequest to any of the testator's heirs is not valid even to the extent of one-third his property, unless the other heirs consent to it. But a bequest to a son of an heir is valid

to the extent of one-third without the consent of the heirs. In all cases where the validity of a bequest depends upon the consent of heirs, such consent must be given after the testator's death.

In any case in which the assent of the heirs is necessary to the validity of a bequest, it is also necessary that the assenting heir be of mature age, of sound mind, and not suffering from an illness which ultimately causes his death. If the assent is given by an heir in his death-illness, the assent is to be treated *as if it were a bequest*. If the legatee be an heir of the assenting heir, then the assent will not be lawful unless concurred in by the other heirs of the deceased heir. If the legatee (for whom the assent was given) be a stranger to the assenting heir (who was sick at the time of giving his assent and subsequently dies of that illness), then the latter's assent is valid to the extent of a *third* of *his* (the assenting heir's) estate.

If some of the heirs give their consent to a bequest, and others withhold their consent, the bequest is valid in proportion to the amount of the shares of the consenting heirs to the whole estate. Thus, if a testator leave a third of his property to an heir, and the sum of the shares of the assenting heirs amount to one-half, and the heirs sharing the other half do not give their assent, then the legatee would get a *sixth* only.

The nullity of a bequest in favour of an heir, depends also on the legatee's being so at the time of the testator's death. Thus, if a person bequeath a legacy to a woman, and afterwards marry her, she will not take the legacy without the consent of the other heirs, and her not being an heir at the time of making the will is of no consequence. And, if a man bequeaths anything to his wife, and then divorces her before his death, so that she does not inherit from him, she will be entitled to the legacy, as she was not among the inheritors of the testator at his death.

(7.) A person having no heirs (of any kind) can bequeath by will the whole of his or her property, after meeting his funeral expenses and the payment of debts.

(8.) A person who is in debt to the extent of his whole property cannot make a valid bequest; in such case, the bequest can be valid if the creditors relinquish their claims.

(9.) A bequest in favour of a child in the womb, is valid, provided the child is born in less than six months from the date of the will.

(10.) If a legacy is left to two persons jointly, and one of them was dead *at the time the bequest was made*, then the surviving legatee will get the entire legacy. But if one died subsequent to the bequest, the survivor gets a half only.

"The principle in these cases," says the *Fatwa Alamgiri*, "is that when the person conjoined with another enters into a bequest, and *comes out* of it by the failure of a condition, he does not occasion any cessation to the right of the other; and that when he does not enter into the bequest for want of personality or competence, the other takes the whole." Thus, "if a person leave a third of his property to '*Zayid* and *Amr*,' and *Amr* be dead at the time, the whole of the third is given to the survivor, *Zayid*, whether the testator, at the time of making the will, may have been acquainted with the death of *Amr* or not; for as a defunct is not capable of becoming a legatee, he therefore cannot prevent a living person from becoming so." So also, "if a man bequeath a third of his property to '*Zayid and Bakr*,' *Bakr* being dead at the time; or 'to *Zayid and Bakr if he be alive*,' he being dead at the time; or '*to him and to the person in the house*,' no one being in house; or '*to him (Zayid) and to the child of Bakr*,' and such child dies before the testator; the whole legacy is to *Zayid* in all these cases." But where the testator says, "I leave a third of my property to *Zayid and Bakr, he being*

alive or poor," and the testator dies when *Bakr* is dead or rich, *Zayid* has only a half of the third, for here *Bakr* entered into the bequest, and came out of it by the failure of a condition. And, if the testator should say '*between Zayid and Bakr, I leave a third of my property*,' or that 'a third of my property be divided as a legacy between *Zayid* and *Bakr*,' and one of them is dead at the time, the surviving legatee would take a half of the third, for the words used by the testator clearly denote his intention that each should have a half. If one of the legatees should die after the testator, but before acceptance of the legacy, and the survivor should then accept, both legatees would be entitled to the bequest. But if one of them should die before the testator, the share of the legatee so dying would revert to the testator.

(11.) "If a person bequeath any article jointly to one of his heirs and a stranger; in such case, the bequest in favour of the heir is not admitted, and a moiety only of the legacy is given to the stranger; because, as an heir possesses the capacity of being a legatee, he therefore obstructs the stranger in the title which he would otherwise have to the complete legacy. It is not so where a legacy is left between one person living and another dead, for here the whole goes to the living legatee, since as a dead person is incapable of succeeding to a bequest, there is no obstruction in this instance."—The *Hidaya*. Similarly, if the bequest be to a homicide and a stranger, it would be valid for the half belonging to the stranger, and the homicide would take nothing. But if a person were to acknowledge a specific thing or a debt in favour of his heir and a stranger, the acknowledgment would be void as to the stranger also. In all such cases, the heir will not be excluded if the legacy regarding himself be assented to by the other heirs, after the testator's death.

(12.) If a person in his death-bed, or in his health, makes an acknowledgment of debt in favour of a stranger, such acknowledgment takes effect to the whole extent of his property; but, if the acknowledgment is made in favour of an heir, it does not avail for more than a third of his property.

Case-law.

Although the mental faculties of a person suffering from partial paralysis may have been affected by his physical weakness, he may still be capable of devising and of executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement. In order to constitute an insane delusion affecting the question of testamentary capacity, it should have been shown, not only that the delusion was unfounded, but also that it was so destitute of foundation that no one save an insane person would have entertained it: *Sajid Ali* v. *Ibad Ali*, **I. L. R. 23 Cal. 1.**

Power of testator and consent of heirs.—Under the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. Where a will purported to give one-third of the testator's property to one of his sons as his executor, to be expended at his discretion in undefined pious uses, and conferring on him a beneficial interest in the surplus of such third share—*held* that it was an attempt, under color of a religious bequest, a legacy to one of the testator's heirs, and consequently it was invalid without the consent of the other heirs: *Khajooroonnissa* v. *Rowshan*, **I. L. R. 2 Cal. 184; 26 W. R. 36; L. R. 3 I. A. 291.**—A will which has never received the assent of the heirs, is inoperative to alter their heritable rights according to Mahomedan law: *Kadir Ali* v. *Nowsha Begum*, **2 Agra 154.** So, where a will divests all the property from the next heirs: *Jumoonoodeen* v. *Hossein Ali*, **2 W. R. (Mis.) 49.** Or, where the testator gives to his daughter more than one half of his estate: *Mahomed Modun* v. *Khodezunnissa*, **2 W. R. 181.** Or, where a legacy is left to one of a number of heirs without the consent of the rest: *Abedoonissa* v. *Ameeroonissa*, **9. W. R. 257.**—A married woman cannot bequeath the whole of her estate to her brother without the consent of her husband: *Muhammad* v. *Imamuddin*, **2 Bom. 53.**—Where the plaintiff claimed as purchaser from the daughters of a deceased Mahomedan, and the son set up a will, executed by his father, bequeathing a large portion of the estate for charitable purposes, and the rest divided among the

heirs,—*held* that the Lower Appellate Court should have found whether the heirs were consenting parties, for the bequest by a Mahomedan of more than *one-third* of his estate without the consent of the heirs is invalid: *Baboojan* v. *Mahomed Nurul Huq*, 10 W. R. 375.

What is valid consent.—The consent given by heirs to a Mahomedan testator's will before his death is no assent at all; to be valid it must be given after the testator's death: *Nusrut Ali* v. *Zeinunnissa*, 15 W. R. 146.—According to Mahomedan law, the consent of the heirs can validate a testamentary disposition of property in excess of a third of the testator's property, if the consent be given after the death of the testator. But if the consent be given during his life-time, it will not render valid the alienation, for it is an assent given before the establishment of their own rights: *Cherachom* v. *Valia*, 2 Mad. 350. But see the following decisions:—To establish the consent of a Mahomedan heiress to a will, evidence of some act done at the time of its execution, or some act done subsequently, amounting to a ratification of it is necessary: *Ramcoomer* v. *Faqueerunissa*, 1 Ind. Jur. (O. S.) 119. Also, according to Mahomedan law, a will is valid as against an heir if he affixed his signature to it as a consenting party thereto without undue influence: *Khadeja Bibee* v. *Suffur Ali*, 4 W. R. 36.—In a suit for an undivided share of property claimed by the plaintiffs as heirs of the deceased owner, where the defendants pleaded possession under a will, *held* that the Court could not tell how far the will was valid under the Mahomedan law, which allows a testator to give away from his heirs only one-third of his property, and therefore the onus was on the defendant to furnish a complete statement of the testator's property at the time of his death, failing which the plaintiffs' claim must prevail: *Sukoomut Bibi* v. *Warris Ali*, 2 W. R. 400.

Construction.—Where a Mahomedan lady made a will disinheriting her nearest relations, and leaving her whole estate to her nephew "from generation to generation," *held* that the devise to the nephew was absolute to him, and did not extend to his sons in case of his death before his aunt: *Oomutoonnissa* v. *Ooreefoonnissa*, 4 W. R. 66.—Where a Mahomedan bequeathed the rents of a certain house in trust for his children, and directed that after the death of the last surviving child, such rents should be paid to the Committee of the District Charitable Society, *held* that the gift to the children being a gift to the heirs of the testator to which there was no assent, was invalid; and consequently, the gift to the Charitable Society also failed: *Fatima Bibee* v. *Ariff Ismailjee*, 9 C. L. R. 66.—Where a Mahomedan

testator desired that his moveable estate should not be divided or alienated by any of his heirs, and directed his executor to appropriate the net income, according to a schedule annexed to his will, among certain specified persons divided into two classes, *viz.*, those who took and those who did not take by inheritance,—*held* that the intention of the testator was to endeavour to prevent any partition of the estate, and not convert his heirs-at-law into mere annuitants taking grants from him; and that the executor held the estate in trust to pay the profits in certain defined shares to the heirs: *Khajoorunissa* v. *Roheemunnissa*, **17 W. R. 190.**—An assignment of property made by a Mahomedan in favour of his widow and his two sons, reserving to himself full power over it during his life, and restricting the sons' right to alienate during their mother's life-time, as she was to enjoy it in lieu of her dower, *held* to be a disposition of a testamentary nature, and void of the requisites of a sale under the Mahomedan law: *Mogul Begum* v. *Fukeerun*, **3 Agra 288.**—By the Mahomedan law no writing is required to make a will valid, and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently clear and ascertained. Where a power of attorney executed by a Mahomedan testatrix showed that she directed a *Wajib-ul-urz* to be made in respect of a certain mauza, and there was also verbal evidence to the effect that she did express an intention that the whole of the property should be devised by will, her testamentary disposition was held to take effect as to the whole of her property, and not to be limited to the particular mauza: *Mahomed Altaf* v. *Ahmed Buksh*, **25 W. R. 121.**—Where the will of a talukdar declared that in respect of his estate, in its entirety and without division, the engagement for the revenue should be in the name of his eldest daughter's son, and so continue; and besides this grandson, the son of his second daughter, as well as two other daughters of the testator, were to be equal sharers entitled to the profits of the estate, the will declaring that the profits may be divided equally among all the four persons; *held*,—on a question whether under the will the son of the second daughter took a heritable interest or only a life-estate, the gift being only of the profits,—that no evidence having been found showing that an unlimited gift of the profits was less than a gift of the *corpus*, the interest given by the will was heritable: *Faiz Muhammad* v. *Muhammad Said*, **I. L. R. 25 Cal. 816.**

Bequest to a person not in existence at testator's death.—Where a Mahomedan testator left his property in four equal shares to his

second and third sons, to the lawful son (if any) of his eldest son (who was himself disinherited), and to his brother; and the will directed that the property was not to be divided until the second and third sons had attained the age of twenty, and that the share of the lawful son of the eldest son was to be held in trust until such son should reach the age of twenty; and at the time of the testator's death, no son of the eldest son was living,—*held* that a son born to the eldest son after the testator's death, could not recover the share bequeathed to the son of the eldest son, as according to Mahomedan law as well as Hindu law, persons not in existence at the death of a testator are incapable of taking any bequest under his will: *Abdul Cadur Haji* v. *Official Assignee*, I. L. R. 9 Bom. 158.

Words denoting duration of estate.—Words such as "always" and "for ever," used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking the estate. An instrument in the nature of a will made by a Mahomedan, gave shares in his property to his surviving widow, son, and grandchildren, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of full sixteen annas of all his estates . . . . . All the matters of management in connection with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. A son of the son having claimed to retain possession of the property in order to carry out the provisions of the will, it was held that a sharer under the will was entitled to the full proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers: *Md. Abdul Majid* v. *Fatima Bibi*, I. L. R. 8 All. 39; L. R. 12 I. A. 159.

§157. Void bequests.—(1.) A bequest is void if the legatee dies in the testator's life-time.

(2.) A bequest of a thing which does not exist in the possession or disposal of the testator at the time of his death, is void, unless the bequest was referred to his property, in which case it is to be paid in value. Thus, if a person bequeath '*a goat*,' and he has no goat at his death, the bequest is void. But if, having no goats at the time of his making the will, he should afterwards ac-

quire goats so as to leave some at his death, the bequest is valid; or he bequeath 'a *goat of his property*,' and afterwards die leaving no goats, the legatee gets the value of the goat or goats, as the case may be.

(3.) If the bequest be specific, or of some particular kind of property, and such property all perish before the testator's death, the bequest is void. And, if he should afterwards become possessed of another specific thing of the same kind, or of similar kind of property, the right of the legatee would not attach to the subsequent acquisition.

(4.) Any accident, occasioning uncertainty with respect to the legacy or legatee, renders the bequest void.

§158. A Mussulman's bequest in favour of a Zimmi, or of a Zimmi in favour of a Mussulman, is valid. A bequest to an alien living in the hostile country is not valid. A bequest in favour of a hostile infidel is also invalid. A bequest to an apostate by a Mussulman is not lawful. A bequest to a person from whom the testator received a mortal wound, is not valid, unless consented to by the heirs; but a bequest to the son or other relation of the slayer is valid.

A bequest by a person who is incompetent to do a gratuitious act is invalid. Hence, a bequest by an insane person is void.

§159. A will made by a person in jest, or under compulsion, or mistake, is not valid.

§160. "If a person deeply involved in debt bequeath any legacies, such bequest is unlawful and of no effect, because debts have a preference to bequests, as the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary; and that which is most indispensable must be first considered. If, however, the creditors of the deceased relinquish their claims, the bequest is then valid."—The *Hidaya*.

§161. When a testator bequeaths property in favour of his *akrabah* or kindred, the nearest of kin within the prohibited degrees will take first, and failing them the next in proximity but still within the prohibited degrees, and so on in regular succession *within the prohibited degrees*, but the claimant must not be an heir of the testator. This is the opinion of Abu Hanifa. According to his two disciples, Abu Yusuf and Muhammad, every one of testator's relations, whether on the father's side or on the mother's side, to the remotest degree of ascent or descent, would take the legacy without any distinction between the nearer and the more remote. The opinion of Abu Hanifa, however, is the prevalent one and received as law. But where the bequest is to the *ahl* (literally meaning '*wife*') of himself or of such a one, all persons who are living in the family, and are maintained by him, excepting the slaves, are entitled to take.

§162. A bequest made in favour of the heirs of another, would be divided among those heirs in the proportion they get in inheritance, that is, the male getting twice as much as each female of equal grade.

§163. A bequest in general terms, such as, "*a third of my property*," takes effect on the whole of the testator's property at the time of his death.

§164. If a person bequeath a part of his property to another without specifying the amount of it, the heirs are at liberty to give whatever they think fit. "For here the amount of the bequest is unknown; but as the uncertainty with respect to that is no bar to its validity, it is therefore valid; and such being the case, and the heirs being the representatives of the testator, it is consequently at their discretion to fix the amount, in the same manner as the testator himself might do if he were living." (*Hidaya.*)

§165. If a person bequeath a *third* of his property to one, and a *third* to another, both would be valid if allowed by the heirs; but if they do not allow it, the legatees share a *third* only between them in halves. If a half is given to one, and a fourth to another, and the bequests are allowed by the heirs, they are valid to their full extent; otherwise, both the bequests will have to be met out of a *third* of the testator's property, the legacies being distributed in proportion to their amount. Thus, the third is divided into three shares, of which *two* are given to the legatee of the *half*, and *one* is given to the legatee of a fourth. This is the opinion of Abu Yusuf and Muhammad. (According to Abu Hanifa, the third is to be divided into seven shares, *four* of them being given to the one, and *three* to the other.) In any case, where the portions bequeathed to several legatees exceed a third of the testator's estate, and his heirs do not consent to it, the legacies are to be distributed from out of a third only, in proportion to the amount of each.

§166. If a person bequeath the whole of his estate to one person, and then a third of it again to another, then, according to Abu Hanifa, a *third* of the estate must be equally divided between the legatees; but according to the two disciples, the third is to be divided into *four* shares, *three* being given to the legatee of the whole, and *one* to the legatee of the third, that is, the legacies are paid out of a third in proportion to their amount. If there be no heirs, or they assent to the legacies being paid in full, the whole estate will be taken by the legatees in proportion to their respective amount.

§167. If a person bequeath *something*, or a *portion of his property*, or *some of his property*, or *a share*, the heirs may give whatever they please. The legatee of a *share* or *part* would take a half of the estate, if their be no heirs.

§168. If a person bequeath a *sixth* of his property to another, and afterwards bequeath a *third* of his property to the same person, the legatee gets the *third* only, and will not be entitled to both. The principle governing the case is said to be that the *sixth* is included in the latter bequest of a *third*. According to Mr. Rumsey, "the principle set forth in the *Hidaya* is, that if there be two fractional bequests to one and the same person, the earlier only takes effect so far as it is included in the later," and that "the later of two fractional bequests to the same person takes effect to the exclusion of the former."

§169. If a man bequeath by will a third of his property, and two-thirds thereof happen to perish, so that only one-third of his whole estate remains, then the legatee is entitled to the whole of the remainder.

§170. If a person bequeath a third of his property to another, and he was poor at the time of making the bequest, but he afterwards becomes rich, then in that case the legatee will be entitled to get a third of his estate at death, whatever the same may amount to, for the bequest does not take effect until after the death of the testator.

§171. If a legacy be left to the sons of "such a one," and the person has no sons at the time of the bequest, but sons are subsequently born to him prior to the testator's death, then these sons, or such of them as are surviving at the time of the testator's death, would take the legacy. If the person had sons at the time of bequest, and some of them should die before the testator, and others are subsequently born, then all who are living at the time of the testator's death would be entitled to participate in the legacy. But if the bequest was left to existing sons only, who are mentioned by the testator by name, and all of them happen to die before the testator, then the legacy would fail, because when

the legatees are defined and specified, no other person can take.

§172. If a person bequeath a third of his property, and has no property at the time of making the bequest, the legatee would take a third of whatever he may be possessed of at the time of his death. But if the bequest be of something specific, or of some particular kind of property, and there is no such property at his death, or it perish before his death, the bequest is void.

§173. If a person bequeath a third of his property to one, and then makes another a participator in the same legacy, the two legatees share the third in equal portions. If he leaves two legacies of equal amount to two persons, and then says that a third person will be a participator in the bequest, the three legatees will divide the total bequest in equal shares. But if the amounts in the two legacies be different, then the third person will get the half share of each legacy. Thus, if he leaves 400 *dirms* to A., and 200 *dirms* to B., and C. is to participate, then C. will get 200 out of A.'s legacy, and 100 out of B.'s.

§174. If the testator's estate consists partly of ready-money, and partly of debts due to him by others, and the amount of the bequest does not exceed a third of the existent property, then it can be paid in full at once. If, however, it exceeds a third of the property in hand, then the legatee is to receive a third of the property in hand, and the balance afterwards as the debts are recovered by the heirs.

If a person bequeath anything to his neighbour, then, according to Abu Hanifa, the bequest is taken by the person whose house is immediately adjoining to that of the testator. But according to the two disciples, all the inhabitants of the vicinity, who belong to the same mosque, are entitled to participate in the bequest.

§175. Usufructuary bequests.—The bequest of the occupation of a house, or of the usufruct of lands and gardens, whether for a limited term or for ever is lawful. If the legatee die before the expiration of the limited term, the article bequeathed in usufruct immediately reverts to the heirs of the testator. The bequest of the produce of anything does not entitle the legatee to a personal use of it, or to let it out on hire. A bequest of "produce" would include both existing and future produce; but the bequest of "the fruit of a garden," or "the fruit on a tree," would mean the existing fruit only, unless perpetuity of the bequest is expressly declared.

§176. Pious bequests.—Of bequests for the performance of religious duties, pilgrimage, and benevolent purposes, such as are absolutely incumbent and ordained should be executed first, whether the testator gave them priority or not; otherwise, if all of them are of equal importance, the arrangement prescribed by the testator should be followed.

Case-law.

A devise to pious uses which was in such vague terms as to confer the beneficial interest on the executor, was held to be in contravention of the Mahomedan law and invalid without the consent of the heirs; in this case, the testator gave one-third of his property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, and it was held to be an attempt to give, under colour of a religious bequest, a legacy to one of the testator's heirs: *Khajooroonissa* v. *Rowshan*, **I. L. R. 2 Cal. (P. C.) 184.**—In the will of a Khoja Mahomedan, written in the English language and form, a gift of a fund "to be disposed of in *charity* as my executor shall think right" is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects by analogy to Statute 43 Elizabeth, c. 4. Where, however, the will is in the native language, and the word "*dharm*" is used, the word is held too vague and uncertain for the gift to be carried into effect, the word "dharm" including many objects not comprehended in the word

"charity" as understood in English law: *Gangbhai* v. *Thavar Mulla*, 1 Bom. 71.

§177. **Revocation of bequests.**—A testator may lawfully revoke a bequest, and such revocation may be either express or implied. Revocation is express when the testator says, "I have revoked the bequest" or "I retract what I bequeathed," or uses similar expressions. If a man bequeath a piece of cloth, and afterwards cut it up and sew it; or bequeath cotton, and afterwards spin it into thread and weave it; or bequeath iron, and afterwards manufacture it into something, the revocation is implied. If the testator perform upon the article he had bequeathed, any act which, when performed upon the property of another, would be the cause of terminating the right of the proprietor (such as, the slaughter of a goat, the fabrication of a vessel from a piece of copper, or of a sword from a piece of iron, or the grinding of wheat into flour), such act is a retraction of the bequest. If the testator perform upon the property bequeathed any act creating an addition to the legacy, and the addition be so connected with the *corpus* that the legacy cannot be separately delivered, such act is a retraction of the bequest; as, when a piece of ground is bequeathed, and the testator afterwards erects a building upon it,—or when a piece of cloth is bequeathed, and a gown is lined with it. But, plastering the wall of a bequeathed house, or undermining the foundation of it, is not a retraction. Again, every act of the testator which occasions an extinction of his property in the thing bequeathed, is a retraction of the bequest; for instance, if the testator sells the article he had bequeathed, the bequest is revoked, even if he afterwards purchases it; or if he makes a gift of it to another, even if he afterwards retracts the gift.

§178. If a testator bequeath to one person what he had already bequeathed to another, without making any mention of

the prior bequest, both the legatees become sharers in the bequest. But where he makes the second bequest after expressly alluding to the prior bequest of the same thing to another, as when he says, "The slave whom I have bequeathed to such a one, is to such a one," there is a revocation of the prior bequest. And if the second person were dead at the time of the testator's speaking, the first bequest would remain valid, for the second becomes void on account of the legatee's death; while if the second person were living at the time that the testator spoke, and would subsequently die before him, both legacies would be void, and the subject of them revert to the heirs of the testator,—for in this case, the effect of the second bequest being a retraction of the first, that bequest becomes void, and the death of the legatee before the testator renders the second bequest void. In the case in which the second legatee was dead at the time the second bequest was made, it is void *ab initio*, and so the first bequest is not affected by it at all.

§179. If the testator denied his bequest, and it is proved by witnesses, then, according to Muhammad, this does not amount to a retraction; whereas, according to Abu Yusuf, it is a retraction of the bequest.

§180. If the testator desire that the execution of his will be suspended for sometime after his death, this is not a retraction.

Of Executors and their Powers.

§181. An executor is a trustee appointed by the testator to superintend, protect, and take care of his property and children after his death, as also to be his personal representative.

§182. A testator may appoint any person to be his executor. But the Judge may remove an improper person appointed as an executor, and appoint a proper person in his stead. A slave, an infidel, a minor or insane person, an alien who does not

embrace the Mussalman faith, and an apostate are improper persons to be executors. A woman, a blind person, or one who has undergone the *hadd* or specific punishment for slander, may be lawfully appointed executors.

§183. An executor may decline to accept office either before or after the death of the testator. But having accepted it, he cannot retract after the death of the testator, nor in his lifetime without his knowledge. When a person has been appointed an executor without his knowledge, and he handles the property of the testator after his death, such act of the executor amounts to his acceptance of the office. An executor wishing to relieve himself after having accepted office, must apply to the Judge. An executor guilty of misconduct, or who proves to be unfit for the office, and there is apprehension of danger to the estate, may be removed by the Judge.

When a man has appointed more than one executor, one of them cannot alone dispose of property, and acts done by one of them singly are not operative without the sanction of the other, except in urgent matters requiring immediate execution, or for the interest or advantage of the estate. But if every one of the executors is declared to be a complete executor, any one of them may dispose of property alone.

§184. When there are two executors and one of them dies, the survivor cannot act without authority from the Judge; but if he is also the executor of the deceased executor, he is competent to act without such authority.

§185. Where several persons have been appointed by the testator to be his executors, and all or some of them accept office, they are competent to act; but if one of them only accepts and the others do not, he cannot act without authority from the Judge.

§186. Where the testator directed that the executor should act with the opinion of another, the executor may or may not act with the knowledge of that other. But if the direction was "*not* to act without the knowledge of such another," the second person is also an executor, and the first cannot act singly.

§187. An executor appointed for a particular purpose, becomes a general executor, unless expressly prohibited to act in any other matter.

§188. An executor may, on the approach of death, appoint a successor, though the testator did not commit to him such power.

§189. Where there is no executor appointed by the testator, the Judge may nominate one. But if the Judge appointed one without knowing that there was an executor appointed by the testator, the nominee of the testator has the preferential title to the office.

§190. **Powers of executors.**—(1) If all the heirs are minors, an executor can lawfully make a partition with the legatee or legatees, giving him or them their one-third and retaining the two-thirds for the heirs; and if the heirs' portion in his hands happen to perish, they cannot have recourse against the legatees, nor can they make the executor responsible.

(2) If *some* or *all* of the heirs are adult but *absent*, it would be lawful for the executor to make a partition on their behalf with the legatee, in everything except immoveables.

(3) If *all* the heirs are adult, and some or all of them are *present*, the executor *cannot* make any partition of either moveables or immoveables as against the heirs, or against the legatees even if they be infants.

(4) A partition made by an executor in the absence of a legatee for secular purposes (as distinguished from a legatee

for pious purposes), is void as against such legatee, and the legatee may still claim to be a partner with the heirs, if the portion allotted to him happen to perish.

(5) If all the heirs are adult and present, the executor cannot sell any part of the estate, but if the heirs are absent, he can sell moveable property, but not immoveable property unless they are falling into decay. But if an executor sells immoveable property for the payment of debts, while he has other property in his hands sufficient for the purpose, such sale is lawful.

(6) An executor may sell immoveable property to a *stranger* in any of the following circumstances:—(*a*) where he gets double the value of the property, or (*b*) for the benefit of the minor, or (*c*) for liquidation of debts of the testator, or (*d*) where the general provisions of the will cannot be carried into effect without such sale, or (*e*) where the income exceeds the expense of keeping the property, or (*f*) where it is in danger of being destroyed or damaged, or (*g*) where it is in the hands of a usurper and there is no chance of its recovery; or (*h*) if there are debts which cover the whole estate, the executor may sell the whole, or as much as may be necessary if the debts do not cover the whole; or (*i*) if there are general legacies, he may sell as much as is required for their liquidation, but not exceeding a third after payment of the debts.

(7) If an executor pays one creditor in preference to another, without an order from the Judge or unless the debt has been decreed against the estate, he is responsible to the other creditors. But an executor may sell a portion of the estate to a creditor in exchange for his debt, if he is apprehensive of other creditors coming forward, and then he will not become responsible.

(8) An executor may expend the whole estate upon the young children of the deceased, even if there be decreed claims against the estate.

(9) An executor cannot lawfully purchase anything for his minor ward at a price much above its actual value.

§191. The executors of fathers and other relatives.—(1) The father's executor is in the place of the father, and the executor of the grandfather is in the place of the father's executor. These can exercise authority when the deceased died intestate.

(2) The father's executor can enter into a partition of the testator's moveable and immoveable property with the legatee. The power of the father's executor in the management of the property of the minor children of the deceased, is superior to that of the grandfather. The authority of the father's executor, and, in his absence, that of the grandfather or his executor, with regard to the property of the orphans of the intestate, is the same as that laid down in the case of the executor of the deceased.

(3) The mother's executor may lawfully sell moveable property belonging to the estate of the deceased, but not immoveable property, *nor anything which a minor has inherited from his father, whether moveable or immoveable.* Nor can he buy anything except food and raiment, for the minor.

(4) With regard to an estate inherited from the mother, her executor cannot sell anything if the heirs are adult and present, and there is no debt. But he can sell any part for the payment of debts. If there are both adults and minors, and the former are absent, he can sell moveables only, unless there are debts, in which case he can here exercise the same authority as an executor of the deceased. If the adults are all present, he

cannot sell their share unless it be for the payment of debts, but he cannot sell their share in the immoveable property.

(5) The executors of other relations such as, a brother or paternal uncle, exercise the same authority as the mother's executor. The order of their exercising authority is the same as the order of their testators in the guardianship of minors.

Case-law.

The appointment of an infidel executor does not invalidate a Mahomedan's will, and until he is removed and superseded by the Civil Court, all the acts of such an executor, and his dealing with the property under the will, are good and valid: *Jehan* v. *Mandy*, 1 B. L. R. 16 (S. N.); 10 W. R. 185.

Under the Mahomedan law, an executor is entitled to nominate a successor to carry out the purposes of the will under which he was made an executor: *Hafeez-oor-Rahman* v. *Khadim Hossein*, 4 N.-W. P. 106.

Khoja Mahomedans.—The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts: *Ahmedbhoy* v. *Vullebhoy*, I. L. R. 6 Bom. 703.

Probate.—An executor of the will of a deceased Mahomedan, since 1st April 1881, the date of the coming into force of Act V. of 1881, cannot claim to represent the estate of his testator until he has taken out probate: *Fatma* v. *Shaik Essa*, I. L. R. 7 Bom. (O.J.) 266.

§192. The leading difference between the two Schools in the law of wills is that, while according to the *Sunnis* a bequest in favour of an heir is invalid, it is quite valid according to the *Shiahs*.

§193. The Indian Succession Act (X. of 1865) does not apply to the testamentary succession to the property of Mahomedans. Section 331 of that Act provides—"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan, or Buddhist." The

preamble to Act V. of 1881, the Probate and Administration Act, cites the expediency of providing for "the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply"; and by section 2 of the Probate and Administration Act, Chapters II. to XII., both inclusive, of this Act, are applicable in the case of every Muhammadan dying before, on, or after the first day of April 1881—the day on which the Probate and Administration Act came into force.

CHAPTER X.—Wakf.

§194. **Definition.**—According to Abu Hanifa, *wakf* means the appropriation of a specific thing in such a way that the appropriator's property in the thing is not extinguished, but the benefits thereof are applied to some charitable or other beneficient purposes. The appropriation does not become obligatory upon the appropriator, so long as it is not declared to be obligatory by a decree of the Judge; that is, the appropriator is at liberty to resume the thing appropriated, or to sell it, or to make a gift of it, so long as his right is not extinguished by a decree of the Judge. According to Abu Yusuf and Muhammad, the two disciples of Abu Hanifa, *wakf* means the dedication of a thing to the ownership of God, the advantages of which are to be applied to the benefit of mankind. The appropriator's right is divested, according to Abu Yusuf, by his mere declaration, so that it cannot be resumed by him after such declaration. But, according to Muhammad, the appropriator's right is not extinguished until he has delivered the thing into the hands of a procurator. When the property in the thing appropriated has passed out of the appropriator, whether by a decree of the Judge, or by mere

declaration, or by declaration and delivery, it does not enter into the property of the persons for whose benefit the appropriation is made. For instance, if a dwelling-house is appropriated to the poor of a particular tribe, and the poverty of one of them is subsequently removed, the right in the house passes to the other poor persons of the same tribe, which could not be the case if the particular person had been a proprietor.

§195. The appropriator or the person making the *wakf* is called the *wakif*.

§196. The legal effect of *wakf*, according to Abu Hanifa, is the detaining of the property appropriated in the ownership of the appropriator and bestowing of its usufruct in charity; and, according to Abu Yusuf and Muhammad, the extinction of the appropriator's right of property in the subject of the *wakf* in favour of the Almighty. The legal effect becomes complete when, according to the different views of the three doctors, the appropriation becomes absolute. When an appropriation becomes valid and absolute, the sale or transfer of the thing appropriated is unlawful according to all opinion.

Case-law.

Where a Sunni Mahomedan executed and registered a deed of *wakf*, but never acted upon it, and retained possession of the property until his death, and subsequently the property passed to his sons by inheritance, *held* that no valid *wakf* of the property mentioned in the deed was constituted, for, according to the Sunni law, it is essential to the validity of a *wakf*, that the *wakif* should actually divest himself of possession of the *wakf* property: *Muhammad Azizuddin* v. *The Legal Remembrancer*, I. L. R. 15 All. 321.—According to the Shiah sect, a *wakf* created by will is not valid unless actual delivery of possession of the appropriated property is made by the appropriator himself to the *mutawalli*. Consequently, where the *wakif* dies before actual delivery of possession to the *mutawalli* or the beneficiaries of the trust, the *wakf* is null and void *ab initio*, and the consent of his heirs to the testamentary *wakf* cannot validate such *wakf*: *Agha Ali Khan* v. *Altaf Hasan*

Khan, I. L. R. 14 All. 429.—The payment of expenses of a mosque out of the rents of certain property, is not proof of itself that the property is endowed : *Shurfoonnissa* v. *Koolsoom*, 25 W. R. 447.

§197. The conditions of a valid *wakf* are :—

(1.) The appropriator must be free, sane, and adult. One who is a minor, or insane, or a slave, is not competent to make an appropriation. The possession of *Islam* is not a necessary condition.

(2.) There should be a nearness of relation between the appropriator and the object of appropriation, otherwise the *wakf* will be void. Thus, if a Mussulman were to appropriate his property for the benefit of a church or temple, such appropriation will be void.

(3.) The property appropriated must be the property of the appropriator at the time of making the appropriation. If a man makes an appropriation of land belonging to another, and then becomes the proprietor of it, the *wakf* is not lawful. But if the proprietor of the land allowed the appropriation at the time it was made, the *wakf* would be lawful. If a bequest were made of land in favour of a legatee, who makes a *wakf* of it before the testator's death, or if a donee of land makes a *wakf* of it before taking possession, but takes possession after the appropriation is made, the *wakf* is not lawful in either case, for the appropriator had no property in the thing appropriated at the time of making the appropriation. The donee of land passed by an invalid gift or invalid sale, may make a valid *wakf* of the land after he has obtained possession of it, but he is responsible for the price of the land in case the gift or sale is set aside.

It is not, however, necessary that both proprietary and possessory rights should be vested in the appropriator. If a man gives a lease of his land, and then makes a *wakf* of it before the

expiration of the term of the lease, the *wakf* would be valid, but the lease would not be void; and on the expiration of the term of the lease, the land would revert to the purposes to which it was appropriated. If either the lessor or the lessee dies, the lease is void, and the land immediately becomes *wakf*. If a man pledge his land, and then make an appropriation of it before redeeming the same from the pledgee, either the pledge or the *wakf* is not void, but after redemption the land reverts to the uses for which it was appropriated. If the pledgor should die before redeeming it, but he leave enough to redeem the land, it is to be redeemed, and the *wakf* is obligatory. But if he does not leave enough to redeem the land, then it may be sold, and the *wakf* would be void.

(4.) The property appropriated should be free from uncertainty. If a person make a *wakf* of land, and afterwards it is found that another person has a proprietary right with respect of an *undefined* portion of it, the *wakf* with regard to the remainder is also void. But it would be otherwise if another's share in it be *specific* and not of an undefined nature. The appropriation of land without the trees standing thereon, is not lawful, because it is unknown "what enters into the *wakf*" after the trees with their sites are excluded.

(5.) Perpetuity of the object is a necessary condition; and the appropriator should destine the ultimate application of the *wakf* to objects not liable to become extinct. If a man says "I appropriate this to such a person, and after him to the *poor*;" the *wakf* is valid, for its ultimate application is destined to a class, the *poor*, who can never become extinct. If an appropriation be made for a specified time, the *wakf* will be perpetual and not restricted to the period mentioned.

(6.) The appropriation must be at once complete, and not suspended upon the occurrence of a future event. If a man

were to say, "I give this land or house in charity, if my son arrives, or if I die of this disease, or if such a one please," there is no valid appropriation. But if a man says, "If this mansion be my property, it is appropriated as charity," the appropriation would be valid if the mansion be actually his property at the time of speaking. If he says, "If I die of this my disease, make this my land *wakf*," the appropriation is lawful, because here the expression used "amounts to a conditional appointment of an agent, which is lawful." If he says, "When I die, my land or mansion is *wakf*," such appropriation, being suspended till his death, is of the nature of a testamentary disposition, and takes effect to the extent of a third of the appropriator's property, unless consented to by the heirs.

(7.) The subject of appropriation should be lands, houses, shops, or any other immoveable property, and any moveables that may be attached, or appertaining, to such immoveable property. Moveables, when not appertaining to the land or house which is appropriated, cannot be *wakf* by themselves, except a *Kuran*, weapons of war, and beasts of burden, the appropriation of which is valid according to the traditions.

The appropriation of land with the slaves and cattle at work thereon, and with implements of husbandry, is valid, but they should be specified and numbered. In the *wakf* of buildings and shops, everything is to be included which would be included in the sale of the buildings and shops. In the *wakf* of land, the buildings and trees standing thereon are included, as also a right of way or water whether mentioned or not by the appropriator. But though trees are included in the *wakf* of land, the fruit standing on such trees is not included; canes and other plants that are cut annually are not included, nor the crop if the land has been sown; but such as are cut biennially are included in a *wakf* of the land.

The *wakf* of a *musha*, or undivided part, is valid, without any difference of opinion, where the thing appropriated is indivisible in nature. There is, however, difference of opinion in the case of the *wakf* of an undivided part of a thing that admits of partition,—Abu Yusuf holding it to be valid, and Muhammad being of a contrary opinion. The opinion of Abu Yusuf on the point is adhered to by the author of the *Hidaya*, and is the present law according to modern jurists, so that the *wakf* of the half, or the fourth, of a field or house, would be quite lawful. The *wakf* of a *musha*, or undivided part, for a *masjid* or burial ground, is not valid according to both of them, whether the thing is divisible or not. Where a man appropriates his share in partnership land, he must divide his share from that of the partner. But where he appropriates a portion (such as, a half or a fourth) of his own land, he is not at liberty to divide off the portion appropriated from the rest.

Case-law.

According to Mahomedan law, a *wakf* cannot be created of shares in a limited-liability company: *Fatima Bibi* v. *Arif Ismailjee*, 9 C. L. R. 66.

(8.) The appropriation should be free from any option reserved by the appropriator. According to the opinion of Muhammad, which is approved in the Hidaya, the *wakf* would become void if a condition of option be annexed to it. If a man reserve to himself the right of changing the land appropriated for any other land, such reservation of right would be valid according to Abu Yusuf; but according to Muhammad, the *wakf* would be valid, and the condition reserved void. Both of them decided that the *wakf* of a *masjid*, made on the condition of the appropriator's having an option, was valid, and the option was void.

§198. *Wakf* is created by special words declaratory of the appropriation; such as "this my land is *wakf*," or "I have made

this my land *wakf*," or "this my land is a *sadakah* or charity, freed and perpetual, during my life and after my death," and so forth. The word *wakf* alone may be used, or it may be combined with the word *sadakah*, meaning charity. But the word "*sadakah*" alone will not suffice to constitute *wakf*, unless it is declared to be perpetual. If a man says, "This my land is *sadakah*," it will be a vow of charity and not a *wakf*, and it would be lawful to him to bestow the specific thing or its price. But if he says, "This my land is *sadakah*, not to be sold, not to be given, and not to be inherited," it would be *wakf*, as perpetuity is expressly signified. If a man were to say, "This my land is appropriated on such a one, or on my son, or the poor of my kindred, or orphans," it would not be *wakf* according to Muhammad, because the appropriation is for a purpose which is liable to become extinct, and is not perpetual; but, according to Abu Yusuf, it would be a valid *wakf*, as the making of it perpetual is not a condition with him. According to Abu Yusuf, when other objects fail, the produce of the *wakf* would revert to the poor, whether it was so mentioned or not by the appropriator himself; and as "the poor" can never fail, and must be presumed when other objects fail, it is not necessary, according to his views, that the object designed and declared by the appropriator should be perpetual.

Case-law.

Creation of wakf.—According to Mahomedan law, a valid endowment may be verbally constituted without any formal deed: *Shurbo Narain* v. *Ally Buksh*, **2 Hay 415.**—The chief elements of *wakf* are special words declaratory of the appropriation, and a proper motive cause; and where the declaration is made in a solemnly published document, the *wakf* is completed: *Doyal Chand* v. *Keramut Ali*, **16 W. R. 116.**—The mere use of the word *wakf* in an instrument of endowment, is not sufficient to constitute a valid *wakf*. There must be a dedication of the property to religious and charitable purposes: *Abdul Ganne* v. *Hussen Miya*, **10 Bom. 7.**

§199. Mahomedan lawyers apply the term *wakf* not only to appropriations of a purely pious and charitable nature, but also to settlements on a person's self and children or other relatives. The religious and charitable endowments include such dedications as are generally recognised by the Mahomedan law as being of a religious and charitable nature. Appropriations for the benefit of the poor; for aiding pilgrimages to Mecca and marriages of poor people; for building or supporting mosques; for the funeral expenses of the poor; for sinking wells or tanks; for cemeteries, inns, or caravanserais for Mussulmans; for the kindred of the Prophet, or poor *sufis*, or poor travellers; for *jihad* or religious wars, are all valid endowments under the Mahomedan law. Appropriations which are of the nature of settlements upon the appropriator himself, or his children, or any other person, are also valid *wakf* according to the Mahomedan lawyers; but upon failure of the person or persons for whose benefit the settlement is made, the ultimate destination of the *wakf* should be the benefit of the poor. According to Abu Yusuf, the ultimate benefit to the poor is presumed whether mentioned by the appropriator or not. The Mahomedan law does not prescribe any restriction whatever upon such settlements, except such as are common to religious and charitable endowments. Whenever the requirements of a valid *wakf* are satisfied, the settlement would also be valid. But the decisions of our Courts have held, as will be seen from the cases cited below, that a substantial dedication to religious or charitable purposes at some time or other is essentially necessary to render a *wakf* valid; and where the intention of the appropriator would appear to be merely tying up the property in the family, making it inalienable by any member of it, and also secure against any decrees against the members, the *wakf* will not be valid. But there is nothing in the Mahomedan law itself to warrant such a conclusion. That

law includes in the category of *wakf*, not only appropriations for religious and charitable purposes, but also appropriations which are purely settlements, the ultimate destination to the poor being brought in upon failure of other objects.

§200. **Religious endowments.**—*Mosques.*—If a person build a mosque, his right of property in it is not terminated so long as he does not separate it from the rest of his property, and does not admit the public to come and worship therein. Separation from the rest of the testator's property is an indispensable condition; and as regards the admission of the public to perform worship in it, it would suffice "if a single person say his prayers in the mosque, because it is impossible that *all* men should perform their prayer in it." But if a *mutawalli* or superintendent has been appointed for a mosque, and delivery of possession has been made over to him, the condition requiring the saying of prayers in the mosque is not obligatory, and the appropriation of the mosque becomes valid even though no one say prayers in it. Where land is appropriated for the purpose of erecting a mosque thereon, it cannot be resumed or sold by the appropriator, nor can it be inherited by his heirs. Where a man directs people to assemble on his land, which is unoccupied and which is fit for building, and permits them to say their prayers in such land, intending that people should go on in doing so forever, the land becomes appropriated as a *masjid*, and will not go to the person's heirs after his death. If, however, the permission was expressly given for a limited period, the land does not become a mosque. But, where a man makes his land a mosque in this way, he cannot stipulate for anything out of it to himself, nor can he reserve an option, for in the appropriation of a mosque, the condition becomes void, and the *wakf* is valid. If a *masjid* is appropriated for the people of a particular *mohallah* (a particular quarter), it would be open for others to

come and worship therein. A *masjid* falling into decay, and ceasing to be a place of worship, and no longer used by the people, will not revert to the appropriator or his heirs; it cannot be sold, nor can its materials be applied to repair another mosque in the vicinity. The appropriation of land for the benefit of a *masjid*, and to provide for its repairs and necessary expenses, is lawful, whether there be any ultimate destination for the poor or not; but the residue of the produce of such land can be dedicated to the poor. The uses for which the land is appropriated to the mosque, should be distinctly mentioned.

Cemeteries, Caravanserais, &c.—The appropriation of a house for the accommodation of pilgrims, of the poor, of mendicants, of *Mussalman* warriors, and the erection of an aqueduct, an inn, a caravanserai, or the allowing of land to be made a cemetery for *Mussalmans*, are all valid *wakf*, and the appropriator's proprietory right is extinguished by his declaration to that effect, or by such declaration and the same being used by people, or upon the thing being delivered to a *mutawalli*. Similarly, the giving of land as a way for *Mussalmans*, attested by the calling of witnesses to the fact is a valid *wakf*.

§201. **Settlements.**—If a man says, "My land is a *sadakah* settled on myself," or "I have settled it on myself, and after me on such a one, and then upon the poor," or "on such a one, and after him upon me," such appropriation is lawful according to Mahomedan lawyers, as also appropriations in the nature of settlements upon a man's child or any other relation, or upon his neighbours. When the appropriation is upon the man's child and after him upon the poor, the child who may be in existence at the time of the accrual of the produce of the *wakf*, will obtain the benefit of the appropriation. If there be no child at the time, the produce is to be divided among the poor, and if a child should

be born subsequently to the appropriator, the subsequent produce will go to such child during his life, and after him to the poor.

§202. Where a settlement is made in favour of *children*, then the males and the females of his legitimate children are included alike. The word 'child' means "child of loins," failing whom, "the child of a son," failing whom, it includes every one of the lower generations in existence at the time. If at the time of the settlement the appropriator had a child of his loins, and the appropriation was on his child and after him upon the poor, then the child of his loins, whether male or female who may be in existence at the time of the accrual of the produce would alone be entitled to the benefit of the *wakf*, and failing such child the lower generations will not be entitled to enter into the benefit of it, but the poor would at once step in. On the other hand, if, in the same case, the appropriator had no child of his loins at the time of the settlement, in that case only the lower generation, that is, a son's child, would be entitled to enjoy the benefit of the *wakf*. A daughter's child is not included in such case. If, however, subsequent to the disbursement to the son's child, the appropriator happens to get a child of his loins, the future produce shall belong to him, and after him to the poor. When, in the same case, the appropriator had no child of his loins, nor a son's child, but there were children of the third and any lower generations, then the third generation, and those that are below them, shall participate together.

§203. Where the settlement is on a man's "child and the child of a child," such words would include two generations; the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and are equally entitled to participate in the benefit of

the *wakf*, to the exclusion of all lower generations and the children of daughters.

§204. Where the settlement is upon a man's "child, the child of his child, and the child of his child's child," such words though expressing three generations only would include all present and future generations; the produce of the *wakf* is to be expended upon his children for ever, so long as there are any of his descendants, the nearer and the more remote participating equally, and the poor will not be entitled to the benefit of the *wakf* so long as there is a single descendant surviving. Similarly, where the settlement is upon a man's "children," the term would include all generations; but here the first generation will enjoy the benefit of the *wakf* while a single member of it is alive, to the exclusion of any lower generation; upon failure of the first generation, the second generation would participate to the exclusion of the lower generations; and failing the first and second generations, the lower generations would at once equally participate without any distinction being made between the nearer and the more remote. Moreover, when the appropriation is for "children," and there is only one child at the time of the produce, then half of it shall belong to such child, and the other half to the poor. So, where the settlement is on the needy of his children, and there is only one needy child among them, then one-half of the produce shall belong to him, and the other half shall go to the poor. Where the settlement is "on my two children, and when they fail then upon the children of both, and the children of the children of both forever so long as there are descendants," and one of the children dies leaving a child or children, then half will belong to the surviving child and half will go to the poor; and upon the death of the second child of the appropriator, the whole of the produce shall be expended on the children of the two and their children's children. Where the

settlement is upon a man's sons, and he has no sons, but only daughters, the produce will go to the poor, and the case is also the same when the settlement was upon a man's daughters, and he has no daughters but only sons. Where the settlement is on a man's *nasl* or progeny, the children of sons and daughters shall equally divide the produce, whether they be near or remote. In a settlement on "children and their *nasl*," all descendants are included whether males or females, near or remote, unless it had been said that a beginning was to be made with the higher generation, and then the generation below it.

§205. When the settlement is on children in general terms with an ulterior destination for the poor, and some of the children die, their shares are to be enjoyed by the survivors, and when they all die, the produce will go to the poor. But if the settlement was made by naming each of the children, then the share of the deceased child will not go to the survivors, but to the poor. A settlement on heirs includes males and females, who may be existing, with a right of survivorship, unless the heirs are designated by name, in which case the share of the deceased heir shall pass to the poor.

§206. In a settlement on "a person of my *karabat* (kindred)," the nearest of the relatives within the prohibited degrees is to be understood; but if the words be on "the persons of my *karabat*" or "on my *akrabah* (relatives)," then all relations will be included; this is the opinion of Abu Hanifa. According to the two disciples, the term *karabat* whether used in the singular or plural, is to be understood to include everyone related to a person through a common ancestor, either on the father's or the mother's side, and whether within the prohibited degrees or not, without any distinction between the nearer and the more remote. Abu Hanifa attaches this meaning to the term when used in the

plural only. But according to some, the word *karabat* does not include the appropriator's children of his loins, nor his father, nor his grandfather. Abu Yusuf has said that a poor's son does not come in when the settlement is on poor kindred, and Abu Hanifa has also said that the child of a child is not of the *karabat*. A settlement on the people of the *bayit* or house, is for the benefit of every one connected with him, whether near or remote, and male or female; but the children of females are not included. A settlement on neighbours is for those of his neighbours who assemble with the appropriator in the same place of worship in the *mahallah*, provided they are also residents in the vicinity.

§207. Where a settlement is on a person or persons described by a qualifying term, as when land is settled on the blind or the deaf or the poor of a man's children or relatives, and the quality be one that does not cease, or if it ceases, it does not return again, in that case persons having that quality at the time of the settlement will only be entitled to the produce. Thus, a settlement on the young ones of the children is for such of them as are young at the time of the settlement. But when the quality is one that is capable of terminating and of returning again, in that case, persons having such quality at the time of the produce will have a right. Thus, a settlement on children who have professed the Moslem faith, would include those who are Mussalmans at the time of the produce. A settlement on *poor* children or relatives includes only such of them as are poor at the time of the produce, unless a contrary intention is evident from other expressions used by the appropriator. A settlement on the males of one's children, would include such of his male children as may be in existence at the time of the settlement; for the quality of being a male child is not liable to cease, or to revert again having once ceased.

§208. *Appropriation by a man in his death-illness.*—When the appropriator suspends the *wakf* on his death, as when he says, "When I die I have appropriated my mansion to such purposes," the appropriation is valid to the extent of a third of his property, unless allowed by his heirs. If a person make an appropriation upon his death-bed, it is valid to the extent of a third of his property, unless allowed by the heirs. In both cases, where the property appropriated is within a third of the appropriator's property, it is valid without waiting for the assent of the heirs; where the *wakf* exceeds a third of his property, the excess becomes valid if assented to by the heirs, but not otherwise.

§209. If a man in his death-illness appropriates his land for his child and his child's child, one-third of such land, if he has no other property, is a valid appropriation for the benefit of his child's child, even without the consent of the heirs. But the child will not be entitled to the benefit of the *wakf* as he is an heir, and the legacy to an heir is not valid without the consent of the other heirs. But if the settlement be allowed by the heirs, it may be valid to its full extent, and the child shall also be a participator in the produce. Where the appropriation is for the appropriator's child, his child's child, and his *nasl* for ever, and after them for the poor, it would be valid to the extent of a third of his property, unless assented to by the heirs, and the produce of the *wakf* will be divided among all the heirs according to their shares in the heritage. But neither the wife nor the parents shall get anything out of such appropriation.

§210. If a man during his illness appropriate his land, and also leave bequests, then both the *wakf* and the legacies are to be satisfied from out of a third of his property, unless the heirs allow the excess over a third to be also divided between the dedication and the bequests.

Case-law.

How far a family-settlement can enter into a wakf.—Where the profits of an endowed estate have been charged with certain items which must in time cease, and the lapse of which will leave the whole property available for the purposes of the endowment, the creation of such a charge will not render the endowment invalid: *Mushurool 'Huq* v. *Puhraj Ditarey Mohapattur*, **13 W. R. 235.**—But where there is no dedication of the property solely to the worship of God or to religious and charitable purposes, a Mahomedan cannot, by using the term *wakf*, effect a settlement of property upon himself and his descendants, so as to keep such property inalienable by himself and his descendants for ever: *Abdul Ganne* v. *Hussen Miya*, **10 Bom. 7.**—A *wakf*, the purpose of which is to create a mere family-settlement without a charitable object, is invalid: *Fatima Bibee* v. *Arif Ismailjee*, **9 C. L. R. 66.**—Grants to an individual in his own right, and for the purpose of furnishing him with the means of subsistence, do not constitute a work for endowment: *Kunees Fatima* v. *Saheba*, **8 W. R. 313.**—Where a Mahomedan settled a portion of his immoveable property in favour of his daughter and her descendants, as also her descendants' descendants, how low soever, and when they no longer existed, then in favour of the poor and needy,—it was *held* that the settlement did not create a valid *wakf*, as there was no dedication of the property solely to the worship of God or to religious or charitable purposes: *Mahomed Hamidulla Khan* v. *Lotful Huq*, **I. L. R. 6 Cal. 744**; **8 C. L. R. 164.**—Where a Mahomedan created a *wakf* of all his property, and appointed his minor grandson *mutawalli*, providing that the property should be managed by the minor's father; and that after payment of certain debts the property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issue,—*held* that notwithstanding the provisions for payment of debts and for maintenance, the *wakf* was valid: *Lutchmiput* v. *Amir Alum*, **I. L. R. 9 Cal. 176**; **12 C. L. R. 22.**

Although the making provisions for the appropriator's family out of property dedicated to religious or charitable purposes, may be consistent with the creation of that property as *wakf*, yet in order to render it *wakf* the property must have been *substantially*, and not merely colourably, dedicated to religious and charitable purposes. Where an instrument purported to dedicate property as *wakf*, and vested it in the members of the grantor's family in succession, to carry on the affairs of the *wakf*, and it did not devote a substantial part of the property to charitable or religious uses at sometime or other—

the uses prescribed involving only an outlay suitable for such a family to make in charity—the gift was held not to be a substantial or *bonâ-fide* dedication of the property as *wakf*. The use of the expression *wakf*, being only to cover arrangements for the benefit of the family and to make their property inalienable, the property was not created *wakf*, nor was it freed from liability to attachment in execution of a decree against one of the grantees. (The Judicial Committee did not determine how far provisions for the grantor's family might form part of a settlement for religious or charitable purposes, and yet not deprive it of its character as establishing *wakf*, but approved of the decision in *Mushurool Huq* v. *Puhraj Ditarey*, **13 W. R. 235**, cited above, where it has been held that the mere charge upon the profits of the estates of certain items which must in the course of time have ceased, being for the benefit of one family, did not render an endowment invalid as a *wakf*) : *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu*, **I. L. R. (P. C.) 17 Cal. 498.** This decision of the Privy Council has so far settled the law regarding family settlements in a deed of *wakf*, that a settlement whose chief object is the benefit of the family, and where the charitable uses are insignificant and very remote, and do not constitute the main objects of the dedication, is entirely void as *wakf*; and it has been followed in all subsequent cases by the High Courts in India.—To constitute valid *wakf*, there must be a dedication in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the income to the family of the appropriator; and *the dedication must not depend upon an uncertain contingency, such as the possible extinction of the wakif's family*: *Rasamaya Dhur* v. *Abul Fata*, **I. L. R. 18 Cal. 399.** This ruling has been dissented from by Mr. Justice Amir Ali in *Meer Mahomed Israil* v. *Sashti Churn Ghosh*, **I. L. R. 19 Cal. 412**, where it has been held that a *wakf* in favour of the settlor's children and kindred in perpetuity, with a reservation of a part or the whole of the income thereof in favour of the settlor himself for his own life, is valid. Though quite in consonance with the spirit of Mahomedan law, the ruling is opposed to the course of decisions by the Indian Courts, and it has not been followed in subsequent cases, as will be found from the following rulings.—Where a *wakif* purported to create a settlement by deed in favour of his family, and in the event of a failure of descendants, in favour of the poor, it was *held* by the majority of the Full Bench, upon the authority of **I. L. R. 17 Cal. 498** cited above, that the instrument did not create a valid *wakf*, there being no substantial dedication to religious and charitable purposes; and that the Lower Appellate Court having found that the deed created a valid endow-

ment to the extent of Rs. 75 per annum only, that charge should be allowed. *Held* by three of the Judges that the course of the decisions should not be disturbed by reference to the texts which may favour the idea that a settlement on the settlor and his descendants in perpetuity is a pious act. Mr. Justice Amir Ali, one of the dissenting Judges, adhering to the principles of Mahomedan law, gave his own judgment quite in accordance with the views of the Mahomedan text-writers, and remarked "that the deed created a valid endowment; that there was a consensus of opinion among lawyers of every school and sect that *wakfs* on children, kindred, or neighbours in perpetuity, are valid. To hold that a *wakf*, the benefaction of which is bestowed wholly or in part on the *wakif's* family and descendants is invalid, would have the effect of abrogating an important branch of the Mahomedan law. A *wakf* is a permanent benefaction for the good of God's creatures. The *wakif* may bestow the usufruct, but not the property, upon whomsoever he chooses, and in any manner whatever; only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist, to prevent their falling into indigence, it is a pious act, even more pious than giving to the general body of the poor." This sound view of the Mahomedan law has not been adopted in our Courts, as the course of decisions has been to negative the validity of settlements in perpetuity on a man's descendants: *Bikani Mia* v. *Shuk Lal*, I. L. R. 20 Cal. 116.—Following the Privy Council decisions in I. L. R. 17 Cal. 498 and I. L. R. 17 Bom. 1, it was held in another P. C. Judgment that an instrument nominally a *wakfnama*, and expressly making a settlement of property in perpetuity on the family of the dedicators, with an ultimate gift for the benefit of the poor upon failure of the descendants of the family, did not create a valid *wakf*; that a gift to the poor might be illusory from the smallness of the amount, or from its uncertainty or remoteness, and that the period when this gift was to take effect was so uncertain and so remote, that the gift was illusory; that the charitable purpose, in order to establish a *wakf*, must be substantial and not illusory; and that provision for the dedicator's family out of the appropriated property may be consistent with the making of a valid *wakf*, where the appropriation is substantially for a pious or charitable purpose; but as family settlement in perpetuity is contrary to Mahomedan law, and as successions of inalienable life-interests are forbidden, such dispositions cannot be rendered legal by the mere addition of the words that they are made as *wakf*, or for the benefit of the poor, where no substantial benefit is

really conferred on the latter: *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur*, I. L. R. 22 Cal. 619.

The decisions of the Allahabad High Court have also been in the same direction as against the validity of settlements in perpetuity upon one's descendants and kindred. In the case of an instrument executed by a *Shiah* Mahomedan, providing for the devolution of his property with the intention apparently of preserving the estate in perpetuity in tact under the headship of some male member of the family, with provision by way of allowances for the other members, and in which there was no express mention of any sort of dedication of the property to charitable purposes,—it was held that such a document could not be construed as creating a *wakf*. It was observed that though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settlor, the dedication to charitable uses being postponed, yet here *there was not even an ultimate dedication of the property to charitable uses*: *Murtaza Bibi* v. *Jumna Bibi*, I. L. R. 13 All. 261. It would seem that if there had been an ultimate dedication to charitable purposes, the instrument would have made a valid deed of *wakf*, notwithstanding its creating a perpetuity. But as the Court followed the decision in I. L. R. 17 Cal. 498, it cannot be so construed. Subsequent decisions of the same Court made the point more clear, and settled the law as in later Calcutta decisions. —The mere creation of a charge for some charitable purposes, on the profits of an estate strictly settled on the family of the settlor in perpetuity, and not dedicated in substance to charitable uses, is not sufficient to constitute a good and valid *wakf*: *Muhammad Munawar* v. *Rasulan Bibi*, I. L. R. 21 All. 329.—In determining whether a disposition of property made by a Mahomedan is or is not a valid *wakf*, the intention of the *wakif* may be interpreted by reference to custom prevailing at the time of its creation; and if there is found to be *a substantial dedication of the property dealt with to charitable uses*, that dedication will constitute a valid *wakf*: *Phul Chand* v. *Akbar*, I. L. R. 19 All. 211. [Property settled in perpetuity on the *wakif's* descendants or kindred, cannot be said to be substantially dedicated to charitable uses, even if there be an ultimate endowment to such uses upon failure of the grantees.]

The earlier decisions of the Bombay High Court favoured the grant of interests in perpetuity upon descendants or kindred, where the ultimate grant was to religious or charitable uses. In *Fatma Bibi* v. *The Advocate-General of Bombay*, I. L. R. 6 Bom. 42, it was observed that if the condition of an ultimate dedication to pious and unfailing purpose be satisfied, a *wakf* is not

rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated. The case of charities 'useful and beneficial' to the community is an exception to the rule against perpetuities. It is for the Courts to pronounce whether any particular object of bounty falls within this class. In order to decide this question, they must in general apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses are allowable and commendable according to Mahomedan law. A trust for the benefit of the poor, for aiding pilgrimages, and marriages, and for the support of wells and temples, is a charity amongst the Mahomedans. The law and opinion of Mahomedans regard such a trust as a charity; and granting there is a charity, the objection to a perpetuity fails according to the principles of the English law. Where the proposed object of the endowment is one which is directly contrary to the public law of the State, the above rule does not apply.—The above ruling has been upheld in a subsequent decision of the same High Court, and in another case the principle was adopted. In *Amrutlal Kalidas* v. *Shaikh Hussein, and others*, **I. L. R. 11 Bom. 492**, the validity of a *wakfnama* was upheld, in which a Mahomedan father executed an instrument purporting to be a *wakfnama* in favour of his heirs and descendants, generation after generation, and in case of their failure, providing for the distribution of the profits among Mahomedan *fakirs* and indigent people. In *Nizamu din* v. *Abdul Gafur*, **I. L. R. 13 Bom. 264**, it was held that a Mahomedan cannot settle his property in *wakf* on his own descendants in perpetuity without making an express provision for its ultimate devolution to a charitable or religious object. In this case, the validity of a *wakfnama*, which created settlements in perpetuity upon the *wakif's* two wives and daughters and their descendants, was denied, as it was solely for the benefit of the settlor's family, and contained no express provision for the ultimate devolution of the property to any religious or charitable object. The settlement upon a class of heirs and their children in perpetuity would not have been a bar to the validity of the deed, if there was an ultimate charitable object.—But this view of the law has been dissented from in the Privy Council judgment on the same case. Following the decision in **I. L. R. 17 Cal. 498**, it has been held that a *wakfnama* to be valid must be a substantial dedication of property to a religious or charitable purpose at some time or other. Where a *wakfna-*

ma purported to make a settlement on heirs, the settlor's intention having been to make the whole estate devolve from one generation to another, without being alienable by them, and without being liable in execution against them,—it was held that the instrument could neither be maintained as establishing a *wakf*, nor as a settlement: *Abdul Gafur* v. *Nizamudin*, I. L. R. (P. C.) 17 Bom. 1.

The decisions of the Madras High Court are also against settlements in perpetuity. Where a Mahomedan lady by instrument conveyed her property to her husband on trust (1) to maintain the settlor and her children out of the income; (2) to hand over the property to the children on their attaining majority; and (3) in the event of the settlor's death without leaving children, to have *Kathom* recited in a mosque, to give food to the mollas who come there for reciting the same, and to get the *moilu* performed; and the settlor reserved to herself and her representatives the option of dealing with the property as a special fund for the maintenance of her children, if any,—it was held, in a suit by the settlor's half-sister to recover her share of the property after the settlor's death without leaving any children, that she was entitled to recover her proportionate share of the property, notwithstanding the provisions of the above instrument: *Pathukutti* v. *Avathalakutti*, 1. L. R. 13 Mad. 66.—Where a Mahomedan, by an instrument in writing, dedicated certain moveable and immoveable property for the upkeep of her husband's tomb, and for the daily, monthly, and annual expenses of the aforesaid mausoleum, as well as for the annual *fateha* ceremonies of the deceased, and after her own death for her annual *fateha* ceremony; and a traveller's inn was erected by the endower of the property as an appurtenance to the tomb, and the ceremonies involved the distribution of charities,—it was held that the instrument was void as a *wakf* as contravening the rule against perpetuity: *Kaleloola Saheb* v. *Nuseeruddeen*, I. L. R. 18 Mad. 201. The provisions for a private mausoleum were distinguished in this case from those for the tomb of a saint, the former not being held to be either for the advancement of religion or for public benefit.

Religious endowments.—Where a *sanad* of the Moghul Emperor granted in inam to a certain person a village and other lands as the means of the subsistence for his children, in order that they may engage themselves in praying for the perpetuity of that Government,—it was held that this grant did not constitute *wakf* or religious endowment, and the property was descendible

according to the ordinary Mahomedan law; and the direction that the donee and his issue were to pray for the perpetuity of that Government meant no more than an inculcation of gratitude for the gift: *Mahomed Ali* v. *Gobar Ali*, I. L. R. 6 Bom. 88.—Where, by a sanad, a gift was made of the income of certain villages, with a specification that one-third of it was for the defrayal of expenses of the servants of a mosque, and light, &c., one-third for the expenses of a madrassa, and the remainder for the maintenance allowance of the *mutawalli*, held that the gift constituted a valid *wakf*: *Jugatmoni* v. *Romjani*, I. L. R. 10 Cal. 533.—Dedication of property for the expenses of an individual's own mausoleum or that of her husband, is not a religious endowment: *Kaleloola* v. *Nuseerudeen*, I. L. R. 18 Mad. 201.—A mosque cannot be dedicated or appropriated exclusively to any particular school or sect of *Sunni* Mahomedans. It is a place where all Mahomedans are entitled to go and perform their devotions as of right: *Ataullah* v. *Asimullah*, I. L. R. 12 All. 494.—The essential conditions requisite to the constitution of a *Masjid* are, (1) that the site must be publicly appropriated to the purpose of a *masjid*; and, (2) that public prayer should be performed in it: *Yakoob* v. *Luchmun*, 6 N. W. P. 80.

§ 211. *Disbursements of the income of wakf property.*—The income of an appropriation shall be expended in the first instance in the repairs of it, such as the repairs of a mansion and the cultivation of land, whether it has been stipulated by the appropriator or not. Then, if nothing else has been distinctly specified by the appropriator, on such things as are most essential to the general purpose of the appropriation. But if any thing else has been specified by him, it will have precedence next after the execution of necessary repairs. Where a mansion has been appropriated by a man for the residence of his child, the repairs are to be made by the person having a right to reside therein; but if he refuse to do so, or he is poor, the Magistrate may let it out and execute the repairs out of the rent, and when the repairs are completed return it to the person entitled to reside in it. But that person cannot be compelled to make the repairs, nor can he let it out on his own authority.

§ 212. Where a man has appropriated his property to the poor and indigent, and has himself subsequently fallen into want, he cannot himself participate in the produce of the property so appropriated. But where the appropriation was first on himself and then upon the poor, he could of course enjoy the profit for his life, whether he becomes rich or poor.

§ 213. If a *wakf* were made in health, and afterwards some of his children or kindred become indigent, then a part of the produce is to be given to them, the nearest in kindred being entitled to receive first, and then the more remote. Thus, the child of his loins should get first, next his child's child, and then the next lower generation.

§214. **Appointment of Mutawalli.**—A trustworthy person should be appointed as *mutawalli* or superintendent for the governance of *wakf* property, who may be able to act by himself or by a deputy. Both males and females, and even blind persons can be appointed *mutawallis*. The appropriator may appoint himself or any of his children the *mutawalli* of the *wakf* created by him. If a man makes a *wakf* without appointing a *mutawalli*, the governance of the *wakf* belongs to himself; but according to Muhammad, the *wakf* is not valid, for the delivery of possession to a *mutawalli* is a necessary condition according to him. A minor cannot be appointed a *mutawalli*. If an adult and a minor be entrusted with the governance of a *wakf*, the Judge should appoint a competent man in the place of the minor. The same person can be appointed to be *mutawalli* during the life-time of the appropriator, as also after his death. But if the appropriator does not distinctly mention that the *mutawalli* appointed by him will also act as such after his death, the appointment will not continue after his death. Where no *mutawalli* has been appointed, and the appropriator appoints an executor before his death, such executor will also be the administrator of

his *wakf*. But where a *mutawalli* has been validly appointed, the executor will have nothing to do with the *wakf*, unless the appropriator has distinctly revoked every other appointment of executor by him. In other words, where no *mutawalli* has been appointed during the appropriator's life-time, or there has been an appointment without a direct provision for the *mutawalli* acting after his death, the appropriator's executor is also the administrator of the *wakf*. Where a *mutawalli* is invested with power to act after the appropriator's death, and the latter did not revoke such appointment, his appointing an executor will not discharge the former *mutawalli*.

§ 215. If the appropriator appointed two persons to be the executors of his *wakf* after his death, and one of them died after making his companion the executor of the *wakf*, the surviving executor can lawfully manage the whole of the *wakf* by himself; and if, of two such executors, one of them refuses to act, the Judge shall appoint another in his place, or he shall entrust the entire management to the person who accepted the appointment. If the appropriator makes it a condition that the executor of his *wakf* shall not be competent to appoint another, such condition is valid; otherwise, a *mutawalli* may in his death-bed make over his office to another. If the *mutawalli* dies before the appropriator, the appointment of a new *mutawalli* would rest with the appropriator; and if the appropriator dies leaving an executor, the appointment rests with such executor. Where there is no *mutawalli*, and the appropriator is dead, and has not left an executor, the appointment is with the Judge. When a person fit to be a *mutawalli* is found among the offspring, or in the family, of the appropriator, a stranger should not be appointed by the Judge. But when a fit person cannot be found and a stranger is appointed, and afterwards a fit person can be found in the family, he shall obtain the office. Persons attending a mosque

in their neighbourhood for saying prayers, can appoint a man of their own choice as *mutawalli*, for the welfare of the mosque, without asking permission from the Judge.

§ 216. *Powers and duties of a mutawalli*:—

(1) He can commit his office to another, while in his death-bed, as an executor can appoint another in his office;

(2) a *mutawalli* appointed as a general trustee can appoint a successor during life and while in good health;

(3) a lease granted by a *mutawalli* for more than one year, of a mansion appropriated for the poor, is unlawful;

(4) a lease granted by a *mutawalli*, or by the appropriator himself, or by the Judge, is not cancelled by the death of the grantor, or by the dismissal of the Judge from his office;

(5) a lease of land may be lawfully given for three years, unless it would be necessary to annul it for the benefit of the *wakf*; a lease of any other property is valid for one year only, unless the benefit of the *wakf* requires it to be continued. A long lease granted by the appropriator may be cancelled by the Judge, if he apprehends injury to the substance of the *wakf* property;

(6) a *wakf* land should be let out for the rent of similar property. If the *mutawalli* has let it at an inadequate rent, he is liable for the rent of similar property;

(7) a *mutawalli* occupying *wakf* land under invalid lease, is liable for the rent of similar property. But he may cultivate the land himself, hire labourers, and pay them out of the income of the *wakf*, dig reservoirs of water or do any other thing beneficial to the *wakf*;

(8) the *mutawalli* may, with the permission of the Judge, incur debts for paying land-tax, for repairs, for the purchase of seed, and other beneficial purposes;

(9) a *mutawalli* is not to be removed by the Judge except for manifest malversation ;

(10) an appropriator retaining in his own hands the governance of the *wakf* may be deprived of the charge, if he is not trustworthy, or if he neglects the performance of his duty, and the Judge may appoint another as *mutawalli* in his place ;

(11) the Judge may remove a *mutawalli* appointed by the appropriator, if it be for the advantage of the *wakf*.

Case-law.

Mutawalli.—The fact of a person being a *Shiah* does not disqualify him for the supervision of a *wakf* made by a *Sunni* : *Doyal Chand* v. *Keramut Ali*, **16 W. R. 116.**—A woman is capable of undertaking the office of *mutawalli*; the office is a personal trust and may not be transferred, nor the endowed property conveyed, to any person whom the acting *mutawalli* may select : *Wahid Ali* v. *Ashruff Hossain*, **I. L. R. 8 Cal. 732 ; 10 C. L. R. 529.**—A woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications : *Hussain Bibee* v. *Hussain Sherif*, **4 Mad. 23.**—A woman is not competent to perform the duties of *mujavar* of a *durga*, which are not of a secular nature : *Mujavar Ibrambibi* v. *Mujavar Hussain*, **I. L. R. 3 Mad. 95.**—The office of *suffada-nashin* is descendible to persons in the male line, and those descended from females are regarded as not belonging to the family : *Ahmud Hossein* v. *Mohioodeen*, **16 W. R. 193.**—The rule of Mahomedan law that the remuneration of a *mutawalli* should not exceed one-tenth of the income, relates to such *mutawallis* as have no beneficial interest in the usufruct of the endowed properties, or are strangers to the endowment : *Mohiuddin* v. *Sayiduddin*, **I. L. R. 20 Cal. 810.**

Succession to management.—An appointment as manager, by the trustee for the time being of a Mahomedan religious endowment, was held not effectual beyond the incumbency of the nominator : *Moheeooddeen* v. *Elahee Buksh*, **16 W. R. 277.**—It is essential that the superior or manager of a Mahomedan religious endowment should have certain qualifications, which would not be always insured by succession by descent ; and the theory of hereditary succession is most unlikely and out of the question : *Syedun* v. *Allah Ahmed*, **W. R., 1864, 327.**—In the case of religious and charitable endowments, the deter-

mination of the question of succession depends upon the rules which the founder of the endowment may have established, whether such rules are defined by writing or are to be inferred from evidence of usage: *Gulam Rahumtulla* v. *Mohommad Akbar*, 8 Mad. 68.—The founder of a *wakf* has a right to reserve the right of management to himself or to appoint another for the purpose, but when he has specified the class from amongst which the manager is to be selected, he cannot afterwards name a person as manager not answering the proper description: *Advocate-General* v. *Fatima*, 9 Bom. 19.—Since the passing of Act XX. of 1863, a *mutawalli* cannot be considered as an officer appointed by the Government: *Lall Mahomed* v. *Lalla Brij Kishore*, 17 W. R. 430.

Misconduct of mutawalli.—If a *mutawalli* fail to act up to the directions of an endowment, the grant does not necessarily revert to the heirs of the grantee: *Reasut Ali* v. *Abbott*, 12 W. R. 132.—A valid *wakf* cannot be affected by misconduct of a *mutawalli*: *Doyal Chund* v. *Keramut Ali*, 16 W. R. 116.—The misappropriation of *wakf* funds might form the subject of a suit to compel the *mutawalli* to do his duty, but could not alter the essential nature of his trust: *Asheerooddeen* v. *Drobo Moyee*, 25 W. R. 557.—Where it was proved that a *mutawalli* has been guilty of waste, he was ordered by the High Court to file every six months a true and complete account of his income, expenditure, and dealings with the endowed property: *Imdad Hossein* v. *Mahomed Ali*, 23 W. R. 150.—If a superintendent of an endowment misconducts himself, the Mahomedan law admits of his removal, and this is sufficient to protect the objects for which the trust was created: *Hidaitoonnissa* v. *Afsul*, 2 N.-W. P. 420.—But the removal of a *mutawalli* for mismanagement, is not applicable to the case of a trustee who has a hereditary proprietary right vested in him. It is essential that such power of removal be specially reserved by the donor at the time of the endowment: *Gulam Hussain* v. *Aji Ajam*, 4 Mad. 44.—In a suit to recover certain property as *wakf* on the ground of the former *mutawallis* having misconducted themselves by selling to defendants the endowed property, it was held as the plaintiff had shewn no title to partake of the benefit of the endowment, he had no right to recover possession, and that the utmost he could ask for was to have the *mutawalli* removed for misconduct, and a new *mutawalli* appointed, provided the circumstances would justify the Court in doing so: *Bhurruck Chundra* v. *Golam Shurruf*, 10 W. R. 458.

Incidents of wakf property.—A provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donor is not valid: *Fatma-*

bibi v. *Advocate-General of Bombay*, I. L. R. 6 Bom. 42.—A valid *wakf* cannot be alienated: *Doyal Chund* v. *Keramut Ali*, 16 W. R. 116.—The endowed property cannot be conveyed: *Wahid Ali* v. *Ashruff Hossain*, I. L. R. 8 Cal. 732.—Land granted for the endowment of a *khalibi*, or other religious office, cannot be claimed by right of inheritance: *Jaafar* v. *Aji*, 2 Mad. 19.—The trustees of an endowment cannot create a valid *mirasi* tenure at a fixed rent by granting a lease of any portion of the *wakf* property: *Soojat Ali* v. *Zumeerooddeen*, 5 W. R. 158.—Where endowed property devolves to the appropriator's widow as trustee, it cannot be sold in satisfaction of a claim against the appropriator: *Fegredo* v. *Mahomed Mudessur*, 15 W. R. 75.—If the deed of trust gives the *mutawalli* the power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not: *Golam Ali* v. *Sowlutoonnissa*, W. R., 1864, 242.—Where the whole of the profits of land are not devoted to religious purposes, but the land is a heritable property burdened with a trust, such as the keeping up of a saint's tomb, it may be alienated subject to the trust: *Fultoo Bibee* v. *Bhurrut Lall*, 10 W. R. 299.—The fact that a mortgage is in existence over property at the time when it is appropriated, does not invalidate the endowment under Mahomedan law. It is an endowment subject to a mortgage: *Hajra Begum* v. *Khaja Hossein*, 4 B. L. R. (A. C.) 86; 12 W. R. 498.—Reversing the decision in *6 W. R. (P. C.) 3; 2 Moo. I. A. 390*, it has been held that the ordinary rules of limitation are applicable to a *mutawalli* suing to recover possession of endowed property: *Lall Mahomed* v. *Lalla Brij Kishore*, 17 W. R. 430.

§217. **Shiah School**:—According to this school, *wakf* is to tie up a thing itself and to leave its usufruct free. A *wakf* becomes obligatory by giving delivery of possession. The subject of the *wakf* must be something capable of yielding benefit without being itself consumed, and also capable of being delivered. The *wakf* of an indeterminate thing is not valid for want of identity, and the *wakf* of a profit is not valid by reason of non-stability. The *wakf* of a trained dog or cat is valid, for they are capable of yielding benefit. A *wakf* of works of general utility, such as, bridges and mosques, is valid. But a *wakf* productive of sin, is not valid; and if the object of the *wakf* is not mentioned, it would

be void. If a person make a *wakf* in favour of himself, it would not be valid; but, a person who makes a *wakf* in favour of the poor, would be entitled to participate in the profits, if he himself becomes a *fakir*.

§218. The conditions of a valid *wakf*, according to this school, are:—(1) it must be perpetual; (2) it must be unconditional; (3) it must be entirely cut off from the appropriator, and possession must be given of the thing appropriated. If there is a condition, such as the property reverting to the appropriator in case of his necessity, the condition is valid, and the *wakf* void. If the appropriator die without giving possession, the property goes to his heirs.

Case-law.

To constitute a valid *wakf*, or grant made for charitable and religious purposes, it must, according to the doctrine of the Shias, be absolute and unconditional, and possession must be given of the thing granted. Where a Mahomedan lady executed a deed conveying her property on trust for religious purposes, reserving to herself for life two-thirds of the income derivable from the property, and only making an absolute and unconditional grant of the rest for the purposes of the trust, it was held that, under the Mahomedan law, the deed must be considered invalid with respect to that portion of the income reserved by the grantor to herself for life; but, as to the rest, that the deed operated as a good and valid grant: *Kalub* v. *Mehrum*, **4 N.-W. P. 155**. See also **I. L. R. 14 All. 429**.—According to the Shiah doctrine, the appropriator of property to charitable or other uses, who has transferred the proprietary right therein to a trustee, cannot at his pleasure take it back from the trustee whom he has constituted the owner, and give it to another person, unless, at the time of creating the trust, he has reserved to himself the right to do so in express terms: *Hidaitoonnissa* v. *Afzul*, **2 N.-W. P. 420**.

CHAPTER XI.—Pre-emption.

§219. **Shufa**, or the right of pre-emption, is the right to take possession of property sold to another by paying a price similar to that settled or paid by the purchaser. The person entitled to claim the right is called the *Shafi*, or the pre-emptor.

§220. **Its nature.**—The right of pre-emption applies only to immoveable property, whether divisible or not. It does not apply to moveable property. The right of pre-emption is occasioned by the junction of the property of the *Shafi*, with the subject of the sale.

§221. The right of pre-emption takes effect with regard to property sold, or parted with by any other mode which is equivalent to sale. Accordingly, the right does not extend to property passed by inheritance, will, or gift without consideration. When property is parted with by a gift for a consideration, and the consideration is expressly stipulated in the deed of gift, the right of pre-emption will be established. The transferee must come into possession before the right of *Shufa* can be admitted. Where property is exchanged for property, the right of pre-emption takes place.

§222. *Shufa* cannot take effect with regard to property transferred by a grant without consideration, nor with regard to property assigned as a dower, or compensation for *Khula*, or as hire or reward. But where the grant is made for a consideration expressly stipulated, or where the grant is made on condition of return, it becomes subject to the right of pre-emption.

§223. The *Fatwa Alamgiri* defines the following as among the conditions of *Shufa* :—

(1) There must be a contract of exchange, that is, a sale or something that comes into the place of sale, otherwise there is no right of pre-emption. So that, the right does not arise out of

gift, charity, inheritance, or bequest. But if the gift be a *hiba-ba-shart-ul-iwaz*, or with a condition that something shall be given in exchange for it, and mutual possession is taken, the right arises. If possession is taken by one of the parties and not by the other, there is no right of pre-emption according to 'our three masters'. And if a mansion is given without any condition for an exchange, but the donee gives another mansion in exchange for it, there is no right of pre-emption with regard to either. But pre-emption is due on a mansion which is the exchange for a composition, whether the composition be after an acknowledgment or a denial of the claim, or silence has been observed with regard to it; and it is due on the mansion compounded for, when the composition is after an acknowledgment of the claim, though it is not due if the composition have taken place after a denial of the claim:

(2) There must be an exchange of property for property:

(3) The thing sold must be *akar*, or what comes within the meaning of it, whether the *akar* (immoveable property) be divisible or indivisible, as a bath, or well, or a small house.

§224. **Invalid sale.**—Says the *Hidaya*, "the privilege of *Shufa* cannot take place regarding a house transferred by an invalid sale, either before or after the purchaser obtaining possession of it; for, before the purchaser obtains possession, the house belongs as usual to the seller, and his right of property is not extinguished; and after he has obtained possession there is still a probability that the bargain may be dissolved, since the law admits the dissolution of a sale in a case of invalidity in order to obviate such invalidity, an effect which could not be produced if the privilege of *Shufa* were allowed. If the house adjacent to one which has been transferred by an invalid sale be sold whilst the one so transferred is still in the possession of the seller, he (the seller of the house by invalid sale) is still the *Shafi*

of the adjacent house, because of the continuance of his right in the other." But if there the seller's right of ownership is entirely cut off and is established in the purchaser, the right of pre-emption is no longer stopped.

§225. Where a house or trees are sold without the ground on which they stand, there can be no right of pre-emption.

● Case-law.

Application of the law.—In the case of pre-emption to which the Mahomedan law applies, the rules of that law are to be administered in their entirety where they are not inconsistent with the principles of justice, equity, and good conscience : *Amir Hasan* v. *Rahim Bakhsh*, I. L. R. 19 All. 466.

Transfer of Property Act, 1882.—Held by the Full Bench that a transfer of immoveable property exceeding in value Rs. 100, accompanied by payment of price and delivery of possession, but without the execution of a sale-deed, was a complete sale under the Mahomedan law, and that the right of pre-emption did arise with reference to such sale, as the Mahomedan law was to be applied in deciding whether or not a right of pre-emption arose : *Begum* v. *Muhammad Yakub*, I. L. R. 16 All. 344.

The nature of the right of pre-emption.—The right of pre-emption is not one which attaches to property, and the obligation it implies may be limited to the residents of a district or to a family, or to any particular class of persons, it being for the claimant in each case to show that it attaches to the defendant : *Akhoy Ram* v. *Ram Kant*, 15 W. R. 223.—The right of pre-emption is founded on the supposed necessities of a Mahomedan family arising out of their minute sub-division of ancestral property ; and, as the result of its exercise is generally adverse to public interest, it will not be recognized by the High Court beyond the limits to which those necessities have been judicially decided to extend : *Nusrut Reza* v. *Umbul Khyr*, 8 W. R. 309.—The right of pre-emption is not a matter of title to property, but is rather a right to the benefit of a contract ; and when a claim is advanced on such a right, it must be shown that the defendant is bound to concede the claim either by law or by some custom to which the class of which he is a member is subject, on grounds of justice, equity, and good conscience : *Mohesh Lall* v. *Christian*, 8 W. R. 446.—The right arises from a rule of law by which the owner of the land is bound ; it exists no longer if there ceases to be an owner who is bound by the

law either as a Mahomedan or by custom: *Byjnath* v. *Kopilmon Singh*, **24 W. R. 96.**

Conditions of pre-emption.—The right of pre-emption applies to sales only: *Ram Golam* v. *Nursing Sahoy*, **25 W. R. 43**; to cases in which the sale has been actually completed by the extinction of the vendor's rights: *Ladun* v. *Bhyro Ram*, **8 W. R. 255.**—The right of pre-emption may be exercised upon a resale of the property, although it has not been set up in respect of a previous sale of the same property, which sale has fallen through: *Busunt Koomaree* v. *Kali Persad*, **Marsh. 11**; **1 Hay 32**—When once the right is allowed and exercised, it cannot be disputed at subsequent occasions of the sale; held further that neither manhood, puberty, justice, or respectability of character, are necessary conditions of pre-emption under the Mahomedan law: *Punna* v. *Juggur Nath*, **1 Agra 236.**—Where a husband transferred certain property to his wife *in consideration of a certain sum which was due by him to her as dower, held* that such transfer was a sale within the meaning of the Mahomedan law of pre-emption, and gave rise to the right of pre-emption: *Fida Ali* v. *Muzaffar*, **I. L. R. 5 All. 65.**—If the property had been transferred **as dower** (and *not in consideration of dower*, nor *as an exchange for dower*), it would not have been subject to pre-emption.

Where pre-emption does not arise.—Where there has not been a real *bonâ-fide* sale according to the Mahomedan law: *Mohno Bibee* v. *Juggurnath*, **2 W. R. 78.**—Where the sale has not been completed, and the seller's right has not been completely extinguished: *Ladun* v. *Bhyro*, **8 W. R. 255**; see also *Soondur Kooer* v. *Lalla Rughoobur*, **10 W. R. 246**; and *Buksha Ali* v. *Tofee Ali*, **20 W. R. 216.**—Where there is a transfer without money or other consideration, and which is in fact a gift: *Ameer Ali* v. *Pearun*, **W. R. 1864, 239.**—When either the buyer or the seller repudiates the sale: *Ojheeonissa* v. *Rustum Ali*, **W. R. 1864, 219.**—Under the Mahomedan law, the right of pre-emption cannot be enforced with reference to *leases in perpetuity*, such as *mokurari* leases, however small the reserved rent may be, as such leases are not sales: *Ram Golam Singh* v. *Nursing Sahoy*, **25 W. R. 43**; nor where a *mourasi* lease is granted by a co-proprietor: *Dewanutulla* v. *Kazem*, **I. L. R. 15 Cal. 184.**—The right cannot be exercised by a judgment-creditor in respect of the sale of property in execution of his decree: *Nusmoodeen* v. *Kanye Jha*, **Marsh. 555**; **2 Hay 651.**—The law of pre-emption does not apply to cases where property is sold by public auction at a sale in execution of a decree, as the neighbour or partner has the same oppor-

tunity to bid for the property as other persons present in Court: *Abdul Jabel* v. *Khelat Chandra Ghose*, 1 B. L. R. (A.C.) 105; 10 W. R. 165.—But see the decision in *Imamooddeen* v. *Abdool*, 5 N.-W. P. 170, wherein it was *held* that when part of an estate is sold in execution of a decree, a co-sharer in the estate, being a partner in the thing actually sold, is entitled to the right of pre-emption.—There is no right of pre-emption in favour of a mere tenant upon the land: *Gooman Singh* v. *Tripool Singh*, 8 W. R. 437.—Mere possession does not give any right of pre-emption. There must be ownership in the contiguous land, the onus of proof lying on the pre-emptor: *Beharee Ram* v. *Shoobhudra*, 9 W. R. 455.—The owner of land is not entitled by Mahomedan law to the pre-emption of a house standing thereon, where his property in the land is wholly separate and distinct from the property in the house which belongs to another person with whom the owner has nothing in common: *Pershadi Lal* v. *Irshad Ali*, 2 N.-W. P. 100.—Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, it was *held* that a right of pre-emption attached to the house: *Zahur* v. *Nur Ali*, I. L. R. 2 All. 99.

In the cases of mortgages, when right accrues.—Where the mortgaged property had not passed from the mortgagor to the mortgagee, the right of pre-emption was held not to have arisen, as the ownership being still with the mortgagor, he could redeem his property within a stipulated period: *Bhowanee Pershad* v. *Purshunno Singh*, 11 W. R. 282.—The right of pre-emption does not arise until the equity of redemption is finally foreclosed: *Gurdial* v. *Teknarayan*, B. L. R. Sup. Vol. 166; 2 W. R. 215.—A suit for pre-emption is maintenable on foreclosure, after the expiry of the year of grace, but before decree for possession had been obtained by mortgagee: *Tara Kunwar* v. *Mangri Meah*, 6 B. L. R. (Ap.) 114.—On the foreclosure of a mortgage under the Transfer of Property Act, 1882, the right to sue for pre-emption accrues, not from the date fixed in the decree under s. 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 s. 87 of the said Act: *Anwer-ul-Huq* v. *Jwala Prasad*, I. L. R. 20 All. 358.

Applicability of the right to persons other than Mahomedans, and local custom.—Without proof of prescriptive usage and ocal custom, a Mahomedan pre-emptor cannot enforce his right against a Hindu defendant: *Sheraj Ali* v. *Ramjan Bibee*, 8 W. R. 204.—A Hindu

purchaser is not bound by the Mahomedan law of pre-emption in favour of a Mahomedan co-partner, although he purchased from one of several co-parceners; nor is he bound by that law on the ground of vicinage. A right of pre-emption is not binding upon the Court, nor on any purchaser other than a Mahomedan: *Kudratulla* v. *Mahini Mohun Shaha*, 4 B. L. R. (F. B.) 134; 13 W. R. (F. B.) 21. See also, *Poorno Singh* v. *Hurry Churn*, 10 B. L. R. 117; 18 W. R. 440, wherein the vendor of certain land situate in Cachar was a European, and the Court held that there was no right of pre-emption as the vendor was not subject to the rule of law. In *Moti Chand* v. *Mahomed Hossein*, 7 N. W. P. 147, the Court held that pre-emption under the Mahomedan law cannot be claimed against a Hindu purchaser. But see the following Full Bench decision, wherein the Court dissented from the view taken by the Calcutta High Court in *Kudratulla* v. *Mahini Mohun Shaha* cited above.—Where the pre-emptor and the vendor are Mahomedans, and the vendee a non-Mahomedan, the Mahomedan law of pre-emption is applicable in advertence to the terms of s. 24 of the Bengal Civil Courts Act (VI. of 1871): *Gobind Dayal* v. *Inayatullah*, I. L. R. 7 All. 775.

Custom.—A solitary case or two is not sufficient to prove the custom of pre-emption in a locality where it is not binding upon the parties by positive law: *Benarsee Doss* v. *Phool Chand*, 1 Agra 243.—The custom of pre-emption has been recognized among Hindus in the province of Behar: *Joy Koer* v. *Suroop Narain*, W. R. 1864, 259.—Recognized among Hindus in Behar and some other provinces of Western India. In districts, where its existence has not been judicially noticed, the custom will be a matter to be proved; such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown. The Court, may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption; but the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in Mahomedan law: *Fakir Rawot* v. *Emambaksh*, B. L. R. Sup. Vol. 35; W. R. (F. B.) 143.—Where the custom of pre-emption prevails among Hindus, it does not necessarily follow that the pre-emptor must fulfil all the conditions imposed by the Mahomedan law. It should be determined whether under the custom in vogue it is necessary to fulfil those conditions: *Jai Kuar* v. *Heera Lal*, 7 N. W. P. 1. The existence of the custom among Christians in Bhagalpur must be proved on the same principle as has been applied to Hindus in Behar: *Moheshee Lall*

v. *Christian*, 6 W. R. 250.—The existence of the custom is recognized among the Hindus of Gujarat: *Gordhandas* v. *Prankor*, 6 Bom. (A. C.) 263.—The Mahomedan doctrine of pre-emption is not law in the Madras Presidency: *Ibrahim* v. *Muni Mir*, 6 Mad. 26.—Nor in Sylhet: *Jameelah* v. *Pagul Ram*, 1 W. R. 251.—It is doubtful whether the custom prevails as between Hindus in Jessore: *Madhub Chunder* v. *Tamee Bewah*, 5 W. R. 279. Or among the Hindus of Chittagong: *Inder Narain* v. *Mahomad Nazeer-ooddeen*, 1 W. R. 234. Or in Tipperah: *Dewan Munar Ali* v. *Ashurooddeen*, 5 W. R. 270.—In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible evidence to prove its existence: *Gurdayal* v. *Jhandu*, I. L. R. 10 All. 585.

§226. The pre-emptor cannot take possession of the property claimed by him except by the voluntary transfer of the purchaser or by a decree of the Court.

§227. If there are several persons entitled to claim the right of pre-emption, and if one of them be absent, those present can prefer the right and obtain judgment. If the absentee returns he can have his share adjudicated to him.

§228. *Who can exercise the right?*—The privilege of *Shufa* belongs, *first*, to a *sharik* or co-sharer in the property sold; *secondly*, to a *khalit* or a sharer in the appendages, that is, to one having a prescriptive right, such as an easement over the property sold; and *thirdly*, to a neighbour. These persons may claim the right in the order enumerated. So that, where a co-sharer is the claimant, the second or third cannot exercise the right. Of neighbours one who is closer than another neighbour, has the preferable right. But, if the person entitled to claim the right in the first instance, relinquish his right, then the person next in order would be entitled to prefer his claim. Where there are several persons equally entitled to claim the right, it is to be decreed between them in proportion of their several rights.

§229. The right of pre-emption may be claimed by all description of persons, no distinction being made on account of difference of religion.

§230. The right of pre-emption if once relinquished will not revive again.

Case-law.

The right of pre-emption belongs in the first place to a partner in the property sold, secondly, to a participator in its appendages, and, thirdly, to a neighbour. The right of support is not an appendage to property, but is merely included in the incident of neighbourhood. Where there were two houses adjoining the house in dispute, one of them being subject to the easement of support in favour of the house in dispute, and the other adjoining house was subject to the easement of receiving and carrying off the rain-water falling from the roof of the disputed house,—it was *held* that the owner of the latter house (which was the servient tenement) was a "*participator in the appendages*" of the disputed house, and as such had a preferential right to purchase the same, the owner of the other adjoining house (which was subject to the easement of support) being held to be a mere neighbour: *Ranchoddas* v. *Jugaldas*, I. L. R. 24 Bom. 414.—A share-holder in the property sold has, according to Mahomedan law, the first or strongest right of pre-emption: *Gopal Sahi* v. *Ojoodhea*, 2 W. R. 47.—For the establishment of the right of pre-emption by a sharer, it is not necessary that the property sold should be actually separated or defined: *Gobind Chunder* v. *Raj Kishore*, 14 W. R. 365.—The term *sharik* cannot be restricted to cases in which the parties enjoy the properties jointly: *Gureebollah* v. *Kebul Lall Mitter*, 13 W. R. 124. But see the ruling in *Mahadeo Singh* v. *Zitannissa*, 7 B. L. R. 45 (note); 11 W. R. 169, wherein it was held that the proprietor of a divided one-anna share in a four-anna share of an estate is not entitled to a right of pre-emption as a *Shafi Khalit* in the remaining three-anna share.—Where the plaintiff claimed pre-emption in the position of a co-partner in the property to be sold, notwithstanding a private separation having taken place between the shareholders, inasmuch as he was still liable for arrears of Government revenue, and might still apply for a public *batwara*, it was *held* that, as plaintiff had divided off his own share and made himself in every respect independent of his copartners so far as lay in his power to do so, he was not entitled to the right: *Byj Nath Singh* v. *Dooly*

Mahtoon, 11 W. R. 215.—A private partition, though not sanctioned by official authority, but if it be full and final as among the parties to it, will have the same effect on the right of pre-emption as the most perfect partition: *Gopal Sahi* v. *Ojoodhea*, 2 W. R. 47.—A co-sharer forfeits his right by joining an outsider with himself in the purchase: *Saligram* v. *Raghubardyal*, I. L. R. 15 Cal. 224.

Plurality of co-sharers.—Under the Sunni law, the right of pre-emption may be exercised by one or more of a plurality of co-sharers: *Nundo Pershad* v. *Gopal Thakur*, I. L. R. 10 Cal. 1008.—Where there is a plurality of persons entitled to the privilege of pre-emption, the right of all is equal without reference to the extent of their shares in the property: *Moharaj Singh* v. *Lalla Bheechuk Lal*, 3 W. R. 71.

Preferential right of several kinds of pre-emptors.—A sharer in the appendages has not an equal right with a sharer in the body of the estate: *Golam Ali* v. *Agurjit Roy*, 17 W. R. 343.—Where the word *Khalit* is improperly used in a pre-emption suit to designate a *sharik* or partner in the substance of the thing, and it is not clear whether he claims as the one or the other, it may be shown by express words, or it may be inferred from the written statement: *Lala Prag Dutt* v. *Bandi Hossein*, 7 B. L. R. 42.—A co-parcener has a higher right than a neighbour: *Hur Dyal* v. *Heera Lall*, 16 W. R. 107. But one of two joint sharers has no preferential title in his capacity of neighbour, but is equally entitled with his co-sharer to the privilege of pre-emption, without regard to the extent of their shares: *Roshun* v. *Mahomed Kuleem*, 7 W. R. 150.—According to Mahomedan law, the owner of the land, through which the land claimed in pre-emption receives irrigation, has a preferential right to purchase rather than a mere neighbour: *Chand Khan* v. *Naimat Khan*, 3 B. L. R. (A. C.) 296; 12 W. R. 162.—There can be no pre-emption by reason of the common enjoyment of a right of way, unless the road be a private road, and not a thoroughfare. The sharers in a right of way have an equal right of pre-emption, although one of them may be a contiguous neighbour: *Karim Bakhsh* v. *Khuda Bakhsh*, I. L. R. 16 All. 247.

Pre-emption on sale of villages and large estates.—In the sale of villages or large estates, a partner has a right of pre-emption, but a neighbour cannot claim such a right on the ground of vicinage: *Mahomed Hossein* v. *Mohsin Ali*, 6 B. L. R. 41; 14 W. R. (F. B.) 1. See also, *Jahangeer Buksh* v. *Bhickaree Lall*, 11. W. R. 71.—A claim for pre-emption on the ground of

vicinage alone, will not lie in the case of large estates: *Ejnash Kooer* v. *Amjud Ally*, 2 W. R. 261. Pre-emption extends to agricultural estates, and is not merely confined to urban properties or small plots. Where there are several properties to which a common appurtenance in the shape of an undivided plot of land, a few trees and tanks, is attached, partners in the appurtenance can claim pre-emption in respect of the properties: *Karim Buksh* v. *Kamr-uddin*, 6 N.-W. P. 377.—A right of pre-emption attaches to the sale of the share of a zemindari in the case of a co-sharer, though it may not attach on the ground of vicinage: *Akhoy Ram* v. *Ram Kant*, 15 W. R. 223.

Pre-emption on the ground of vicinage.—The Mahomedan law of pre-emption on the score of vicinage applies only to houses or small plots of land, and not to large estates or to a claim based on partnership when it is in proof that a separation of the estate has been effected: *Chowdhry Joogul Kishore* v. *Poocha Singh*, 8 W. R. 413.—There can be no pre-emption on the ground of vicinage alone in the case of large estates; but only when houses or small holdings of land make the owners such near neighbours as to give a claim on the ground of convenience and mutual service: *Ejnash Kooer* v. *Amjud Ally*, 2 W. R. 261.—Is limited to parcels of land and houses, and does not extend to the purchase of an entire estate, even though it be entirely surrounded by the lands of the claimant: *Abdul Azim* v. *Khondker Hameed Ali*, 2 B. L. R. (A. C.) 63; 10 W. R. 356.—Where two persons have an equal right of pre-emption by reason of vicinage, the property is to be decreed to them in halves, on payment of their respective moieties of the purchase-money: *Khem Kurun* v. *Seeta Ram*, 2 N.-W. P. 257.—Where an estate, originally one, has been divided into two *mahals*, no right of pre-emption will arise on behalf of one of the *mahals* in respect of the other, on the ground of vicinage, nor even if certain appurtenances to the original *mahal* are still enjoyed in common by the owners of the separated *mahals*: *Abdul Rahim* v. *Kharag Singh*, I. L. R. 15 All. 104.

Where a coparcener is the purchaser.—There is no rule of Mahomedan law giving one coparcener a right of pre-emption where another coparcener is the purchaser: *Lalla Nowbut Lall* v. *Lalla Jewan Lall*, I. L. R. 4 Cal. 831; 2 C. L. R. 319; *Moheshee Lall* v. *Christian*, 6 W. R. 250; nor where the purchaser is a neighbour: *Teeka Dharee* v. *Mohur Singh*, 7 W. R. 260. These rulings have been dissented from in *Amir Hasan* v. *Rahim Baksh*, I. L. R. 19 All. 466, where it was held that third persons have a

claim to pre-emption where the vendee is also a person who would have a similar claim were the sale to a stranger.

But if a co-sharer associates a stranger with him in the purchase of a share then another co-sharer will be entitled to pre-empt the whole of the property sold: *Harjas* v. *Kanhya*, I. L. R. 7 All. 118.

§231. *When the right takes effect.*—Pre-emption does not operate until the sale is conclusive. If the seller sold the property reserving an option, the right will not operate so long as the option is not extinct. But if the purchaser buys under an option, the right would take effect without delay.

Pre-emption will not take place until a regular demand has been made in the presence of witnesses.

§232. *How the right is to be claimed.*—The person claiming the right of pre-emption should declare his intention of purchasing the property, immediately on hearing of the sale. Delay in asserting his claim, invalidates the pre-emptor's right. Such claim of purchasing by right of pre-emption should immediately be asserted (1) by making immediate demand; (2) by a demand invoking witnesses, in the presence of the purchaser, or of the seller, or on the premises; and (3) by regular suit. The first demand is called the *Talab-i-mowasabat* (immediate demand), and is to be made the moment the pre-emptor is apprized of the sale being concluded. The second demand is called the *Talab-i-istihad* (demand with invocation of witnesses), and is especially necessary.

Case-law.

Necessity of preliminary ceremonies.—Strict proof is necessary of the performance of the preliminaries: *Hosseinee* v. *Lallun*, W. R. 1864, 117.—The right of pre-emption is a right weak in its nature. Where such right is claimed under the Mahomedan law, it should never be enforced except when all the formalities prescribed by that law have received strict compliance: *Ali Muhammad* v. *Taj Muhammad*, I. L. R. 1 All. 283.

It is essential that the ceremony of *talab-i-mowasabat*, or immediate demand, should be properly performed: *Jarfan Khan* v. *Jabbar Miah*, I. L. R. 10 Cal. 383.—As also, the *talab-i-ishtahad*, or the demand with invocation of witnesses, must be shown to have been made as soon as possible: *Nuraddin* v. *Asgar Ali*, 12 C. L. R. 312.—The *talab-i-ishtahad* must be performed in the presence of the person in possession of the lands, whether it be the vendor or the purchaser: *Chamroo* v. *Puhlwan*, 16 W. R. 3; or, it may be performed in the presence of the purchaser only, though he has not yet obtained possession: *Janger Mahomed* v. *Mahomed Arjad*, I. L. R. 5 Cal. 509; 5 C. L. R. 370; to the same effect, see also, *Ali Muhammad Khan* v. *Muhammad Said Husain*, I. L. R. 18 All. 309. Or, on the land: *Golakram* v. *Brindaban*, 6 B. L. R. 165; 14 W. R. 265.—Where a pre-emptor made the preliminary demand in the presence of witnesses, but when doing so, was neither on the premises claimed in pre-emption, nor was he in the presence of the vendor or vendee, and it was found that the *talab-i-ishtahad* was invalid, held that the pre-emption cannot be claimed: *Jadunundun* v. *Dulput*, I. L. R. 10 Cal. 581. Affirming this decision, it was held in a subsequent case, that where the *talab-i-mowasabat* was performed in the presence of witnesses, but not in the presence of the vendor or vendee, nor on the premises, it is necessary that when performing the second demand the pre-emptor should declare that he has made the preliminary demand, and at the same time should invoke witnesses to attest it: *Rujjub Ali* v. *Chundi Churn*, I. L. R. 17 Cal. 543. This ruling overruled the finding in *Nundo Pershad Thakoor* v. *Gopal Thakoor*, I. L. R. 10 Cal. 1008, wherein it was held that when the pre-emptor had declared his right, when he first heard of the sale, in the presence of witnesses; and subsequently, on the same day, demanded his right from the vendors and purchasers, in the presence of the same witnesses, it was unnecessary that he should again state, when making the second demand, that he had fulfilled the requirements of the preliminary demand.—Following I. L. R. 17 Cal. 543, it was held that the pre-emptor is bound, while making the second demand, to state distinctly that he has already performed the *talab-i-mowasabat*: *Abbasi Begam* v. *Afzal Husen*, I. L. R. 20 All. 457; and this necessity is not removed by the fact that the witnesses to both demands are the same: *Abid Husen* v. *Bashir Ahmad*, I. L. R. 20 All. 499. See also, *Akbar Husain* v. *Abdul Jalil*, I. L. R. 16 All. 383. The *talab-i-ishtahad* is as essential as the *talab-i-mowasabat*: *Narbhase* v. *Luchmee*, 11 W. R. 307; *Jhotee Singh* v. *Komul Roy*, 10 W. R. 119; *Raseeooddeen* v. *Zeenut Bibee*, 8 W. R. 463; but where a Mahomedan sued

to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom, and the formality of *ishtahad* required by the Mahomedan law was *not* one of the incidents of such custom,—it was *held* that the circumstance that the plaintiff was a Mahomedan did not make it necessary for him to observe the formality of *ishtahad* as a condition precedent to the enforcement of such right: *Zamir Husain* v. *Daulat Ram*, I. L. R. 5 All. 110.—For other cases under the Mahomedan law, regarding the necessity of performing the *talab-i-ishtahad*, see *Bhowanee Dutt* v. *Lokhoo Singh*, W. R. 1864, 60; *Ramdular Misser* v. *Jhumack Lal*, 8 B. L. R. 455; 17 W.R. 265; *Girdharee Singh* v. *Rojun Singh*, 24 W. R. 462; *Prokash Singh* v. *Jogeswar Singh*, 2 B. L. R. (A. C.) 12; *Jadu Singh* v. *Rajkumar*, 4 B. L. R. (A. C.) 171; 13 W. R. 177.—In the making of the *talab-i-ishtahad* the servants of the pre-emptor are competent witnesses. The disability in this respect imposed by the Mahomedan law is limited to minors and persons convicted of slander: *Muhammad Yunus Khan* v. *Muhammad Yusuf*, I. L. R. 19 All. 334.—Where pre-emption was claimed in respect of a share in an undivided village, and the demand was made in the presence of witnesses within the area of the village to which the share sold belonged, *held* that the demand was a good demand made on the premises: *Kulsum* v. *Fakir Muhammad*, I. L. R. 18 All. 298.

Performance of the ceremonies through agent.—The affirmation by witnesses need not be made by the pre-emptor in person; it may be made by a duly constituted agent: *Ojheoonissa* v. *Rustum Ali*, W. R. 1864, 219.—The personal performance by the pre-emptor, of the *talab-i-ishtahad*, or demand for pre-emption, depends on his ability to perform it. He may do it by means of a letter or messenger, or may depute an agent, if he is at a distance, and cannot afford personal attendance: *Wajid Ali Khan* v. *Lala Hanuman Prasad*, 4 B. L. R. (A. C.) 139; 12 W. R. 484.—To the same effect also, see *Ali Muhammad Khan* v. *Muhammad Said*, I. L. R. 18 All. 309; and *Abadi Begam* v. *Inam Begam*, I. L. R. 1 All. 521.—It is a general rule of pre-emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor, has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself: *Harihar Dat* v. *Sheo Prasad*, I. L. R. 7 All. 41.

Delay in making the claim.—The Mahomedan law allows a short time for reflection before performance of the *talab-i-mowasabat*. Accordingly, the mere fact of the pre-emptor taking a short time before making that de-

mand, in order to ascertain whether the information conveyed to him was correct or not, does not invalidate his right: *Amjad Hossain* v. *Kharag Sen*, 4 B. L. R. (A. C.) 203; 13 W. R. 299.—But the claim should be made as soon as the claimant is aware of the completion of the sale: *Ajoodhya* v. *Sohun Lal*, 7 W. R. 428; and, *Gholam Hossein* v. *Abdool Kadir*, 5 N.-W. P. 11; also, *Mahomed Wares* v. *Hasee Emamooddeen*, 6 W. R. 173, where it was held that a delay of one day is not such a delay as to interfere with the right of pre-emption under the Mahomedan law. But see the case of *Ali Muhammad* v. *Taj Muhammad*, I. L. R. 1 All. 283, wherein it was held that the plaintiff, having failed to make the *talab i-mowasabat* until twelve hours after the fact of the sale became known to him, had lost his right of pre-emption.—On hearing of a sale, the pre-emptor must immediately make his demand called *talab-i-mowasabat*. Where, on hearing of the sale of a property to which he had a right of pre-emption, he went to the property in dispute, and there declared his right as pre-emptor, *held* that such delay was fatal to his claim: *Ram Churun* v. *Narbir Mahton*, 4 B. L. R. (A. C.) 216; 13 W. R. 259.—The act of a claimant rising from his seat to claim his right of pre-emption, instead of claiming it as he sat, is not a delay sufficient to entail a forfeiture of his right: *Maharaj Singh* v. *Lallah Bhuchook*, W. R. 1864, 294.—It is not a binding rule of law, that the *talab-i-ishtahad*, if made within a day after the receipt of intelligence of the purchase, is necessarily in time for the preservation of the right of pre-emption. The due and sufficient observance of the ceremony as to time, is a question to be decided in each case by the Court: *Jamilan* v. *Latif Hossein*, 8 B. L. R. 160; 16 W. R. (F. B.) 13.—The first thing to be done by the claimant of pre-emption, is to make the preliminary declaration. First going to the house to get the money is not a compliance with the law: *Mona Singh* v. *Mosrad Singh*, 5 W. R. 203.—Where the contract for the sale and purchase of certain property has been entered into, the person entitled to pre-empt is not bound to defer the enforcement of his right till the bill of sale was delivered or registered, or payment made: *Luchmee Narain* v. *Bheemul Doss*, 8 W. R. 500; see also, *Girdharee Lall* v. *Deanut Ali*, 21 W. R. 311.

§233. *Payment of purchase-money by the pre-emptor.*—It is not incumbent on the pre-emptor to produce the price at the time of making his claim, or whilst the matter is litigated in Court. But when the decree has been passed, he should then

produce it. According to the Mahomedan text-writers, delay on the part of the pre-emptor to deliver the price after he has been directed by the Court to deliver it, does not cancel his right, which has been confirmed by the decree of the *Kazi*. The first purchaser has, however, a right to retain the property until he has received the purchase-money from the pre-emptor; and the seller can similary retain the property if the property still remained in his possession.

Case-law.

Tender of price.—It is not necessary for the pre-emptor to tender the price at the time of making his claim: *Khoffe Jan* v. *Mohomed*, **10 W. R. 211**; *Hera Lall* v. *Moorut Lall*, **11 W. R. 275.**—It is not necessary in a suit for pre-emption that the tender of the actual price paid for the property should be proved. It would be sufficient if the pre-emptor states that he is ready to pay what the Court thinks as the proper price for the property: *Nundo Pershad* v. *Gopal Thakur*, **I. L. R. 10 Cal. 1008**; *Nubee Buksh* v. *Kaloo Lushker*, **22 W. R. 4.**—If a pre-emptor does not offer in the plaint to pay the real price whatever it may be, but claims to purchase a specified quantity of land at a specified price, and that right is not proved, the right of pre-emption will be lost: *Achurbur* v. *Bukshee Ram*, **2 W. R. 38.**

§234. The pre-emptor is entitled to take the property sold for the amount settled with, or paid by, the purchaser. If the seller abate a part of the price in favour of the purchaser, the pre-emptor is entitled to such abatement also. If the purchaser agrees to give an enhanced price after conclusion of the bargain, the pre-emptor is not liable for such augmentation.

Case-law.

Where the amount of consideration paid by the vendee is disputed by the pre-emptor, the burden of proof is on the plaintiff who alleges that the price stated in the deed of sale is fictitious, and he must give *primâ-facie* evidence to show that the price so stated was not the true price: *Sheopargash* v. *Dhanraj*, **I. L. R. 9 All. 225.**—Where the Court finds that the price

alleged in the deed of sale is not the true contract price, and where it cannot ascertain the true price on account of the vendor and vendee refusing to disclose the same by their own evidence, or their evidence cannot be believed, the Court should ascertain the market-price of the property at the time of the sale, and accept it as the probable price agreed upon between the parties: *Agar Singh* v. *Raghuraj Singh*, I. L. R. 9 All. 471.

Where the pre-emptor paid the decreed amount into Court, and a creditor of the decree-holder (the pre-emptor) was allowed by the Court to withdraw a portion of it, *held* that it was not competent to the Court to pay any portion of the pre-emptive price to any one but the person entitled to it under the decree for pre-emption, and that the decree-holder was entitled to obtain possession: *Abdus Salam* v. *Wilayat Ali*, I. L. R. 19 All. 250.—Where the decree of the Court was conditional upon payment of the purchase-money within one month from its date, and after the expiry of this period without payment, the defendants appealed from the decree, which was dismissed, and the original decree affirmed,—it was *held* that the period of one month allowed for the payment of the purchase-money must be calculated from the date of the Appellate Court's decree, and that payment by the decree-holder within one month from that date was in time: *Rup Chand* v. *Shamshul-Jehan*, I. L. R. 11 All. 346.—In case of such a decree conditioned on payment of the pre-emptive price within a fixed period, an appeal against such decree can be preferred after the expiration of such period, on the ground that a condition of the contract out of which the right to pre-empt arose had not been embodied in the decree: *Wazir Khan* v. *Kale Khan*, I. L. R. 16 All. 126. See also *Kodai Singh* v. *Jaisri Singh*, I. L. R. 13 All. 376.

Rights of the first purchaser.—He is entitled to the profits of the property, accruing between the time of purchase and subsequent transfer to the pre-emptor: *Buldeo Pershad* v. *Mohun*, 1 Agra. 30.—He can retain the property until he has the money from the party claiming pre-emption: *Dulbood Singh* v. *Mahadeo Dutt*, 2 W. R. 10.

§235. Delay in "litigating the matter for a sufficient reason, such as sickness, imprisonment, or the like, and consequent inability to appoint an agent does not cause the right of pre-emption to be annulled." If the pre-emptor neglect to sue without a sufficient reason, the right would not be annulled according to

Abu Hanifa, and also according to Abu Yusuf by one report. By another report, Abu Yusuf agrees with Muhammad in holding that if the pre-emptor fails to institute his suit within a month from his making the demand, without a sufficient excuse, his right will be annulled.

Limitation.—The period of Limitation, prescribed by art. 10, Second Schedule of the Indian Limitation Act, 1877, "to enforce a right of pre-emption, whether the right is founded on law or general usage, or on special contract, is *one year* from the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered."

Case-law.

A share in an undivided zemindari mahal is not susceptible of *physical possession* in the sense of art. 10, second schedule, Act XV. of 1877. *Constructive* possession by receipt of rent from tenants, is not physical possession within the meaning of the said article: *Batul Begam* v. *Mansur Ali*, I. L. R. 20 All. 315.—Where a claim for pre-emption arose out of the foreclosure of a mortgage by conditional sale of a share in an undivided village, the limitation applicable to such case was that prescribed by art. 120 of the second schedule, Act XV. of 1877, and limitation began to run from the date when the mortgagee obtained an order absolute for foreclosure under section 87 of Act IV. of 1882, the Transfer of Property Act: *Raham Ilahi* v. *Ghasita*, I. L. R. 20 All. 375.

§236. According to all opinion, a pre-emptor cannot take one part of a purchased property without the rest, where such part is not distinct or separate. He must, in such case, either take or abandon the whole, whether the purchase be by *one* person from one seller, or from two or more. But if property is purchased by *several* persons, the pre-emptor may take the whole or the portion of any one of them. "If five persons purchase a

house from one man, the *Shafi* may take the proportion of any one of them. If, on the contrary, one man purchase a house from five persons, the *Shafi* may either take or relinquish the whole, but is not entitled to take any particular share or proportion. (*Hidaya.*)

If part of the purchased property be separate and distinct from the rest of it, as where two mansions are sold to one purchaser by one bargain, and the pre-emptor's right applies to the whole lot sold, he cannot take one part and relinquish the rest. If, however, several houses in a street in which there is no thoroughfare are sold by one bargain to one purchaser, and the pre-emptor's right is based on neighbourhood, he may take the one to which he is a neighbour. But if his right is based on partnership in the way, he cannot take a part of the purchased property.

Case-law.

Suit to pre-empt a portion of the property sold.—Every suit for pre-emption must include the whole of the property subject to plaintiff's right of pre-emption, conveyed by one bargain of sale to one stranger; a suit not including within its scope the whole of such property is not maintenable: *Durga Prasad* v. *Munsi*, I. L. R. 6 All. 423.—In the absence of sufficient ground for refusing to take the whole, the right cannot be asserted as to a portion only: *Casee Ali* v. *Musseutoollah*, 2 W. R. 285.—The right cannot be claimed in respect only of a portion of property conveyed away in a single sale, but this rule holds good only when the property sold is one entire property. Where two distinct properties are sold by a single sale, and a right of pre-emption in respect of one of them resides in a person who has not a similar right in respect to the other, he may claim as much as he could take by a decree if it were sold separately: *Surdharee Lall* v. *Laboo Moodee*, 25 W. R. 500.—Where five plots of land were sold under a deed of sale, and a suit was brought by a third party to pre-empt one of the plots, *held* that he could divide the bargain and sue for a portion only: 6 B. L. R. 386; 14 W. R. 469.—So, where other properties were sold along with the property which was subject to the plaintiff's right of pre-emption: *Rowshun Koer* v. *Ram Dihal*, 13 C. L. R. 45.—Where

property was sold by some co-sharers on behalf of themselves and also on behalf of minor co-sharers, the pre-emptor should claim his right against all the shares: 1 B. L. R. (A. C.) 78; 10 W. R. 111.—The prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption by suing for a portion only of the property sold: *Hulasi* v. *Sheo Prasad*, I. L. R. 6 All. 455.—Where a pre-emptor 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 by reason of other persons being equally entitled with himself to claim pre-emption, 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 other pre-emptors.—*Abdullah* v. *Amanat*, I. L. R. 21 All. 292.

§237. According to Abu Hanifa and Abu Yusuf, says the *Hidaya*, a father or guardian may lawfully resign the right of *Shufa*, on being apprised of the sale.

§238. "If the purchaser break down the erections (on the purchased land), the *Shafi* may either resign his claim, or may take the area of ground for a proportionable part of the original price; but he is not entitled to the ruins, because they are no longer appendages of the ground, having been separated from it, and so become separate property." But where the deterioration has *not* been caused by the purchaser, the claimant must either pay the whole price or resign his claim. If the purchaser has disposed of the property before the pre-emptor takes possession of it, the latter is entitled to cancel such disposal.

If the purchaser has made any improvements, such as erecting buildings, planting trees, and so forth, and a decree is then passed in favour of a pre-emptor, the purchaser is entitled to take up the buildings and trees before making delivery. But if such removal be injurious to the land, the pre-emptor must pay for the improvements also, or he should relinquish his claim. But if the purchaser has sown seed in the land, the pre-emptor must wait till the ripening of the crops, when he will take the

land at the full price. The purchaser will not be liable for any rent or hire for the period that the land remained in his possession.

§239. If the pre-emptor, having obtained possession of the pre-emptive property, has made any improvements in it, and it afterwards appear that the land was wrongfully sold, being the property of another, then the pre-emptor will be entitled to recover the price from the seller or from the purchaser from whomsoever he may have taken the property. He can remove the improvements, but is not entitled to any compensation for them.

§240. *How the right becomes void.*—The right of pre-emption is rendered void (1) by voluntary relinquishment of such right by the pre-emptor himself, (2) by the pre-emptor's conduct indicating his acquiescence in the sale, and (3) by the death of the pre-emptor, if he dies after making the formal demand and before the decree of the Court. If the pre-emptor dies after the decree for possession, the right is not extinguished, but devolves upon his heirs. If the pre-emptor compromises for compensation, or he sells his claim before obtaining decree, the right is also extinguished.

"There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim he can sell all his property, with the exception of that part immediately bordering on his neighbour's; and where he is apprehensive of the right being advanced by a partner, he may in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when, if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation." *Macnaghten.*—The seller may also evade the pre-emptor's right by making a free gift of the intervening part of his house or land.

Case-law.

Where in a suit for pre-emption, a *Sunni* Mahomedan plaintiff has not obtained his decree for pre-emption in his life-time, the right to sue does not survive to his heirs: *Muhammad Husain* v. *Niamutunnissa*, I. L. R. 20 All. 88.

Refusal to purchase by pre-emptor.—Where an offer of sale was made to a pre-emptor, and he refused to purchase, and consented to a sale of the property to a stranger, *held* he could not afterwards set up his right: *Braja Kishor* v. *Kirti Chandra*, 15 W. R. 247.—So, where a Mahomedan offered to sell his share to a partner, and the latter refused to purchase, whereupon it was sold to a stranger: *Toral Komhar* v. *Auchhi*, 9 B. L. R. 258; 18 W. R. 401.—But where there has been a refusal to purchase before the sale, and such refusal was made simply because there was a dispute as to the actual price of the property, but there was no absolute surrender or relinquishment, pre-emption may be claimed after the sale: *Abadi Begam* v. *Inam Begam*, I. L. R. 1 All. 521.

Relinquishment by acquiescence.—Where the plaintiff, on the ground that the true consideration for the sale was less than the amount stated in the sale-deed remained silent and failed to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his right of pre-emption: *Bhairon Singh* v. *Lalman*, I. L. R. 7 All. 23.—The pre-emptor's entering into a compromise with the vendee, or allowing himself to take any benefit from him in respect of the *Shufa* property, is an acquiescence in the sale, and relinquishment of the right of pre-emption: *Habib-unnissa* v. *Barkat Ali*, I. L. R. 8 All. 275.—Where the pre-emptor continues to assert his right, and offers to take the property from the purchaser by paying him the sale-price, without resorting to, and with a view to avoid, litigation, he cannot be said to have acquiesced in the sale, and waived his right: *Muhammad Nasiruddin* v. *Abdul*, I. L. R. 16 All. 300.—In the case of a mortgage by conditional sale, the pre-emptor's acquiescence in such mortgage does not involve relinquishment of his right when the conditional sale becomes absolute: *Ajaib Nath* v. *Mathura Prasad*, I. L. R. 11 All. 164.

§241. *Shiah School.*—According to this school, the right of pre-emption is established in a co-sharer of the seller, where there

are two co-sharers only. The right is extinguished in the case of there being several co-owners of the sellers, and so several *Shafis* or claimants by pre-emption. Without any difference of opinion, the privilege does not belong to a neighbour. It is also a condition that the *Shafi*, or the claimant of the right, should be a Mussulman when the purchaser is of that faith, even though he may have purchased from an infidel. But a Mussulman can assert the right both against Mussulmans and infidels. Property, a division of which would occasion damage or injury to the property by rendering it useless (such as, baths, wells, ways, and rivulets), is not open to the right of pre-emption, when a co-owner of such property sells his share in it. Pre-emption cannot be claimed with regard to a part of the property sold when the whole is open to such claim. But if a person sell his share in two mansions, his co-owner can assert the right of pre-emption with regard to one of them or to both. The right of pre-emption is hereditary. It is inherited like any other property, whether the *Shafi* had demanded it or not. And, if one heir should relinquish his share of the right, the share of the others would not be dropped or extinguished.

Case-law.

According to the prevalent doctrine governing the *Shiah* sect, no right of pre-emption exists in the case of property owned by more than two co-sharers : *Abbas Ali* v. *Maya Ram*, I. L. R. 12 All. 229.

CHAPTER XII.—Inheritance.

(SUNNI LAW.)

§242. THE property of a deceased person is to be applied in the following successive order:—*First*, to the performance of his funeral ceremonies and burial without superfluity and yet without deficiency; *Secondly*, to the discharge of his debts, even to the extent of the whole of the remainder; *Thirdly*, to the payment of legacies, (1) out of a third of what remains after the payment of his debts, if there be any heirs of the deceased, or (2) out of the whole of such remainder if there be no heirs; and, *Fourthly*, to the distribution of the residue among his successors. Thus, if nothing remains after meeting the funeral expenses and the payment of debts, neither the legatees nor the heirs get anything. If anything remains, the legacies should be paid first, before distribution among heirs. But when there are heirs, the legacies cannot be paid in excess of a third portion of the residue remaining after the payment of debts.

Case-law.

Payment of debts.—When a creditor of a deceased Mahomedan sues the heirs in possession, and obtains a decree against the assets of the deceased owner, such a suit is to be looked upon as an administration suit, and those heirs of the deceased, who have not been made parties to the suit, cannot in the absence of fraud claim anything but what remains after the debts of the testator have been paid: *Mutty Jan* v. *Ahmed Ally*, I. L. R. 8 Cal. 370; 10 C. L. R. 346.—The heir of a deceased Mahomedan is liable to pay his debts in proportion to the interests taken by him in the inheritance: *Bussunteram* v. *Kamaluddin*, I. L. R. 11 Cal. 421.—*Per* Garth, C. J., a decree by consent against one heir cannot legally bind the other heirs, under the Mahomedan law: *Assamathem Nessa* v. *Roy Lutchmiput*, I. L. R. 4 Cal. 142.—Where the heirs of a deceased Mahomedan divided his estate before the payment of his debt, and the creditor sued some of the heirs for the whole debt, it was *held* that as a decree against such heirs would not bind the other heirs, a decree should be passed against them for a share of such

debt proportionate to the share of the estate they had taken: *Pirthipal Singh* v. *Husaini Jan*, I. L. R. 4 All. 361.—A decree against one heir of a deceased Mahomedan debtor cannot bind the other heirs: *Sitanath Dass* v. *Roy Luchmiput*, 11 C. L. R. 268.—But where the widow of a deceased Mahomedan was in possession of his estate, and there were other heirs of the deceased, *held* that a suit for his debts was properly brought against the widow, and that her liability was to be measured not by the extent of her interests in his estate, but by the amount of the assets which had come into her hands, and which she had not duly disbursed in the discharge of the liabilities to which the estate was subject at her husband's death: *Amir Dulhin* v. *Baij Nath*, I. L. R. 21 Cal. 311.—In order to fix a person with liability for the debts of a deceased Mahomedan, by reason of the receipt of assets, it is incumbent on the creditor to give some evidence of assets having been received by that person: *Fuzeelutoonissa* v. *Hoormutoonissa*, Marsh. 281; 1 Hay 559.—The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ-fide* purchaser from his heir: *Land Mortgage Bank* v. *Roy Luchmiput*, 8 C. L. R. 447.—The debts of a deceased Mahomedan are not a charge upon his estate, so as to give the creditor a priority over all persons who, after his (the debtor's) death, purchase or take a mortgage of his estate: *Land Mortgage Bank* v. *Bidyadhari Dasi*, 7 C. L. R. 460.—The heir of a Mahomedan may, as executor, sell a portion of the deceased's estate, if necessary, for the payment of his debts; and such sale will not be set aside if the purchaser acted *bonâ fide*: *Enayet Hossein* v. *Ramzan Ali*, 1 B. L. R. (A. C.) 172; 10 W. R. 216.—Where plaintiff, an heir of the deceased, was in possession, and was not a party to or properly represented in the suits in which the creditors obtained the decrees, she could not be bound by the decrees, nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected: *Hamir Singh* v. *Zakia*, I. L. R. 1 All. 57.—An heir out of possession and not made a party cannot recover his share without payment of his portion of the debts: *Jafri Begam* v. *Amir Muhammad*, I. L. R. 7 All. 822.

§243. The successors take the estate in the following order:—1. The sharers, that is, persons having specific shares allotted to them: 2. The residuaries, that is, persons taking the remainder of the inheritance after the distribution among sharers.

Where there are no sharers, the residuaries take the whole: 3. If there are no residuaries, the surplus, remaining after the allotment of shares, *returns* to the sharers according to their respective shares. This is called the *return*: 4. On failure of the sharers and the residuaries, the distant kindred inherit: 5. After the distant kindred, comes the successor by contract: 6. Next inherits an acknowledged kindred: 7. Then inherits the person to whom more than a third of the property was left by will: 8. *Lastly*, the property goes to the Bayit-ul-mal or Public Treasury.

§244. **General principles.**—Of the above successors, the sharers and residuaries may inherit together. But the other classes can inherit only when there is none belonging to any of the preceding classes. For instance, daughters are sharers, and brothers are residuaries. If daughters and brothers occur together in the same case, and there is no impediment to the inheritance of the brothers, they will inherit with the daughters. But, so long as there are sharers or residuaries, the distant kindred will not inherit, except when there is a husband or wife and no other heirs.

§245. There is no right of representation. Accordingly, a deceased son's son does not inherit the estate of his grandfather when there are other sons of the deceased. For instance, a man dies leaving a son, and a son of a deceased son. The son's son here gets nothing, being excluded by the *nearest* successor, the son. And, the son's sons by different sons, inherit equal shares when there are no sons of the deceased. He who is related to the deceased through another person, shall not inherit while that person lives. Thus, a son's son does not inherit (to his grandfather) while his father is alive.

§246. A person who has two relations is preferred to one having one relation. In other words, a kinsman by the same

father and mother is preferred to a kinsman by the same father only. Thus, a brother by the same father and mother inherits before a brother by the same father.

§247. When a male and a female of equal grade inherit together, the male has double the portion of a female. Thus, when there are sons as well as daughters, each son has double the share of each daughter: *Ram Beharee* v. *Sitara Khatoon*, 10 W. R. 315.

§248. There is no right of *primogeniture* according to the *Sunni* school of Mahomedan law. The *Shiah* school recognises the right but partially as will be seen in the following chapter.

§249. The Mahomedan law of inheritance does not make any distinction between *real* and *personal* property. Consequently, lands and goods left by a deceased person are equally liable to be shared by the several heirs according to their respective shares.

§250. The Mahomedan law does not recognise the presumptions of a "joint family" in the sense in which it is understood in Hindu law. Nor is here any distinction made between ancestral property and property acquired by a person himself. Every kind of property, whether it was acquired by the deceased himself or it was inherited by him from his ancestors, is alike divisible among the heirs in proportion to their respective heritable rights.

Case-law.

Vested remainder.—It is not consistent with Mahomedan law to limit an estate to take effect after the determination of a prior estate on the death of the owner, by way of what is known to English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate: *Abdul Wahid* v. *Nuran Bibi*, I. L. R. 11 Cal. 597; L. R. 12. I. A. 91.

Question regarding the sect to which the deceased belonged.—Where the deceased was by birth a *Sunni*, but her husband being a *Shia*, she outwardly conformed to his religion during his lifetime, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death: *Hayatun-nissa* v. *Muhammad Ali Khan*, I. L. R. 12 All. 290.

Different kinds of heirs.—They are (1) sharers, (2) residuaries, and (3) distant kindred. In the absence of residuaries, the surplus shall revert to the sharers in proportion to their shares, except in the cases of the husband and the wife. Next are the distant kindred: *Gujadhur* v. *Abdoollah*, 11 W. R. 220.

Right of representation.—According to the Mahomedan law, there is no right of representation in matters of succession, and therefore the rights of a husband as an heir do not descend to the heirs of that husband who has pre-deceased his wife: *Ekin Bebee* v. *Ashruf Ali*, 1 W. R. 152.—The daughter of a deceased brother cannot take so long as a single brother or sister survives: *Aseezunnissa* v. *Ruhmanoollah*, 10 W. R. 306.

Primogeniture.—Where an estate had been held by a succession of elder brothers for a long course of years, and the exclusive inheritance of former members having been upheld by formal decisions, *held* that in the absence of any *sunnuds* declaring the contrary, the practice of succession by primogeniture must be accepted as prevailing on the estate: *Mahomed Akul Beg* v. *Mahomed Koyum Beg*, 25 W. R. 199.

Renunciation of right to inheritance.—According to Mahomedan law, there may be a renunciation of a right to inherit, which need not be expressed, but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another: *Hurmut-ool-nissa* v. *Allahdia*, 17 W. R. (P. C.) 108.

Joint family.—Members of a Mahomedan family living in commensality—do not form a "joint family," in the sense in which the expression is used in Hindu law; and there cannot be any presumption that the acquisitions of the several members are made for the benefit of the family jointly: *Hakim Khan* v. *Gool Khan*, I. L. R. 8 Cal. 826.—Among Mahomedans, a purchase made during a father's lifetime in the name of his son living in the father's house, does not raise a presumption that the purchase was really made for and by the father: *Golam* v. *Hafeezoonnissa*, 7 W. R. 489.—Additions

made to the joint estate by the managing member of a Mahomedan family will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the benefit of all the members: *Vellai Mira* v. *Varisai Mira*, 2 Mad. 414.

§251. **The shares and the sharers.**—There are six shares as appointed in the *Kuran*. These are, a **half**, a **quarter**, an **eighth**, **two-thirds**, **one-third**, and **one-sixth**.

§252. The **sharers** are **twelve** in number, of whom *four* are *males*, and *eight females*.

§253. The male sharers are—1. The father; 2. The true grandfather; 3. The brother by the same mother; and, 4. The husband. The *true grandfather* is any male ancestor in the direct paternal line, who is not related to the deceased through the intervention of the mother or any other female ancestor; as, the father's father, the paternal grandfather's father, are true grandfathers. The mother's father, the father's *mother's* father, are *false* grandfathers.

§254. The female sharers are—1. The wife; 2. The daughter; 3. Son's daughter (how low soever); 4. The sister by the same father and mother; 5. The sister by the father's side; 6. The sister by the mother's side; 7. The mother; and, 8. The true grandmother. The **son's daughter** is the daughter of any male descendant in the direct male line of the deceased; as, a son's son's daughter. But, a son's daughter's son's daughter is not a son's daughter. The **true grandmother** is a female ancestor, whether in the paternal or in the maternal line, who is related to the deceased without the intervention of a *false grandfather*. A female ancestor related through the intervention of a false grandfather, is a **false grandmother**.

True grandmothers:	*False grandmothers:*
Mother's mother.	*Mother's father's* mother.
Mother's mother's mother.	*Father's mother's father's* mother.
Father's mother.	(Here, the mother's father, and the father's mother's father, are both false grandfathers, and their mothers are, therefore, false grandmothers.)
Father's mother's mother.	
Father's father's mother.	

(The false grandfather and false grandmother inherit as distant kindred.)

TABLE I.

§255. Chart of Inheritance among Sharers.

1. The sharers and their respective shares under varying circumstances, and cases when they lose their character as sharers and become residuaries, or are totally excluded from the inheritance, have been set forth in the following Table. For fuller information regarding the succession of the sharers, the reader is referred to the body of the work, later on.

2. Although sharers and residuaries (at least some of them) may inherit together, in the sense that the former do not exclude some individuals of the latter class, yet it is necessary to distribute the shares first—for the residuaries, even those who are never excluded in any case (such as, sons), are to obtain the remainder left after the allotment of shares. When, therefore, it is necessary to find what portions of the inheritance are respectively to be given to a number of persons related to the deceased individual, it would be expedient to find—

(*a*) which of them are *sharers*,

(*b*) which of them *residuaries*, and

(*c*) which of them are among the *distant kindred*.

3. *First*, with regard to the *sharers* thus determined, it is further to be seen if the presence of any other heir reduces any of them to the level of residuaries, or has the effect of excluding any of them. It will be seen hereafter that an heir though himself excluded, would nevertheless exclude another or reduce his share (see section on Exclusion). The sharers who are not excluded and not rendered residuaries, should next be allotted their respective shares according to the table. *Next*, the residuaries should be allowed to step in according to the order set forth in Table II. The distant kindred cannot come in so long as there is a single individual of these two classes. The examples worked out at the end of the chapter will illustrate the above suggestions.

TABLE I.—Chart of Inheritance among Sharers.

Heir.	Heritable right.	Portion inherited.	Exclusion.
Father.	(1) a *sharer*, when the deceased has left a son, or son's son, how low soever; (2) a *sharer* and a *residuary*, with daughters and no sons; (3) a *residuary*, when there is no issue of the deceased;	(1) takes *one-sixth*. (2) takes his legal share and the residue if any; (3) takes the residue after satisfaction of other shares; and if there be no sharers, he takes the whole.	Never excluded.
True Grandfather.	inherits to the father's portion both as a sharer and as a residuary, in the absence of the father; the nearer grandfather excluding the more remote.	The same as in the case of the father.	Excluded by the father.
Uterine brother or sister, or brother or sister by the same mother only.	*Sharer*. (The brothers and sisters by the same mother divide the portion allotted to them in equal shares.)	(1) a *sixth*, when only *one* such brother or sister. (2) a *third*, when there are two or more such brothers and sisters.	Excluded by the children or son's children, the father or a true-grandfather, of the deceased.
Husband.	*Sharer*.	(1) a *fourth*, when the deceased has left a child or son's child, h. l. s. (2) a *half*, when there is no child or son's child, h. l. s.	Never excluded.

Wife or wives.	*Sharer.* (When there are more than one wife, they divide the wife's portion in equal shares.)	(1) an *eighth*, when there is child or son's child of the deceased: (2) a *fourth*, when they do not exist.	Never excluded.
Daughter.	(1) *sharer;* (2) *residuary*, when there is a son or sons of the deceased.	(1) a *half*, when only *one*, and there is no son; (2) *two-thirds*, when more than one, and there is no son.	Never excluded from the inheritance, but when there is a son of the deceased, the daughters do not get any shares, but inherit as residuaries with the son.
Son's daughter (or the daughter of a son how low soever in descent).	(1) *sharer;* (2) *residuary*, when there is a son's son of equal grade or of a lower grade.	(1) a *half*, when only *one*, and there is no child of the deceased, nor any son's son of an equal or higher grade; (2) *two-thirds*, when more than one, and in the above circumstances; (3) a *sixth*, when there is a *single* daughter of the deceased, or a *single* son's daughter of a higher grade.	Totally excluded by a son of the deceased, or a son's son of a higher grade, or two or more daughters or higher son's daughters. Partially excluded by a single daughter, or a single son's daughter of a higher grade; Excluded as a sharer, but inherits as a residuary, when there is a son's son of an equal or lower grade, and there are none to exclude her.
Full sister or sister by the same father and mother.	(1) a *sharer;* (2) a *residuary*, when there is a full brother, or a daughter or daughters, or son's daughters, of the deceased.	(1) a *half*, when only *one* and there is no child, nor full brother of the deceased, nor father, nor true grandfather; (2) *two-thirds*, when more than one, and in the absence of the above.	Totally excluded by a son or son's son how low soever, the father, and the true grandfather.

Table I.—Chart of Inheritance among Sharers—(*contd.*)

Heir.	Heritable right.	Portion inherited.	Exclusion.
Half sister by the same father.	(1) a *sharer*; (2) a *residuary*, when there are half brothers by the same father, or when there are daughters or son's daughters and no whole sister.	(1) a *half*, when only *one*, and there is no child, nor father, nor true grandfather, nor brother, nor full sister; (2) *two-thirds*, when more than one, and in the absence of the above; (3) a *sixth*, in the absence of the above, but when there is a single full sister, who is not made a residuary.	Totally excluded by the father, the true grandfather, son, son's son h. l. s., full brothers, more than one full sister, and by a single sister who is rendered a residuary by daughters or son's daughters of the deceased.
Mother.	*Sharer.*	(1) *a sixth* of the whole, when there is a child or son's child, h. l. s., two or more brothers and sisters, whole or half; (2) a *third* of the whole, when no children or son's children, nor more than one brother or sister, and when there is wife or husband, but not the father of the deceased; (3) a *third* of the remainder after allotment of husband's or wife's share, when no children nor more than one brother or sister, but when there is husband or wife as also the father.	Never excluded.

True grandmother (whether one or more than one, and whether on the father's or on the mother's side, provided they are equal in degree).	*Sharer.*	A *sixth.*	All grandmothers are excluded by the mother; those on the father's side are excluded by the father; the nearer grandmother by any side will exclude those who are more remote, by whichever side they may be related.

The Sharers.

§256. The son is not a sharer. He takes as a residuary, and is never excluded. There are six heirs who are never excluded. These are, the father, the son, the mother, the daughter, the husband, and the wife. The other sharers are sometimes totally excluded, and sometimes they are partially excluded, that is, they get reduced shares. The shares of all sharers are liable to modifications by the presence or absence of other heirs. Such exclusions and modifications will be shown as the inheritance of each heir is discussed, as also in the section on exclusion.

§257. The inheritance which each sharer takes in particular cases is now discussed.

I. *Those sharers who are never excluded in any case.* These are, the *father*, the *mother*, the *daughter*, the *husband*, and the *wife*. (The son, though never excluded, belongs to the class of heirs called residuaries.)

§258. **The father** takes a *sixth* if there is any son or son's son (how low soever) of the deceased. If there is no son or son's son (how low soever), but there is a daughter or son's daughter (how low soever), or more of them, the father gets his *one-sixth*, which is his absolute share, and also a *residuary portion* remaining after the satisfaction of the shares of other heirs. And, if there be no issue, whether male or female, of the deceased, the father does not inherit as a sharer, but he gets a simple *residuary portion*, after the satisfaction of other shares.

§259. The father's inheritance to the estate of his deceased son, varies, therefore, in three different conditions: 1. He gets an absolute share, which is *a sixth* when there is any male issue

h. l. s. of the deceased; 2. He gets both his legal share (*one-sixth*) and a residuary portion, when there are daughters or son's daughters, but no male issue; and, 3. He does not get any share, but inherits as a residuary, when there is no issue of the deceased.

§260. **The mother** gets (*1*) *a sixth* of the whole, when there is a child or son's child (h. l. s.) of the deceased, or when there are two or more brothers and sisters of the deceased, whether of the whole blood or of half-blood:

(*2*) If there be no children or son's children of the deceased, nor more than one brother or sister, the mother's share is a *third* of the whole, provided there be no father, with the husband or wife of the deceased:

(*3*) If there be no children or son's children, nor more than one brother or sister, but the deceased left both parents together with the husband or the wife (as the case may be), then the mother gets *a third of the residue* remaining after the allotment of the share of the husband or wife. But, if in such a case, there be no father but a true grandfather and either husband or wife, then the mother would get a third of the whole.

Example I.—A person left both father and mother, husband (or wife), and one brother (or one sister, or neither brother nor sister); the mother would get a third of the residue after deducting the husband's (or the wife's) share.

Example II.—A person left both parents, one brother and one sister. The mother gets *a sixth* of the whole.

Example III.—A person left his or her true grandfather, and a husband (or wife). The mother gets *a third* of the whole.

§261. The **step-mother** has no share as a mother. She cannot take the maternal share of the inheritance.

N.B.—The letters h. l. s. will be used to denote "how low soever."

§262. **The daughter** or daughters, begotten by the deceased, take in the following order: 1. If there be a single daughter, and there be no son, she would take a *half*; 2. If there be two or more daughters, and no son, the daughters would *collectively* take *two-thirds*; 3. If there be a son or sons of the deceased, then the daughters do not take as *sharers*, but they are made residuaries by their brother or brothers, each daughter getting half the portion of each son.

Illustration.—A man leaves one son and two daughters. The estate will be divided into *four* parts, the son getting two shares, and each daughter one share.

The *step-daughter* has no claim to inherit as a daughter.

§263. **The husband** is entitled (*1*) to *a half*, if the deceased left no issue of her own or of her son. (*2*) If the deceased left any issue, or her son's issue, the husband's share is *one-fourth*.

§264. **The wife**, or wives, if there be more than one widow left by the deceased, are entitled to get a *fourth* of the estate on failure of his own issue or that of his son h. l. s. When there is any issue of the deceased, or of his son h. l. s., the wife, or the wives would collectively get an *eighth* of the estate. When there is more than one wife, the share inherited by them collectively is to be divided equally among themselves without any distinction.

In cases where the marriage was void *ab initio*, neither the husband nor the wife would inherit from the other party. But they do not lose their heritable rights where the marriage was not void but *voidable*, as where it depended upon the sanction of the guardian.

Case-law.

Dissolution of Marriage.—Under the Mahomedan law, after the dissolution of a marriage contract by death or otherwise, the parties or their

heirs bear no more relation to one another than the heirs of *quondam* partners in the same mercantile house: *Ekin Bebee* v. *Ashruf Ali*, 1 W. R. 152.

Fazooli Marriage.—Where the marriage of a minor girl was contracted by her grandmother in the *fazooli* or nominal form, her father being dead, and she having died without ever meeting or communicating with her husband, the marriage was held to be invalid, as she had never expressed her assent to or dissent from the marriage, after attaining puberty,—*held*, that her estate was inherited by her mother to the extent of a *third* share, and by her half-brothers and sisters in the residue, the paternal grandmother being totally excluded by the mother: *Mulka Jehan* v. *Mahomed Ushkurree*, 26 W. R. 26; L. R. I. A. Sup. Vol. 192.

II.—Those sharers who are sometimes excluded by the presence of other preferential heirs.

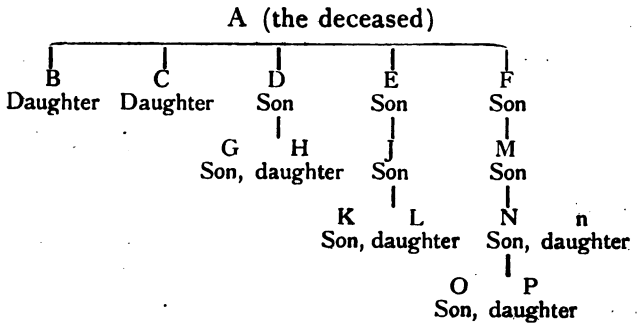
§ 265. The true grandfather inherits in the absence of the father, and has the same interests as the father, that is, he gets a *sixth* when there is a son or son's son h. l. s. of the deceased; a *sixth* as well as a *residuary* portion, when there is a daughter or son's daughter h. l. s.; and a simple *residuary* portion in the absence of the preceding. The position of the true grandfather is, in the absence of the father, identically the same as that of the father, with this difference that if there be a true grandfather, either husband or wife of the deceased, and the mother, and there be no such heirs who reduce the mother's share to a sixth (such as, children or son's children, or two or more brothers and sisters), the mother would get a third of the whole, and not a *third of the residue* (after payment of the husband's or wife's share) as she does if there be the father instead of the grandfather in such a case. Moreover, the father's mother can inherit with the true grandfather, but she gets nothing if there is the father. And, according to some opinions, the true grandfather does not, like the father, exclude the brothers and sisters of the deceased; but, according to Abu Hanifa, he excludes them.

The true grandfather is *excluded* by the father.

§ 266. **Brothers and sisters by the same mother** (also called *uterine brothers and sisters*) have equal rights to the inheritance without any distinction of sex. The general principle that whenever there are males and females of parallel grade, the male has double the share of a female, does not hold in the case of the mother's children. When there is only one brother, or only one sister by the same mother, his or her share is a *sixth*. Two or more half-brothers and sisters by the same mother would get collectively a *third*. The brothers and sisters by the same mother are all excluded, and are entitled to nothing, if the deceased left his own children or his son's children, or father, or a true grandfather. Any one of these would totally exclude the mother's children.

§ 267. The **son's daughter**, if a single one, gets *a half*; two or more son's daughters get *two-thirds* collectively. The son's daughters are totally excluded by a son, and by more than one daughter, of the deceased, as also by a son's son who is of a higher grade than themselves. When there is a single daughter of the deceased, she does not totally exclude the son's daughters, the single daughter taking a *half*, and the son's daughter or daughters taking *one-sixth*. When there is a son's son of equal or lower grade along with the son's daughter or daughters, the son's son makes them residuaries in the proportion of each male getting the double of each female's share, even if there be two or more daughters of the deceased; for the daughters taking collectively *two-thirds* of the estate, the remaining *one-third* is divided among the son's son and son's daughters in the above proportion. When there are no sons, nor daughters of the deceased, the son's sons and son's daughters would take the entire estate as residuaries.

§ 268. The succession of son's daughters in general, in the various cases stated above, and if there be several son's daughters, some of them in a lower degree than others, their succession will be shown from the following illustrative table (called the case of *tashbib*):—



Here, *A* is the deceased person; *B* and *C* are his daughters; *D*, *E*, and *F* are his three sons; *G*, a son's son, and *H*, a son's daughter; *J* is a son's son; *K* and *L* are son's son's son and son's son's daughter; *M* is the son of *F*; *N* is the son, and *n* the daughter of M; *O* and *P* are the son and daughter of *N*.

The son's daughter *H* is not equalled in degree by any other son's daughters; *L* and *n* are son's daughters of equal grade; and *P* is a son's daughter of the lowest grade.

Case I.—If any one of the three sons, *D*, *E*, or *F* be living, then the son's daughters are all excluded.

Case II.—Suppose there is a single daughter, *B*, of the deceased, and a son's daughter, *H*. Here *B* would take a *half*, and *H* would get *one-sixth*. But if there be two daughters *B* and *C* living, then *H* would get nothing, unless she (*H*) is made a residuary by a son's son of equal or lower degree. Thus, if *G*, *J*, or *M* be living, then the daughters *B* and *C* would take *two-thirds*, and the remaining *one-third* would be taken by the

surviving son's son (*G*, *J*, or *M*) and the son's daughter, *H*, as residuaries, the male taking double the share of the female. The remaining *third* will, therefore, be divided into three shares, two of which will be taken by the surviving son's son, and one share by *H*. And if with *H* there be *K*, *N*, or *O*, the division will be the same. If *G*, *J*, and *M* be all living, then the remaining *third* will be divided into *seven* parts, two parts being taken by each of *G*, *J*, and *M*, and one part by *H*. But if *K*, *N*, and *O* be all living, then the remaining *third* will be taken by *K*, *N*, and *H* as residuaries, *K* and *N* taking four shares, and *H* one share, and *O* being of lower degree will be totally excluded.

If there be a single daughter, one or more son's sons, and one or more son's daughters, all of equal degree (as *B*, *G*, *H*, and *J*), then *B* would take *one-half*, and the remainder will be taken by *G*, *H*, and *J* in the ratio of two shares for each male and one for the female.

Case III.—If there be no daughters, but several son's daughters, some of whom are of a lower degree than the others, then those highest in rank would stand in the same footing as the deceased's own begotten daughters, and those next in order would be considered as son's daughters. Thus, if *H*, *L*, and *n* be the son's daughters, then *H* being the highest in order would inherit like a daughter to *one-half*, and *L* and *n*, who are of equal degree, and who are next in order to *H*, would together inherit to a *sixth* as son's daughters, *P* getting nothing. But if *O* be living, then the *third* remaining as residue after distributing the shares of *H*, *L*, and *n*, will be inherited by *O* and *P*, *O* getting two shares, and *P* one share.

If along with *H* any one or more of *G*, *J*, or *M* be living, then the entire estate will be taken by them as residuaries, *H* getting one share, and each of *G*, *J*, or *M* getting two shares, and all of a lower degree will be excluded.

If *H*, *K*, *L*, *N*, and *n* be all living, then *H*, standing on the footing of the deceased's own daughter, would take a *half*, and the remainder will be taken by the residuaries, *K*, *L*, *N* and *n*, all of a lower degree being excluded.

§ 269. The rules for the succession of son's daughters may, therefore, be summarized as follows:—

1. They are all excluded by the deceased's son.

2. If there be a single daughter of the deceased, she would take *one-half*, and the son's daughters of the highest and equal grade would together get *one-sixth*. Those of a lower degree would take nothing, unless they are made residuaries by a son's son of an equal or lower degree.

3. If there are two daughters with son's daughters, the son's daughters would get nothing unless they are made residuaries by son's sons of equal or lower degree.

4. If there are no daughters, and there are son's daughters of different grades, then those of the highest grade inherit as the deceased's own begotten daughters, *half* being the share of one, and *two-thirds* for more than one. Those of the next grade inherit collectively to *one-sixth* as son's daughters, and those below are excluded; but if there be a son's son below those inheriting to one-sixth, he makes the excluded son's daughters, who are above him or equal to him, residuaries with himself, and those below him get nothing.

5. If there be son's sons and son's daughters of equal degree, they take the whole estate as residuaries, each male having double the share of each female.

§270. The **sister by the same father and mother** is entitled to inherit as a sharer in the absence of the father, the true grandfather, children, and son's children of the deceased. A single sister of the whole blood gets *a half*, and two or more whole sisters together get *two-thirds* of their deceased brother's

estate. And, if there be brothers of the whole blood, (one or more), the sisters are made residuary heirs with their brothers, and do not take any shares. Each sister's portion as a residuary will be half of each whole brother's portion, according to the principle "to the male is double the share of each female".

§271. Sisters of the whole blood are also made residuaries by the daughters and son's daughters of the deceased when there is no brother of the whole blood, according to the saying of the Prophet, "Make sisters with daughters residuaries." They take the residue left after the satisfaction of the shares belonging to the daughters and son's daughters. A single daughter or son's daughter of the deceased would alike make them residuaries, unless the sisters are totally excluded by those stated above, and provided there is no brother of the whole blood. For, if there be a brother, he would make them residuaries with himself; he cannot be excluded by a sister or sisters. Thus, if there is a single daughter or son's daughter of the deceased and a full sister (who is not excluded), the daughter or son's daughter takes a *half*, and the remainder *one-half* goes to the sister. And if she has a brother, the remainder *one-half* is divided into *three* shares, *two* being taken by the whole brother and *one* belonging to the sister.

§272. Thus, sisters of the whole blood are absolutely excluded by the father, the true grandfather, a son, and a son's son of the deceased. They are made residuaries by daughters and son's daughters. They inherit as sharers in the absence of all these persons; and if there be brothers of the whole blood, they lose their character as sharers and become residuaries with the brothers.

§273. The **sister by the father's side** stands in the footing of a sister of the whole blood in her absence, but she is not totally excluded when there is a single sister of the whole blood.

1. On failure of the father, the true grandfather, the children and son's children, and the sisters of the whole blood, the sister by the same father inherits as a sharer, *half* being the share of one, and *two-thirds*, the share of two or more of them; but if there be a brother by the same father, he will make them residuaries.

2. When there is no father, or true grandfather, or children, or son's children of the deceased, but there be a single sister of the whole blood, then the whole sister getting *one-half*, the sister or sisters by the same father would get *one-sixth*.

3. When there is no father, nor true grandfather, nor children, nor sons children, but there be two or more sisters of the whole blood, then the sister or sisters by the same father would get nothing, unless there be also one or more brothers by the same father, who will make them residuaries. In that case, the two whole sisters would together take *two-thirds*, and the residue *one-third* will be taken by the half-brothers and sisters, each brother having twice as much as each sister.

4. When there is no father, nor true grandfather, nor sons, nor son's sons, nor whole sisters, nor brothers of the whole blood, nor half-brothers on the father's side, and there be daughters or son's daughters of the deceased, the sister or sisters by the same father would inherit as residuaries, as in the case of the whole sister.

§274. The sisters by the same father are excluded absolutely in the following cases:—

1. When there is the father, the true grandfather, a son, or a son's son of the deceased.

2. When there are brothers, or two or more sisters, of the whole blood.

3. When there is a sister of the whole blood, and she is rendered a residuary by a daughter or son's daughter.

275. Brothers of the whole blood, and brothers of the half-blood, are all excluded in the cases in which the sisters

of the whole blood and of the half-blood are respectively excluded.

§276. The **true grandmother** takes a *sixth*, whether she be by the father's side or by the mother's side, and whether there be one or more of them, provided they are all of equal degree. If there be more than one true grandmother, by whichever side, all of the same degree, they share the *one-sixth* equally among themselves.

§277. The nearest true grandmother on either side will exclude one who is more remote. Thus, a mother's mother will exclude the mother's mother's mother or any other higher ancestress. A father's mother will exclude a higher paternal ancestress. The father's mother will exclude the mother's mother's mother, and the mother's mother will exclude the father's mother's mother, the latter being more distant than the former. When the nearer grandmother is herself excluded by any other heir, she will still exclude a remoter ancestress of whichever side. Thus, if there be the father, the father's mother, and the mother's mother's mother,—the father's mother is herself excluded by the father, and will yet exclude the mother's mother's mother.

True grandmothers of *either* side are all excluded by the mother. The paternal grandmothers are also excluded by the father, and by the true grandfather when he is of a lower grade. Paternal grandmothers, when standing in the position of the father's mother, are not excluded by the true grandfather. Thus, the father's mother is not excluded by the father's father. The father's father's mother, and the father's mother's mother, are not excluded by the father's father's father, because these two ancestresses stand in the same relation with the father's father's father as the father's mother stands with the father's father. In other words, if the grandmother is related to the deceased *through* the grandfather, she will be excluded.

The Increase.

§278. Where there is a certain number of legal sharers among whom the estate is to be divided according to their specific shares, but it is found, on making the distribution of the shares, that there is not a sufficient number to satisfy the just demands of all the claimants, then the divisor is increased so that all the sharers get proportionately reduced shares. In other words, where the sum of the fractions representing the shares of the claimants entitled to inherit, is greater than unity, then all the sharers cannot get their full shares, and the denominator is increased to make it equal to the numerator. Such increase of the denominator, proportionately reduces the share of every sharer.

Illustration.

A woman dies leaving her husband, both parents, and a daughter. The husband gets a fourth, the parents get one-sixth each, and the daughter is entitled to get a half. The estate is to be divided into twelve shares, three of which are for the husband, two for each parent, and six for the daughter; and the sum of these shares is 13. So that, the estate falls short by one share, and this is met by increasing the divisor 12 to 13. The sharers now get their respective shares as stated above, but these are proportionately diminished ones; for instance, the husband instead of getting four out of twelve, gets four out of thirteen, and similarly for the others.

Rule: *Find the least common denominator of all the fractional shares, and convert the fractions to equivalent fractions having this common denominator. Then, find the sum of the numerators of these new fractions, which is always greater than the denominator, in a case of increase. The denominator is, therefore,* **increased** *to the number denoting the sum of the*

numerators, and the fractions are represented with this new denominator instead of their least common denominator.

The increase of the divisor is fixed by law, and is by no means indeterminate. It can take place in three cases: when the divisor is *six*, or *twelve*, or *twenty-four*. It cannot take effect in any other case.

The divisor *six* can be increased to 7, 8, 9 or 10, and to no higher number.

The divisor *twelve* can be increased to 13, 15, or 17, but to no other number.

The divisor *twenty-four* can be raised to 27.

Illustrations.

(a.) A woman leaves her husband and two whole sisters. The husband's share is a *half*, and the two whole sisters together are entitled to two-thirds. The divisor is 6, which is the least common denominator of the two fractions; but the legal shares of the claimants are, three for the husband, and four for the two sisters, and their sum is 7. $\left(\frac{1}{2}+\frac{2}{3}=\frac{3+4}{6}=\frac{7}{6}\right)$ Here the divisor 6 is increased to 7 to square up the shares, so that the husband is given $\frac{3}{7}$, and the sisters together $\frac{4}{7}$.

(b.) A woman dies leaving her husband, two whole sisters, and her mother. The shares are $\frac{1}{2}$, $\frac{2}{3}$, and $\frac{1}{6}$, respectively, and their sum being $\frac{3+4+1}{6}$ or $\frac{8}{6}$, the divisor 6 will be increased to 8, and the distribution will be $\frac{3}{8}$, $\frac{4}{8}$, and $\frac{1}{8}$ respectively.

(c.) A woman dies leaving her husband, two whole sisters, and two half sisters by the mother's side. The shares are $\frac{1}{2}$, $\frac{2}{3}$, and $\frac{1}{3}$ respectively. The sum of these fractions is $\frac{3+4+2}{6}$ or $\frac{9}{6}$; hence, the divisor 6 is increased to 9.

(d.) A woman dies leaving her husband, two whole sisters, two half sisters by the father, and her mother. The shares are $\frac{1}{2}$, $\frac{2}{3}$, $\frac{1}{3}$, $\frac{1}{6}$, respectively. Their sum being $\frac{3+4+2+1}{6}$ or $\frac{10}{6}$, the divisor 6 is increased to 10.

(e.) A man dies leaving a widow, two whole sisters, and his mother. The shares are $\frac{1}{4}$, $\frac{2}{3}$, and $\frac{1}{6}$ respectively. The sum being $\frac{3+8+2}{12}$ or $\frac{13}{12}$, the divisor 12 is increased to 13.

(f.) A man leaves a widow, two sisters by the same father and mother, one brother or sister by the same mother, and his mother. The shares are, $\frac{1}{4}$, $\frac{2}{3}$, $\frac{1}{6}$, and $\frac{1}{6}$, respectively. Their sum being $\frac{3+8+2+2}{12}$ or $\frac{15}{12}$, the divisor 12 is increased to 15.

(g.) If in the preceding case there were two brothers or sisters by the same mother, or there were one brother *and* one sister by the same mother, instead of one such brother *or* sister, then the shares would stand as, $\frac{1}{4}$, $\frac{2}{3}$, $\frac{1}{3}$, and $\frac{1}{6}$, and their sum being $\frac{3+8+4+2}{12}$ or $\frac{17}{12}$ the divisor 12 would be increased to 17.

(h.) A man dies leaving a widow, two daughters, and both parents. The shares are $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{6}$, and $\frac{1}{6}$; their sum is $\frac{3+16+4+4}{24}$ or $\frac{27}{24}$, and the divisor 24 is increased to 27.

The Return.

§279. The return is the converse of the increase. Where there are sharers and no residuaries, and a surplus remains after the distribution of the fixed legal shares, then the surplus *returns* or reverts to the heirs except the husband and the wife. The husband and the wife are not heirs by consanguinity, but for a special cause—marriage. They are not entitled to a return when there are heirs by consanguinity. But in the absence of those heirs, the husband or the wife will be entitled to the return. In other words, when there are no heirs by consanguinity, either sharers, or residuaries, or distant kindred, the husband or the wife (as the case may be) will take *first* his or her legal share, and the residue will *return* to him or her for want of any other preferential heir. When there is a distant kindred, the husband or wife are not entitled to the return.

The persons entitled to the return are seven. These are, the mother, the true grandmother, the daughter, the son's daughter, full sister, half sister by the father, half brother or sister by the mother. One, two, or three classes of these sharers may get in the return, but not more than three classes. It has been stated above that the husband or the widow do get in return when there is no other kindred by blood. The father and the true grandfather are omited in the list of the persons entitled to the return, as they are residuaries when there is no male issue of the deceased, and would as such take the residue.

Rule.—In the cases of Return, the mode of distributing the estate among the claimants, is : *First, the fixed legal shares are allotted to them. and then, the surplus is distributed among those who are entitled to the return, in proportion to their respective shares.* But to avoid lengthy arithmetical processes, certain devices have been adopted in making the distribution, and these are fit to be considered.

The Return is considered in four different cases :—

First.—When there is only one class of sharers and they are entitled to the return. For instance, if there are two daughters, they first get their legal share which is one third for each, and then the residue $\frac{1}{3}$ reverts to them in equal proportion, each getting one-sixth. In this case the claims of the sharers being equal, the residue left is equally divided between them. In other words, the entire estate may be divided into as many equal parts as there are number of claimants, which is practically the same as distributing the legal share of each, and then returning to each an equal portion of the residue. In this way, when there are two daughters, we can at once put down the share of each at one-half—which is the same thing as giving first a third as her legal share, and then a sixth in return.

Secondly.—When there are two or three (and no more) of those entitled to the return, and no one else. As there is none of those who are not entitled to the return, the distribution, according to the general rule stated above, will be made

by first giving the legal shares of each, and then dividing the surplus in proportion to the respective shares of the claimants. Or, it may be made according to the following principles :—

(1) If there be two *sixths*, as when there be a true grandmother (whose share is a sixth), together with a sister by the same mother (whose share is also a sixth), in such case divide the entire estate into *two* parts. For the shares being equal, the return will take place in equal proportion, and consequently the division of the whole is in halves.

(2) If there be a *third* mixed with a *sixth*, the divisor will be *three* instead of *six*. As, if a man dies leaving his mother and one sister by the mother's side. The shares are $\frac{1}{3}$ and $\frac{1}{6}$, the former for the mother, and the latter for the sister. The estate is divided into six parts, of which two are for the mother, and one for the sister, but as these shares make up only three out of the six shares, there is a return of *three* shares. So, we are advised to divide the estate into *three* shares instead of six, and two out of the three shares are given to the mother (that is, two-thirds), and one share (that is, one-third) is given to the sister, and these will be found to be the shares of those claimants by adding up their legal shares and the shares they will be entitled to in the return.

On p. 236 of Babu Shama Churn Sircar's Mahomedan Law, Vol. I., (Tagore Law Lectures, 1873), there is given an illustration, (g), in which the case of the mother and her two children is considered as falling under this mode of division : " in this instance, the root of the case is six, but the shares to be received by the heirs aforesaid are three ; so (here) you will make this (three) the root of the case, and in proportion with those shares divide the property in thirds, thus two-thirds of the property will go to the mother's children (one-third to each), and one-third to the mother." Here the mother's share is reduced to $\frac{1}{6}$ by the presence of her two children who are half-brothers or sisters to the deceased ; and her two children together get at first $\frac{1}{3}$ or $\frac{2}{6}$. The divisor is 6, and the shares taken are 3 ; so the divisor is commuted to 3, making $\frac{1}{3}$ for the mother, and $\frac{2}{3}$ for her two children.

The rule laid down in the Durr-ul-Muktar is : " When there are two or three and no more of those to whom a return is to be made, then the division should be made *according to the number of their shares* : that is, by *two*, when there are two-sixths in the case ; by *three*, when there are a third and sixth ; by *four*, when there are a moiety and a sixth ; by *five*, when there are two-thirds

and a sixth." In the above case of the mother and her two children, the shares are $\frac{1}{6}$, $\frac{1}{6}$, and $\frac{1}{6}$; reducing to L. C. M., the shares are $\frac{1}{6}$, $\frac{1}{6}$, and $\frac{1}{6}$. The number of these shares is 3, and hence the division is to be made by 3. Thus $\frac{1}{3}$, $\frac{1}{3}$, and $\frac{1}{3}$, are the shares of the respective claimants.

(3) If there be a daughter of the deceased and his mother. The shares are $\frac{1}{2}$ and $\frac{1}{6}$. Reducing to L. C. M., they are $\frac{3}{6}$ and $\frac{1}{6}$; the number of shares taken is 4, and the case is therefore one of return; so we change the divisor 6 into 4, and give $\frac{3}{4}$ and $\frac{1}{4}$ to the claimants respectively, and these will be found by arithmetical process to be the portions due to them after adding the legal share to the share they are entitled to in the return. If there be two daughters and a mother, the shares are $\frac{2}{3}$ and $\frac{1}{6}$, or $\frac{4}{6}$ and $\frac{1}{6}$. The number of shares is 5, and as it is a case of return, the division should be made by 5. So that, the shares are $\frac{4}{5}$ for the two daughters, and $\frac{1}{5}$ for the mother.

Thirdly.—When there is with the first class as stated above (that is, kinsmen who are of the same class of sharers), a person not entitled to a return. As, when there are three daughters and the husband of the deceased; or, where there are two son's daughters and a wife. In these two cases, the husband and the wife are persons who are not entitled to the return, and they are mixed with sharers who are of one kind in each case. In such a case, the share of the person not entitled to the return is to be given first, and the residue will then be distributed equally according to the number of the persons entitled to the return. Thus, in case there being the husband with two daughters, the husband's share $\frac{1}{4}$ is given him first, and the remainder $\frac{3}{4}$ is divided into halves between the two daughters.

Fourthly.—When there are two sorts of persons who are entitled to the return, together with a person (either husband or wife) who is not entitled to it. In such case the share of the person not entitled to the return is to be deducted, and the residue rateably distributed among the persons entitled to the return. Thus, if there be a wife, four grandmothers and six sisters by the same mother. Then, as the wife is not entitled to any return, her share $\frac{1}{4}$ is first taken out. The remainder $\frac{3}{4}$ is to be distributed among the grandmothers and the half-sisters as $\frac{1}{6} : \frac{2}{6}$ (which are their shares), or as 1 : 2. Therefore, we divide the residue into three shares, two of which go to the half-sisters and one to the grandmothers. Or, $\frac{1}{6} + \frac{2}{6} = \frac{3}{6}$; therefore, by the principle of return, 6 is changed into 3, and the residue is divided into three shares as above.

TABLE II.

§280. Succession among the Residuaries.

N. B.—Some of the heirs of this class are primarily sharers, but who are rendered residuaries by the presence or absence of other heirs. Thus, the father is primarily a sharer, but when the deceased had no children or son's children, h. l. s., the father inherits as a residuary. Daughters are primarily sharers; but when there are daughters and sons, the latter would make the former residuaries. *The residuaries take the whole of the surplus left after the allotment of the shares; and when there are no sharers, the residuary heir or heirs entitled to succeed would take the whole estate, leaving nothing for those below them. And, when there are a number of persons coming under the same general description, some of them being of a higher degree than the rest, the heir nearest to the deceased will succeed excluding those more remote.* For instance, the father's father and the father's paternal grandfather are both *true grandfathers*, but the father's father being nearer to the deceased will inherit in preference to the paternal great-grandfather, if both be living. Similarly, a son's son excludes a son's grandsons and other lower descendants; a brother's son excludes a brother's grandson and other lower descendants. Again, *when a male and a female of equal grade inherit together, the male has double the share of each female.* Also, *a relative of the whole blood is preferred to one who is related by the father's side only*, as in the case of brothers and sisters, and brother's children. Further, *a person related through females only has no place among the residuaries.*

Class I.—Residuaries by consanguinity.

Order of succession :—

1. Son, (as also, *daughters*, when present with sons.)

2. Son's sons, (and *son's daughters*, when present with them.)

3. Son's son's sons, (and *son's daughters* of equal or higher grade.)

4. Sons of any male descendant (how low soever) in the direct male line, in default of those above them in the order of descent, (and any son's daughters of equal or higher grade.)

5. Father, when there are no sons of the deceased, nor son's sons, h. l. s. (See Table I.)

6. True Grandfather, or any paternal ancestor in the direct male line, h. h. s., when no sons or son's sons, h. l. s., nor father. (See Table I.)

7. Full brothers, and, when with them, full sisters. (A full brother is excluded in the cases in which a full sister is excluded. See Table I.)

8. Full sisters, when with daughters or son's daughters of the deceased, and when there is no full brother.

9. Brothers by the father's side, and when with them, sisters by the father's side. (Excluded when a sister of the half-blood by the father's side is excluded. See Table I.)

10. Sisters by the father's side, when with daughters or son's daughters of the deceased, and when there is no brother of the half-blood by the father's side.

11. Son of a whole brother.

12. Son of a half-brother by the father's side.

13. Son's son of a whole brother.

14. Son's son of a half-brother by the father's side.

15. Other low descendants of brothers of both description, in the direct male line, in the above order; that is, when equal in degree, the heir related by whole blood being preferred to one related through the half-brother, and he who is higher in degree (whether related through the whole or the half-brother) being preferred to one lower than himself.

16. Full paternal uncle (that is, the father's whole brother.)

17. Half paternal uncle by the same grandfather, that is, the half-brother of the father by his father's side.

18. Full paternal uncle's son.

19. Half paternal uncle's (No. 17) son.

20. Full paternal uncle's son's son.

21. Half paternal uncle's (No. 17) son's son.

22. Other low descendants of the two kinds of paternal uncles in the above order; that is, when equal in degree, the heir by whole blood being preferred to one by half-blood, and he who is nearer in degree (whether of the whole blood or of the half blood) being preferred to one more remote.

23. Father's full paternal uncle.

24. Father's half paternal uncle by his grandfather, that is, a half-brother of the father's father, by the same father.

25. Father's full paternal uncle's son.

26. Father's half paternal uncle's (No. 24) son.

27. Sons, h. l. s., of father's full paternal uncle and father's half paternal uncle (24), according to the order explained in No. 22.

28. Paternal uncles, either full or half (by the same father) of the father's father, and their sons and son's sons, h. l. s., in the same order as in the above cases. (See Nos. 23, 24, 25, 26, and 27.)

29. Paternal uncles of the father's father's father and other high ancestors in the direct male line, and their sons and son's sons h. l. s., in the order enumerated above—that is, the nearer excluding the more remote, and the whole relation being preferred to relations connected by half-blood.

Class II.—Residuaries for special cause.

30. The order of succession is the same as in the case of the residuaries by consanguinity, with this exception that a female is not entitled to succeed as a residuary "for special cause." The residuaries "for special cause" do not succeed so long as there is a single member of the consanguinous residuaries.

(The table of succession among the distant kindred is given in the section on that class of heirs.)

The residuaries.

§281. The residuaries are principally of two kinds—I. Residuaries by consanguinity, and, II. Residuaries for special cause.

§282. *The residuaries by consanguinity* are again divided into three classes: (1) Residuaries in their own right; (2) Residuaries in another's right; and (3) Residuaries together with another.

§283. The *residuary in his own right* is every male in whose line of relationship to the deceased no female enters. These, again, are of *four* classes: (*a*) the offspring of the deceased; (*b*) then his root; (*c*) then the offspring of his father; and, (*d*) then the offspring of the paternal grandfather how high soever. Persons who are related to the deceased through the intervention of a female, cannot be residuaries. The brother by the same mother, the daughter's son, the mother's father, are all related through females, and are, therefore, not residuaries.

Case-law.

The succession of residuaries in their own right is as unlimited in the collateral as in the direct line, where it is expressly said to be, *how low* and *how high soever*: *Mahomed Haneef* v. *Mahomed Masoom*, 21 W. R. 371.

§284. *Succession of the residuaries of this class.*—Out of these various classes and grades of residuaries, *the nearest* succeeds first, and then the nearest after him. They are preferable according to the proximity of their degree.

§285 *The offspring of the deceased* are entitled to succeed first, being the *nearest* of all the residuaries. Of these, *first* come the legitimate sons of the body, *then* their sons, *then* their son's sons how low soever. A son's son cannot get so long as there is a son, nor can a son's grandson inherit when there is a son's son.

§286. A child is a Mussalman if either of its parents has been, or has become after the birth of the child, a Mussalman, and is entitled to inherit of its Mussalman parents. The child born of lawful wedlock, or where the marriage between its parents is presumed in law, as also the child acknowledged are all entitled to inherit as legitimate children. [For the establishment of parentage, see ch. vi].

§287. An illegitimate child, as well as the child of imprecation, inherits only from its mother and mother's relations, and is also inherited by them. They do not inherit from their putative father and his relations, because their parentage on the father's side is wanting.

§288. An adopted son or daughter of *known* descent, has no right to inherit from his or her adoptive parents and their relatives, as adoption is not recognised by the Mahomedan law.

Case-law.

Adopted son.—Cannot inherit among Mahomedans: *Oheed Khan* v. *Collector of Shahabad*, 9 W. R. 502.

Illegitimate sons.—Illegitimate sons cannot claim any relationship with their father's family: *Boodhun* v. *Jan Khan*, 13 W. R. 265.—Nor children of fornication or adultery; hence, illegitimate brothers cannot succeed each other: *Shahebzadi* v. *Himmut Bahadur*, 12 W. R. 512.—The Mahomedan law is not applicable to the illegitimate child of a Mahomedan woman, brought up and dying as a Christian: *Nancy* alias *Zahoorun* v. *Burgess*, 1 W. R. 272.

§289. In default of sons and son's sons how low soever, succeeds the next class:—

His root:—This class comprises the father and, failing him, the true grandfather *how high soever*, the nearer excluding the more remote. The father, as has already been seen, inherits both as a sharer and a residuary when there are no male issue of the deceased, but there are daughters and son's daughters. He is a

simple residuary on failure of the children of the deceased, whether male or female, and how low soever. The grandfather, when he is a true one, inherits in the interests of the father in the absence of the latter. The mother's father is a false grandfather, and is among the distant kindred.

§290. On failure of the descendants and the ascendants, succeeds the next class :—

The offspring of his father: These are the deceased's brothers and their sons how low soever. The relatives of the whole blood are preferred to those of the half-blood, and those nearer to him are preferred to those more remote. Thus, first inherits the brother by the same father and mother; then the brother by the same father ; then the sons of the whole brother; then the sons of the half-brother ; then the sons of the brother's sons how low soever, according to the above order. A whole brother's son's son will inherit before a half-brother's son's son; both being of the same degree, the whole relation is preferred to that of half-blood. But, a half-brother's son's son would be preferred to a whole brother's son's grandson, the former being nearer to the deceased. Brothers by the mother's side are not residuaries, but inherit as sharers.

§291. On failure of the descendants, the ascendants, and the father's children, succeeds the next class :—

The offspring of the true grandfather, how high soever. Of this class, the foremost is the father's whole brother; then the father's half-brother by his father; then the sons of the father's whole brother; then the sons of the father's half-brother; and so on, according to the rule stated in the case of the brothers and their sons, namely, the nearer excludes the more remote, and the whole blood is preferred to the half, when both are of equal degree.

§292. On failure of the descendants of the father's father in the order stated above, the father's grandfather's descendants inherit in the same manner; next, the father's great-grandfather's descendants come in the same order, and so on. As observed by Mr. Baillie, "In the right line (that is, where no female intervenes), whether of ascent or of descent, it is universally agreed that there is *no limit* to the persons who may be called to the succession, provided that these are males, and connected with the deceased through males, according to the definition already given of the term residuary."

§293. The **residuaries in another's right** are four females whose shares are *half* and *two-thirds*. These are,—(1) the daughters who become residuaries with their brothers (that is, in the right of their brothers; for, had there been no sons of the deceased, the daughters would have inherited as sharers); (2) The son's daughters who become residuaries in the right of the son's son, how low soever; (3) The sisters of the whole blood, who become residuaries in the right of their whole brothers; (4) The sisters by the same father, who become residuaries in the right of their own brothers (the half-brothers by the same father, of the deceased). The daughter, the son's daughter, and the sister, become residuaries when there is a son, a son's son, and a brother respectively; hence, the former become residuaries in the right of the latter.

§294. It should be remembered that of the residuaries of this class, the daughter alone is never excluded. The rest are excluded by the presence of some preferable heirs.

§295. A female who has no share among the female heirs, but whose brother is among the residuaries, does not become a residuary in his right. For instance, the paternal uncle is a residuary heir, but his sister (the paternal aunt) is not a sharer and does not become a residuary with him.

§296. The **residuary together with another** is every female who becomes a residuary with another female. These are the sisters (whether by the same father and mother, or by the same father), who become residuaries with a daughter or daughters, or with son's daughters how low soever. When the father, the true grandfather, the sons or son's sons, of the deceased, are wanting, and there are sisters (whole or half, by the same father) and daughters or son's daughters, the sisters take as residuaries after the daughters or son's daughters have taken their legal shares. But if in the same case, there be a brother of the same class, his sister will be a residuary with himself.

§297. When the residuaries of the three classes occur together, preference is given to propinquity to the deceased. Thus, where there is a daughter, a full sister, and the son of a brother by the same father, the daughter gets her legal share one-half, and the full sister who is a residuary with another (the daughter) takes the residue, to the exclusion of the half-brother's son, though he is a residuary of his own right, because the full sister is nearer to the deceased than the half-brother's son. Similarly, the brother's son excludes the paternal uncle.

298. *The residuary for special cause* is the manumittor of a slave, and his *male* residuary heirs in the same order as above. This class succeeds on failure of the residuaries by consanguinity, when the deceased was an enfranchised slave, and no female can succeed in this class.

The distant kindred.

§299. In default of the heirs enumerated above, namely, the sharers and the residuaries, the *distant kindred* are entitled to inherit. The **distant kindred** are all those relations who are neither classed among the sharers, nor among the residuaries.

If there be a single residuary, he or she will take the whole of the remainder, and so the distant kindred cannot come in as heirs. If the deceased be an enfranchised slave, his manumittor and the male residuary heirs of such manumittor are entitled to inherit after the consanguine residuaries and before the distant kindred. When there are sharers and no residuaries, the surplus remaining after the distribution of shares, reverts to the sharers by the process of the return, and nothing remains for the distant kindred. But, when there is the husband or the wife of the deceased, and no other persons among sharers or residuaries, the distant kindred will take the remainder left after deducting the husband's or the wife's share; for, the husband or the wife is not entitled to the return when there is a single consanguineous heir, even if that heir be among the distant kindred.

§300. The distant kindred are of four classes:—

1st.—The children of daughters, and of son's daughters or other female descendants, how low soever.

2nd.—The false grandfathers and the false grandmothers, how high soever.

3rd.—The daughters and daughter's children of full brothers and of half-brothers by the same father: the children of half-brothers by the same mother: and the children of (whole or half) sisters.

4th.—The daughters of full paternal uncles and of half paternal uncles by the father's father's side: paternal uncles who are half-brothers of the father by his mother's side, and the children of such half paternal uncles: paternal aunts and their children: maternal uncles and aunts, and their children.

These, and all who are related through them to the deceased, how high soever or how low soever, are within the range of the distant kindred.

§301. The *Sirajiyyah* observes—"A distant kindred is every relation, who is neither a sharer nor a residuary." "These distant kindred are of four classes; the first class is descended from the deceased; and they are the daughter's children, and the children of the son's daughters. The second sort are they from whom the deceased descend; and they are the excluded grand-fathers and the excluded grandmothers. The third sort are descended from the parents of the deceased; and they are the sisters' children, and the brothers' daughters, and the sons of brothers by the same mother only. The fourth sort are descended from the two grandfathers and two grandmothers of the deceased; and they are paternal aunts, and uncles by the same mother only, and maternal uncles and aunts. These, and all who are related to the deceased through them, are among the distant kindred." It is thus apparent that the distant kindred are all such relations who have been excluded from the category of the first two classes of heirs, namely, sharers and residuaries. Thus, of those who are descended from the deceased, the son, son's son how low soever, the daughter, and the son's daughter h. l. s. are among the sharers and residuaries. The son's daughter's children, the children of son's how-low-soever son's daughters, and the children of daughters are the rest of his descendants, and are included among the distant kindred. Of the ancestors of the deceased, the true grandfather h. h. s., and the true grand mother h. h. s., are among the sharers; the false grandfathers and the false grandmothers, though excluded from the category of sharers and residuaries, are allowed to inherit as distant kindred of the second sort. The third class of the distant kindred includes those descendants of the deceased's parents, who are not allowed to inherit in the two other classes of heirs. The uterine brothers and sisters, brothers and sisters of the whole blood, half-brothers and half-sisters by the father's side are all among

the sharers and residuaries; so also, the sons and the son's sons h. l. s. of full brothers and brothers by the same father only. But the children of uterine brothers and sisters and of other sisters, and the female descendants and their children of all brothers, are not included among those heirs, and they find a place among the third sort of the distant kindred. The male descendants in the direct male line of the true grandfather (h. h. s.) are among the residuaries; the other descendants of the true grandfathers, and the children of all false grandfathers and of all grandmothers, are included among the distant kindred of the fourth sort. It is thus seen that the distant kindred are *complementary* to the residuary heirs, that is, they exhaust all those relations who do not find a place among the residuary heirs.

§302. The order of succession of the distant kindred is according to the order of their classification. The first class is the first in succession, though the claimant be more remote than a member of another class. The second class succeeds next; then the third; and then the fourth class. The order of succession among the individuals of each class is according to the proximity of their relationship to the deceased, following the order of the residuaries; and if there be a single member of a class of the distant kindred, he or she will take the whole property, as in the case of the residuaries.

§303. The *Sirajiyyah* describes the rules of succession among each class of the distant kindred separately; and, as the distant kindred of one class totally excludes the classes following it, the order of succession among each class is best considered in that way.

§304. **Succession among the first class.**—The order of succession among the members of the first class of distant kindred is regulated by the following rules:—

Rule (1). The person who is nearest in degree to the deceased is entitled to succeed first; thus, the daughter's daughter succeeds in preference to the son's daughter's daughter, as the latter is more distant by one degree than the former from the deceased. The daughter of a son's daughter succeeds before a daughter of a son's daughter's daughter, or a daughter's son's daughter's daughter, or a daughter's daughter's daughter's daughter. This rule is applicable to the other classes also.

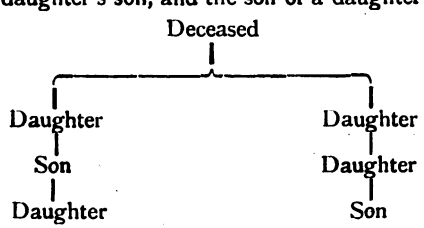
Rule (2). If the claimants are equal in degree, then the child of an *heir* is preferred to the child of a distant relation. Thus, a son's daughter's daughter is preferred to a daughter's daughter's son; because, the son's daughter is an *heir* (being included among the sharers and the residuaries), and the daughter's daughter is a distant kindred; consequently, though the two claimants are equal in degree, both being in the third degree of affinity, the child of an heir is preferred to the child of a distant kindred. The words '*child of an heir*' mean 'one who is the child of a *sharer* or a *residuary*,' that is, one whose *immediate* parent is a sharer or a residuary. This rule also applies to the *third* class, and to the descendants of the *fourth* class.

Rule (3). If the claimants are equal in degree, and there is not among them the child of an heir, or if all of them be the children of heirs, then, (*a*) if all the claimants be of the same sex, and the persons through whom the claimants are related to the deceased be, when in the same rank, also of the same sex (that is, all males or all females), they would get equal shares: and (*b*) if there be difference of sex among the claimants only, but there be no disagreement of sex among their ancestors of the same degree, each male would get the share of two females, as in the case of residuaries. Thus, if the deceased had three daughters, each of whom died leaving a daughter, then these three daughter's daughters would inherit equal shares; because,

they are all related through heirs—the deceased's daughters, they are all of the same sex, and the persons through whom they are related to the deceased are all females. So, if the claimants be all sons' daughters' daughters' sons or daughters, or all daughters' sons' daughters (or sons), there will be equal division among the claimants, as none of them is related through an heir, and there is no disagreement of sex among their ancestors of the same degree. And, when there is a daughter's son with a daughter's daughter, the former has double the portion for the latter; as also, if the claimants are a son's daughter's daughter's *son* and son's daughter's daughter's *daughters*. But (*c*) if there be a difference of sex among the ancestors of the claimants, in the same rank or degree,—as when there are a daughter's *son's* daughter and a daughter's *daughter's* daughter, or when there are a son's daughter's son's daughter and a daughter's son's daughter's son,—then Abu Yusuf will consider the sex of the claimants only, and give them equal shares if they be of the same sex; or if there be a mixture of males and females, he would give each male the double share of each female,—as was done in cases (*a*) and (*b*). That is, according to Abu Yusuf, it is immaterial whether the claimants are descended through males or females. But, according to Muhammad, the sexes of the "roots", that is, of the persons through whom the claimants are descended from the deceased, have to be taken into consideration, and when there is a difference of sex in the first highest rank of the "roots," the distribution will be made primarily among the "roots" of that rank, giving each male double the share of each female, and the portion thus allotted to each class of the "roots" of the same rank will be taken collectively and distributed among their immediate descendants; and if some of these descendants, in the next rank, be males and some females, each male will be given double the share of each female; and the collective share of these male descendants shall pass

to their immediate descendants in the next rank, and that of the females will pass to their own descendants in the next lower rank, and the same process will be repeated over again, so long as the distributive share of each actual claimant is not determined.

Muhammad's rule, Section I.—The *Sirajiyyah* thus enunciates the above rule laid down by Muhammad, noticing the points wherein this lawyer agrees with Abu Yusuf: "But, if their* degrees be equal, and there be not among them the child of an heir, or, if all of them be the children of heirs, then, according to Abu Yusuf and Alhasan, the persons of the branches are considered, and the property is distributed among them equally, whether the condition of the roots, as male or female, agree or disagree; but Muhammad considers the persons of the branches, if the sexes of the roots agree, *in which respect* he concurs with the other two; and he considers the persons of the roots, if their sexes be different, and he gives to the branches the inheritance of the roots, in opposition to the two lawyers. For instance, when a man leaves a daughter's son, and a daughter's daughter, then, according to Abu Yusuf and Alhasan, the property is distributed between them by the rule "*the male has the portion of two females*," their persons being considered; and, according to Muhammad, in the same manner, because the sexes of the roots agree: and, if a man leave the daughter of a daughter's son, and the son of a daughter's daughter,



then, according to the two first mentioned lawyers (Abu Yusuf and Alhasan), the property is divided in thirds between the branches, by considering the persons, two-thirds of it being given to the male, and *one-third* to the female; but, according to Muhammad, the property is divided between the roots, I mean *those in the second rank* (that is, the daughter's son and the daughter's daughter in diagram), in *thirds*, two-thirds going to the daughter of the

* That is, of the claimants.

daughter's son, namely, the allotment of her father, and one-third of it to the son of the daughter's daughter, namely, the share of his mother."*

The *Sirajiyyah* continues—"Thus, according to Muhammad, when the children of the daughters are different in sex, the property is divided according to the first rank that differs among the roots; then the males are arranged in one class, and the females in another class, after the division, and what goes to the males is collected and distributed according to the highest† difference that occurs among their children, and, in the same manner, what goes to the females; and thus the operation is continued to the end according to this scheme:

S	S	S	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D
S	D	D	S	S	S	D	D	D	D	D	D
D	D	D	S	D	D	S	S	S	D	D	D
D	S	D	D	D	D	S	D	D	S	D	D
D	D	D	D	D	S	D	D	S	D	S	D
1	2	3	4	5	6	7	8	9	10	11	12

Note.—The above scheme or table represents six generations of descendants of the deceased,—the first or topmost generation consists of three sons and nine daughters of the deceased, and the remaining five generations representing the descendants of these sons and daughters; the sixth generation forms the claimants

---

* Here the first rank of the roots of the claimants are the two daughters of the deceased, and as there is no disagreement of sex in that rank, the division commences primarily in the second rank, where the persons are of both sexes, and *two-thirds* are given to the daughter's son and *one-third* to the daughter's daughter. The daughter's son's share of two-thirds is passed to his daughter, one of the claimants, and the daughter's daughter's one-third to her son, the other claimant. Abu Yusuf would have reversed the shares, giving two-thirds to the male claimant.

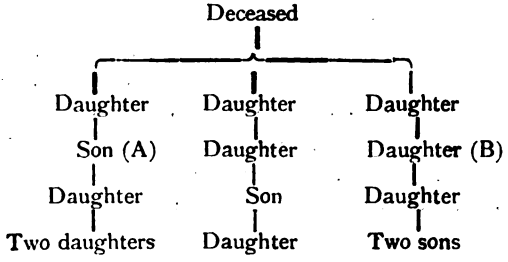
† '*Highest difference that occurs among their children*'—by which it is meant that if there be several generations of the children of the males, the *highest* of those generations that *contains a mixture of males and females*, will be given the collective share of the males (referred to in the text), each male of that generation being given double the share of each female. If there be any intermediate generation having no difference in sex, the individuals of that generation will not occasion any difference in shares, and so they need not be taken into account.

to the estate of the deceased, the individuals of the five higher generations being presumed to be dead. The claimants are all of the same degree, and none of them related through an heir. Moreover, excepting the second rank of ancestors or "roots," there is disagreement of sex among the "roots" of all ranks. The scheme is, therefore, well-suited for the exposition of Muhammad's rule. Now, according to that lawyer, the property is to be primarily distributed among the individuals of the highest rank of the "roots" wherein the difference of the sexes first appears. In the table, this difference is found to exist in the first rank, where there are *three* males and *nine* females. So, the property is primarily divided into *fifteen* shares, *six* being given to the three sons, and *nine* to the nine daughters, the the male getting the double share of a female. The six shares for the three sons are passed collectively to their descendants in the *third* rank, as the individuals in the second rank are all of one sex, and consequently they do not occasion any unequal division of the property. Similarly, the nine shares of the nine females in the first rank are collectively passed to their descendants in the third rank, there being no difference in the second rank. In the third generation, the descendants of the three sons in the first rank are one son and two daughters, and the six shares coming to them collectively are given *three* to the son, and *three* to the two daughters. The son's portion is given undiminished to his descendant in the *last* branch, there being no disagreement of sex among his descendants in the fourth and fifth generations, both of them being daughters. The first D (daughter) in the last branch gets, therefore, three out of fifteen shares of the whole estate. The three shares of the two daughters in the third rank, are passed to their descendants in the fifth rank (one son and one daughter), there being no difference of sex in the fourth branch, and this son in the fifth branch gets two out of the three shares, and the daughter takes one only. Then the son's two shares are given to his branch in the last generation, who is the second in order among the claimants; and the daughter's one share is given to her branch in the last generation, the third in order. Having traced the distribution of the six shares descending from the three sons in the first rank to their descendants among the claimants, in the last generation, we have then to commence with the nine daughters in the first rank, and to trace similarly the distribution of the *nine* shares allotted to them among their descendants in the successive generations down to the last branch, where the actual claimants are to be found. The process is the same as in the case of the three sons of the first rank, it being borne in mind that there begins a fresh distribution wherever there is a difference of sex in the same rank. Thus, the shares of the nine daughters are passed at once to their descendants in the *third* rank, the second presenting no difference of sex. In the third rank, the descendants of the nine daughters consist of three sons and six daughters, and they are given the *nine* shares, in the proportion of two

shares to each male and one to each female. The shares of the three males are passed to their immediate descendants in the fourth rank consisting of one son and two daughters, and the share of the son is given to his descendant in the last generation, a daughter, and the shares of the two daughters are given to their descendants in the last generation, consisting of a son and a daughter, in the above ratio. Then, the six daughters in the third rank are made the starting point for distribution of their shares, which go at once to the three sons and three daughters below them in the fourth rank. The shares of the three son, are given to their children, one son and two daughters, and the share of the son is given to his daughter, and the shares of the two daughters are given to their children, one daughter and one son, all in the sixth generation, in the above ratio. Lastly, the distribution commences with the three daughters in the *fourth* generation, and their shares pass collectively to their children in the next generations consisting of a son and two daughters, in the above ratio. The share of the son goes to his daughter in the last generation, and the shares of the two daughters go to their children, a son and a daughter, in the last generation, in the above ratio. Thus, commencing with the highest generation in the roots, where the difference in sex first appears, the distribution is carried on to the actual claimants. The main feature in the method is, that whenever there is a difference of sex, the males are given in proportion of double the share of each female, *and then the males and females are made separate groups,* each group forming a fresh starting point for distribution, and the process is continued downwards so long as the actual claimants are not reached. Abu Yusuf would have considered the sex of the actual claimants only, and as there are *three* sons and nine daughters, he would have divided the estate into fifteen shares, giving two to each son and one to each daughter. The doctrine of Muhammad regarding the sexes of the "roots" is the more prevalent, and followed in practice in preference to the simpler method of Abu Yusuf.

Muhammad's Rule, Section II.—According to Muhammad, the *number* of the claimants descended from the same root, is to be considered in making the primary distribution among the "roots." That is, when dividing the estate among the roots of the highest rank in which the difference of sexes first appears, if it be found that any of them has two or more descendants among the actual claimants, then such person, instead of being considered as a single person, will get as many shares as he has descendants among the claimants. *If in the generation in which the difference of sex first appears, there be a son and two daughters, and the son has two descendants among the claimnants, and one of the daughters has three descendants among the actual claimants, then the son will be counted as two sons,*

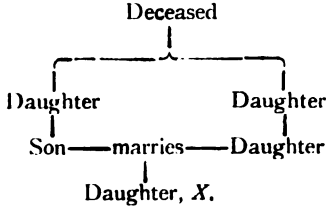
and the daughter having three descendants will be counted as three daughters, in making the distribution in that generation. Thus, if a man leave



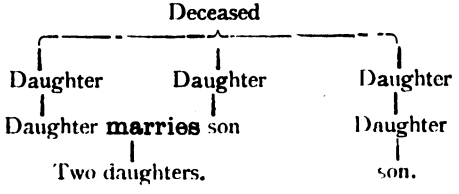
two daughters of a daughter's son's daughter, two sons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's son, as arranged in the above table, then according to Muhammad's rule of division, the estate will be primarily distributed among the individuals of the second rank, wherein the difference in sex among the roots first appears. But, in doing so, the daughter's son (A) will be counted as two sons inasmuch as he has two descendants among the claimants; and the daughter's daughter (B) will be counted as two daughters, for having two descendants among the claimants. Thus, in dividing the estate among the individuals of the second generation, instead of one son and two daughters, we have to divide between *two* sons and *three* daughters; and as each male gets double the portion of each female, the estate is divided into *seven* parts, namely,—*four* for the daughter's son; *two* for the daughter's daughter in the third line, for her having two descendants among the claimants; and *one* for the daughter's daughter in the middle line, who is counted as a single daughter on account of her having a single descendant among the claimants. As there are no other males in the second rank, the share of the son in that rank, which is *four-sevenths* as determined above, is at once passed to his descendants among the claimants, that is, the two daughters in the first line. The collective share of the two daughters in the second rank, has been found to be *three-sevenths*, which goes to their descendants in the third rank, where there is a difference in sex,— the daughter (*i. e.*, the daughter's daughter's daughter) being again considered as equal to *two* daughters, on account of her having *two sons* as claimants. Therefore, the *three-sevenths* are divided into *four* parts, *two* for the son and *two* for the daughter, namely, a *three-fourteenth* share for each of them. The son's *three-fourteenth* share descends to his daughter, and the daughter's like portion goes to her two daughters among the claimants.

Abu Yusuf does not recognise the above rule. He would have divided the property among the branches in *seven* parts, *three* for the three daughters, and *four* for the two sons, giving a double share to the males.

Muhammad's Rule, Section III.—"Our learned lawyers consider the *different* sides in (the) succession (of the distant kindred); except that Abu Yusuf considers the sides in the persons of the branches, and Muhammad considers the sides in the roots." The meaning of this passage of the *Sirajiyyah* is that *if a distant kindred be related to the deceased in more than one way, he or she will be entitled to inherit as so many heirs.* Thus, if a daughter's son marry a daughter's daughter, and they leave a *daughter*, *X*, who is a claimant as distant kindred,



there *X* will inherit as *two* heirs, having a *double* relationship. She will inherit as a daughter's son's daughter, and also as a daughter's daughter's daughter. And here again, the opinion of Abu Yusuf differs from that of Muhammad, whose view of the law is the accepted one. Abu Yusuf does not consider the "roots" of the claimants, and so he divides the property according to the branches (that is, the actual claimants), and gives them, who are related in different ways, so many shares, without any regard to the roots. But, Muhammad originally divides the property according to the first rank that differs among the roots, and *applies the number of the branches to the roots*, so that if two individuals among the roots have two descendants in common among the claimants, then both of the ancestors will be given two shares each on account of each of them having two descendants among the claimants. This is best explained by the following illustration given in the *Sirajiyyah* :—



Where, it is seen, that a daughter's son married a daughter by another daughter, and their descendants are *two daughters* among the claimants, having a double relationship—*first*, as daughter's daughter's daughters, and, *secondly*, as daughter's son's daughters. There is also another claimant, who is a daughter's daughter's son by another line. Here, according to Abu Yusuf, the *two* daughters among the claimants are considered as *four* daughters, on account of their double relationship, and the division is made between *four* daughters and one son; so that the estate is divided into *six* parts, *two* being given to the son, and *four* to the two daughters. But Muhammad begins his distribution primarily among the roots of that rank in which the difference in sex first appears; and as such difference occurs first in the second generation, the division will commence there. The roots of the second generation consist of a daughter's son and two daughter's daughters: That daughter's daughter who is married to the daughter's son, is considered as *two* daughters, having *two* descendants, and the daughter's son is considered for the same reason as *two* sons. So the distribution among that generation is in *seven* parts—

Daughter's son = $\frac{4}{7}$
One daughter's daughter = $\frac{2}{7}$
Another „ „ = $\frac{1}{7}$

The daughter's son's $\frac{4}{7}$ is passed to his two descendants, the two daughters among the claimants. The shares of the two daughters' daughters, $\frac{2}{7}$ and $\frac{1}{7}$, are taken collectively, and are distributed in the aggregate among their descendants in the third generation, that is, among one son and two daughters. The son gets a double share, being a male. So the $\frac{3}{7}$ is divided into *four* parts, *two* for the son, and two for the two daughters; that is, the son gets $\frac{6}{28}$, and the two daughters together get $\frac{6}{28}$. But we have seen that the two daughters inherited $\frac{4}{7}$ from their father. Therefore the total shares inherited by them amount to $\frac{4}{7} + \frac{6}{28}$, or $\frac{16}{28} + \frac{6}{28}$, or $\frac{22}{28}$. The estate is therefore divided into 28 parts, the daughter's daughter's son getting 6, and the two daughters who are related as daughter's daughter's daughters and also as daughter's son's daughters, getting 22, of which 16 are given to them by right of their father, and 6 by right of their mother.

§305. Succession among the second class.—The succession among the excluded grandfathers and grandmothers is regulated by the following rules:—

Rule (1).—The nearer in degree, by whatever side he or she may be related, takes precedence of the more remote. Thus, the mother's father is the first to succeed, as he is the nearest of all false grand-parents. He would exclude the father's mother's father and the mother's mother's father; and, the mother's father's father would be preferred to the mother's mother's mother's father although the latter is related through an heir, the mother's mother's mother, who is a true grandmother.

Rule (2).—If their degrees be equal, that is, if the claimants be of equal degree of affinity, being equally distant from the deceased, then the person *related through an heir* is entitled to preference. Thus, the mother's mother's father inherits in preference to the mother's father's father, because the former is related through an heir—the mother's mother, as she is a true grandmother; and the mother's father is a false grandfather, and his father is not, therefore, related through an heir.

Rule (3).—If the claimants be equal in degree, and there be none among them who is related through an heir, or if all of them be related through heirs, then, if they be all related on the same side (that is, either on the father's side, or on the mother's side) of the deceased, and through persons of the same sex, the distribution will be made according to their persons, that is, the male will receive two shares and the female one share, as in the case of residuaries. But if the claimants be related to the deceased through persons of different sexes, then (provided they do not differ in sides) the division will first be made (as in the First Class) in the rank in which the difference of sex first appears, commencing from the immediate parents of the deceased. And, if some of the claimants be on the father's side, and others on the mother's side, of the deceased, then the property will be pri-

marily divided in *three* parts, *two* of which will be given to the claimants on the father's side, and *one* to those on the mother's side, without regard to the sexes of the claimants; and then, what has been allotted to each set, is to be distributed among the claimants of that set.

"The rule may be thus laid down: whether their relations are equal or not, if in the negative, then the nearer is preferred; but if equal, then it is to be seen whether their relations agree, or differ, if they differ, the property is divided in thirds as is mentioned just above (that is, two-thirds go to those on the father's side and one-third to those on the mother's); but if they agree (in relation), then if the roots agree in sex, the distribution is made accor ding to the number of the persons in the branches, but if they do not agree in sex, the property should be divided according to the difference of sex in the highest rank as in the first class."—*Sharifiyah* (quoted in the *Tagore Law Lectures*).

Example (1).—Where the claimants are—

Father's mother's father's father, *and*
Father's mother's father's mother:

Here, the degrees of both are equal, both being equidistant from the deceased, and they are *not* related through heirs, as the "father's mother's father" is a false grandfather, besides they are both related on the same side, being both related through the father. Hence, the distribution will be made according to the persons of the claimants, the male being allowed a double share.

Example (2).—Where the claimants are—

Father's father's father's mother's father, *and*
Father's mother's mother's mother's father:

Here, both are of equal degree, related on the same (the father's) side, and through heirs; but as the sexes of the persons through whom the claimants are related to the deceased differ, the distribution will primarily be made in the rank in which the difference of sex first appears, according to Muhammad's rule.

Example (3).—Where the claimants are—

Father's mother's father's father, *and*
Mother's mother's father's father:

None of them being related through heirs, and both being of equal degree, the *father's* relation gets two-thirds, and the *mother's* relation gets one-third.

§306. Succession among the third class.—The rules of succession among the distant kindred of the *third* class, (which comprises the sisters' children, brothers' daughters, brother's how-low-soever sons' daughters, sons of uterine brothers, and the children of these), are exactly the same as in the first class, so that, the nearer in degree excludes the more remote, and, in case of equality of degree, the child of an *heir* is preferred to the child of a more distant kindred. The child of a sharer, in this class, is always nearer than the children of distant kindred; it is the child of a residuary who can be of the same degree with the child of a distant kindred of this class, and hence the *Sirajiyya* says that "if they be equal in relation, then the child of a *residuary* is preferred to the child of a more distant kinsman. Thus, the sister's daughter is preferred to the brother's daughter's son, the former being nearer in degree; a whole brother's son's daughter is preferred to a whole sister's daughter's son, as the former is the child of a residuary.

Special rules of this class.—In addition to the above general coincidence of the order of succession among the two classes, there are some special rules applicable to the third class of distant kindred, which arise out of the difference of blood existing among the persons from whom *these* distant kindred are descended. Thus, brothers and sisters are of three sorts—(1) of the whole blood, that is, by the same father and mother; (2) of the half-blood by the same father; and (3) of the half-blood by the same mother, or uterine brothers and sisters. Consequently, when the claimants are of equal degree, and when all or none of them

are children of residuaries, or when some are children of residuaries and some children of sharers, and if there be difference of blood in their relation to the deceased, then, according to Muhammad (whose opinion is the prevalent doctrine), the property will be divided *first* among the brothers and sisters from whom the claimants are descended; taking into consideration the number of the claimants who are descended from the same root, and also the sides by which they are related; and what is allotted to each set, will be distributed among the branches of that set, according to Muhammad's rules as in Class I. But, as uterine brothers and sisters inherit equal shares, the children of uterine brothers and the children of uterine sisters, when inheriting together, will get equal shares.

Example (1).—Where the claimants are—

Daughter of a son of a whole brother,
" " " " half-brother by the father, *and*
" " " " " " " " mother:

The claimants are all equal in degree; the first and the second are children of residuaries, and so they exclude the third, who is not related through a residuary. Then, among the first two, since they are both equal in degree, and both children of residuaries, the division will be primarily made between the whole brother and the half-brother by the father's side, and the latter is excluded by the former (see the order of succession among residuaries); consequently the second claimant gets nothing, and the whole estate goes to the daughter of the whole brother's son.

Example (2).—Where the claimants are—

A daughter of a whole brother,
A daughter of a whole sister,
A daughter of a brother by the same father,
A daughter of a sister by the same father,
A daughter of a brother by the same mother, *and*
A daughter of a sister by the same mother:

Here, the claimants are of equal degree, some of them are descendants of sharers and some of residuaries, and there is difference of blood among the

roots; accordingly, the division will primarily be made among the brothers and sisters. The brother and sister by the same mother together get $\frac{1}{3}$; the brother and sister by the same father are excluded by the whole brother and sister; and the remainder $\frac{2}{3}$ will go to the whole brother and sister jointly. The $\frac{1}{3}$ of the uterine brother and sister, is divided between them in halves, the brother getting $\frac{1}{6}$, and the sister, $\frac{1}{6}$, and these shares are passed to their descendants respectively. The $\frac{2}{3}$ is divided in three parts,—one of which, $\frac{2}{9}$, goes to the whole sister, and the remaining two parts, $\frac{4}{9}$, goes to the whole brother, and these shares are respectively inherited by their children.

Example (3).—Where the claimants are—

Daughter of a whole brother, *and*

One son and two daughters of a whole sister:

Both are equal in degree, and both are children of residuaries; there is no difference of blood, but there is difference of sex among the roots; so, we apply Rule (3) of Class I., and divide the estate between the brother and sister. The brother has one child among the claimants, but the sister has *three* children. Accordingly, the division will be as if between *one* brother and *three* sisters, the former getting the share of *two* sisters. The estate is divided in *five* parts, *two* being given to the brother, and ultimately to his daughter, and *three* to the sister. The sister's portion is next divided among her son and two daughters, the male getting a double share.

Example (4).—Where the claimants are the descendants in the last generation in the following table:—

Brother by the same father	Sister by the same father	whole sister	uterine sister
Daughter	Son **marries**	daughter	Son
Son ($\frac{2}{24}$)	Two daughters ($\frac{18}{24}$)		Daughter ($\frac{4}{24}$)

The claimants are all equal in degree, and none of them are related through residuaries. The sister by the same father and the whole sister have each of them two descendants among the claimants, for the two daughters standing together have a *double* relationship, being connected by different sides; and, according to Muhammad, the number of the branches and their different sides will be considered in the roots. The primary division is made among the brother and the three sisters. (1) The uterine sister has one descendant only, and her share, $\frac{1}{6}$, is passed to her son's daughter. (2) The whole sister has

two descendants among the claimants, and she would therefore get $\frac{2}{3}$ which is the share for two sisters, and it ultimately goes unaltered to her daughter's daughters. (3) The brother and sister by the same father get the residue, $\frac{1}{6}$, as residuaries, the sister taking as *two sisters* for her having two descendants among the claimants, and the brother getting a double share for his being a male. The $\frac{1}{6}$ is, therefore, divided in *four* parts, $\frac{2}{24}$ going to the brother, and ultimately to his daughter's son; and the sister's $\frac{2}{24}$ goes to her son's two daughters, who received $\frac{2}{3}$ from the whole sister, and whose total share now amounts to $\frac{2}{3} + \frac{2}{24} = \frac{18}{24}$. In this example, it should be noted that the shares of the brother and sisters are not mixed up, on account of their forming separate groups by reason of difference of blood, so the share of each group is passed to their descendants. If there had been *more than one individual of the same sex* in the same group of brothers and sisters, the division would have been continued in that group as in Rule (3) of class I.

§307. **Succession among the fourth class.**—The claimants of this class are not only those that have been enumerated above, but also other descendants of the grandfathers and grandmothers, as are not included in the class of residuaries. The order of succession is to begin with the excluded paternal uncle (father's half-brother by the same mother), the paternal aunts, and the maternal uncles and aunts, as these are all equidistant from the deceased, and are nearer to him or her than any other persons of this class. Failing them, the distribution is to be made among their children, how low soever; failing whom, the uncles and aunts of the deceased's parents, and then their children; and when there cannot be found any claimant among these, the uncles and aunts of higher ancestors (male or female), and their children would be entitled to come in. The rules for this class are divided into two sections—the first dealing with the succession of the uncles and aunts, and the second with that of their children.

§308. The first section comprises the half-paternal uncle by the father's mother (that is, father's half-brother by the same

mother), all paternal aunts, and all maternal uncles and aunts. The rules regarding their succession are :—

(1) If there be only one individual of them, that individual will take the whole.

(2) If there are more than one of them, and all of them are related to the deceased *by the same side* (that is, if all are paternal uncles and aunts, or all are maternal uncles and aunts), then the preference is given to the strength of blood; that is, a person (male or female) of the whole blood is preferred to all half relations, and a relation connected by the same father only (whether male or female) is preferred to an uterine relation. Thus, if there be a paternal uncle by the same mother, a paternal aunt by the same mother, and a full paternal aunt, the whole inheritance goes to the full paternal aunt.

(3) If they are all on the same side, and of equal consanguinity (that is, all having the same strength of blood), then the male has double the portion of a female. Thus, if there be a half paternal uncle by the father's mother's side, and a half paternal aunt by the same side, the former gets two shares, and the latter one share only.

(4) When some of the claimants are related by the father's side, and some by the mother's side, of the deceased, then no preference is given to the strength of consanguinity, but two-thirds are allotted to the kindred related through the father, and one-third to those related through the mother, irrespective of the difference of blood; then, what is allotted to each side, is divided among the individuals of that side according to the rules for the division of the property among members of the same side, stated above.

Illustration.

A person leaves a full paternal aunt, a half paternal aunt by the same father, a half paternal aunt by the same mother, a full maternal aunt, a half

maternal aunt by the mother's mother's side, and a half maternal aunt by the mother's father's side,—then, *two-thirds* go to the paternal relatives, and *one-third* to those on the mother's side. Of the three paternal aunts, the full paternal aunt excludes the half relations, and she alone gets the whole of the *two-thirds*. So, the *one-third* share allotted to the mother's side, is wholly taken by the full maternal aunt, her relation being stronger than that of the other two maternal aunts.

§309. The rules regulating the succession of the children of distant kindred of the fourth class, are :—

(1) The person *nearest* to the deceased is first entitled to the inheritance, whether that person is related by the father's side or the mother's side of the deceased. Thus, sons and daughters of paternal aunts are preferred to the children of sons and daughters of paternal aunts.

(2) When the claimants are equal in degree, and are related on the same side, (that is, when all are by the father's side, or all by the mother's side, of the deceased), then the succession is regulated by the strength of consanguinity, that is, a relation of the whole blood would be preferred to one of half-blood, and among relations of the half-blood, *those by the same father* would be preferred to uterine relations. Thus, if the claimants be the children of paternal aunts of the whole blood, children of paternal aunts by the father's father's side, and of paternal aunts by the father's mother only, the children of paternal aunts of the whole blood would exclude the children of the two others; and among the children of the two latter, the children of paternal aunts by the father's father would be preferred to the children of the paternal aunt related through the father's mother only.

(3) If the claimants be equal in degree and also in blood, and be related by the same side, then the child of a residuary is preferred to the child of a more distant kindred who is not a residuary. Thus, where the claimants are the daughter of a full

paternal uncle, and the son of a full paternal aunt, both of them are equal in degree and also in blood, and both related by the father's side of the deceased; the estate goes to the daughter of the full paternal uncle, as she is related through a residuary, her father.

(4) When the claimants are equal in degree, but some of them are related by the father's side, and others by the mother's side, of the deceased, then no preference is given to the strength of blood, nor the fact that any of them are related through a residuary is taken into consideration, but *two-thirds* of the whole are allotted to the paternal relations, and *one-third* to those claiming through the mother's side of the deceased. Then, what has been allotted in each set or side is distributed among the individuals of that set, according to the above rules (1), (2), and (3), and the rules of distribution as in Class I. of the distant kindred. So that, where there are males and females in the same side, who are of equal degree and blood, the male gets double the portion of a female; and when there is difference in blood among the claimants who are equal in degree, the strength of consanguinity would prevail as in rule (2) above. And, when there is equality in blood and also in degree, but the sexes of the persons through whom the claimants are descended do not agree, then the distribution will primarily be made in the rank in which the difference of sex first appears, according to Muhammad's rules stated in Class I.,—a person having two or more descendants among the claimants being given as many shares, and persons having common descendants among the claimants being given their respective shares, as in the case of Class I.

Illustrations.

(*a*) Where the claimants are a daughter of a full paternal uncle, and the daughter of a maternal uncle or aunt by the same father and mother, or by the same father only or by the same mother only, no distinction is made on account

of difference in blood as they are related by different sides, and as they are equidistant from the deceased, two-thirds will go to the daughter of the full paternal uncle, and one-third to the child of the maternal uncle or aunt.

(*b*) Where the claimants are—

a son of a paternal aunt of the whole blood,
a daughter of a „ „ „ „
a son of a maternal uncle of the whole blood,
a „ „ „ „ by the same father, and
a „ „ „ „ by the same mother:

Two-thirds of the whole will belong to the full paternal aunt's son and daughter, in the proportion of two shares to the former and one to the latter; the remainder one-third goes to the full maternal uncle's son alone, as the sons of the maternal uncles of the half blood are excluded by the full maternal uncle.

(*c*) Where the claimants are—

(1) On the paternal side—

(1)	(2)		(3)
Full paternal aunt.	Full paternal aunt.		Full paternal uncle.
daughter	son	marries	daughter
Two sons.		*Two daughters.*	

(2) On the maternal side—

(1)	(2)		(3)
Full maternal aunt.	Full maternal aunt.		Full maternal uncle.
daughter	son	marries	daughter
Two daughters.		*Two sons.*	

the claimants are equal in degree, and, therefore, two-thirds of the estate are given to the paternal relations, and one-third to the maternal. In distributing these shares among the members of the respective classes, the rules of Muhammad as laid down in the case of Class I. of distant kindred are to be applied. Thus, the two-thirds are first distributed among the paternal uncle and aunts—

(1) paternal aunt = 2 females ... having two descendants (sons) among the claimants;

(2) paternal aunt = 2 females ... having two descendants (daughters) in the last branch;

(3) paternal uncle = 2 males = 4 females ... having two descendants among the claimants, who are also the common descendants of No. (2).

Therefore, the $\frac{2}{3}$ is divided into *eight* parts—each of the aunts gets $\frac{2}{8}$ of $\frac{2}{3}$ or $\frac{1}{6}$; and the uncle gets $\frac{4}{8}$ of $\frac{2}{3}$, or $\frac{1}{3}$. In the second rank, there is also difference in sex. Therefore, according to Muhammad's rule, the paternal uncle's share $\frac{1}{3}$ is passed to his daughter in the second line, and the shares of the two aunts are divided between their children in the proportion of *two* shares to the male, and *one* to the female. Therefore, (1) aunt's daughter gets $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$, and (2) aunt's son gets $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$. The (1) aunt's daughter's $\frac{1}{9}$ goes to her *two sons* among the claimants, each of them getting $\frac{1}{18}$; and the two daughters among the claimants in the third line get $\frac{2}{9}$ from their father's side, that being their father's share as found above, and $\frac{1}{3}$ from their mother, which she inherited from her father—the paternal uncle; that is, they together get $\frac{2}{9}+\frac{1}{3}$ or $\frac{5}{9}$, or each $\frac{10}{18}$.

The one-third devolving upon the maternal side is similarly distributed among the claimants of that side. Thus—

Maternal uncle = 2 males = 4 females ... gets $\frac{4}{8}$ of $\frac{1}{3}$, or $\frac{1}{6}$

(1) Maternal aunt = 2 females, ... gets $\frac{2}{8}$ of $\frac{1}{3} = \frac{1}{12}$

(2) Maternal aunt = 2 females, ... gets $\frac{2}{8}$ of $\frac{1}{3} = \frac{1}{12}$

In the second rank,—

the uncle's daughter gets her father's share $\frac{1}{6}$

the (2) aunt's son gets $\frac{2}{3}$ of $\frac{1}{6}$, or $\frac{1}{9}$

the (1) aunt's daughter gets $\frac{1}{3}$ of $\frac{1}{6}$, or $\frac{1}{18}$

In the third or last line,—

the two daughters inherit their mother's share, $\frac{1}{18}$

the two sons inherit $\frac{1}{9}$ from their father, and $\frac{1}{6}$ from their mother, or $\frac{5}{18}$, altogether.

TABLE III.

§310. Succession among distant kindred.

[NOTE.—As the distant kindred are all relations of the deceased, who are neither classed among the sharers nor among the residuaries, it would be impossible to enumerate exhaustively the relations who may come in as this kind of heirs.]

I. *Class* (*1*).

1. Daughter's sons and daughters.
2. Son's daughter's children.
3. Daughter's son's or daughter's children.
4. Lower descendants of daughters and son's daughters, according to proximity of degree.

II. *Class* (*2*).

1. Mother's father.
2. Mother's mother's father, and
   Father's mother's father.
3. Mother's father's father, and
   Mother's father's mother.
4. Higher ancestors on both sides, according to proximity of degree, and strength of consanguinity.

III. *Class* (*3*).

1. Brother's daughters, sister's children, and children of uterine brothers and sisters.
2. Daughters of brothers, and sons and daughters of sisters, *by the father's side of the deceased.*
3. Daughters of sons of brothers *by same father and mother.*
4. Daughters of sons of brothers *by the same father.*
5. Daughters or sons of children of *uterine* brothers; daughters or sons of full or uterine sisters' sons and daughters; children of daughters of brothers by the same father and mother.
6. Children of daughters of brothers and sisters by the same father.

IV. *Class* (*4*).

1. Full paternal aunts; full maternal uncles and aunts.
2. Paternal aunts by the same father; maternal uncles and aunts by the same father.

3. Paternal uncles and aunts by the same mother; maternal uncles and aunts by the same mother.

V. *Children of Class IV.*

1. Full paternal uncle's daughter; full maternal uncle's and aunt's children.
2. Daughters of paternal uncles by the same father; children of maternal uncles and aunts by the mother's father's side.
3. Children of full paternal aunts; children of maternal uncles and aunts by the same mother.
4. Children of paternal uncles and aunts by the same mother.

§311. In the absence of the distant kindred, if the deceased left a husband or a wife, the estate will go to him or her by return. The return to the husband or the widow does not take place so long as there is a single consanguine heir, and in the absence of such heir, the whole estate belongs to him or her—first by obtaining the appointed share, and then the residue for want of any other heir. When there is no husband or wife, the inheritance belongs to the *successor by contract.*

§312. The **successor by contract** is thus defined:—"If a person of unknown descent says to another, 'Thou art my kinsman, and shalt be my successor when I am dead, and thou shalt pay for me any fine and ransom to which I may become liable;' and if the other says, 'I accept,' then it is a valid contract according to our doctrine. The acceptor shall be the heir, he being the payer of the fine or ransom." If the other person also be of unknown pedigree, and make the same proposal to the former, and if he accept it in the same terms, then each of them shall be *successor by contract* to the other party, and shall pay for him any fine or ranson to which he may have become liable. The person of unknown descent making the proposal, may retract from the contract before the other party has paid any fine or ransom for him. The successor by contract inherits the whole

estate when there are no sharers, nor residuaries, nor any distant kindred.

§313. **Acknowledged kindred.**— The acknowledged kinsman inheriting in default of the preceding heirs, is a person of unknown descent who has been acknowledged by the deceased in his lifetime, to be his brother or uncle or any other kindred, so as to be related to the acknowledger *through his father or grandfather or any other ancestor*. When the acknowledgment does not import to be such as to create the relationship *through another*, the kinsman acknowledged does not become an heir as an acknowledged relation. An acknowledged child becomes a legitimate child, and inherits as such, and not as an acknowledged child. Although the acknowledgment of kinship should import of the relation being established through another, it is a further condition that the acknowledgment must be of such a nature as not to prove his consanguinity through such ancestor. Thus, if a man acknowledges another, who is of unknown descent, to be his brother, such acknowledgment imports relation through his father, but it is by no means proof of the acknowledged being a child of the acknowledger's father; and if the acknowledger states that he is his father's child, then the father's denial of it would at once invalidate the relationship acknowledged. It is, therefore, necessary that there should be a simple acknowledgment of relation *through a common ancestor*, without aiming at proving the consanguinity of the acknowledged kinsman through such ancestor. It is a further condition that the acknowledger did not retract, in his lifetime, his declaration of kinship.

§314. The legatee to whom the whole estate, or more than a third of it, has been left, takes the estate, or so much of it as was left to him in default of all preceding heirs. The prohibition against bequests exceeding a third of the testator's estate, arises from the fact that the law does not empower him to dis-

inherit his heirs from beyond a *third* of his estate; but when there are no heirs of any description, there is no bar to the legatee's taking the whole of the bequest.

§315. According to *Shafi*, no person can be a successor by contract except the master of an enfranchised slave. According to him, also, there is no inheritance devolving on the successor by contract, nor on the acknowledged kindred, nor on a person to whom the whole estate was left by will. In his opinion, the property should go into the Public Treasury on failure of consanguineous relations.

§316. The **Public Treasury.**—In the absence of all heirs enumerated above, the property of the deceased is to be placed in the Public Treasury for all Mussalmans, and to be *equally* distributed to the male and female Mussalmans, when a distribution of such pr operty is to be made. Mr. Rumsey observes, in his *Moohummadan Law of Inheritance*, that "in countries subject to British rule, there is at the present day no public treasury in the exact sense in which the expression is used in the Sirajiyya, but that the property of a deceased Mussalman will, in the absence of legatees or inheritors, or so far as their claims do not extend, escheat to the Crown equally with that of a deceased Englishman or Hindu."

Vested Inheritance.

§317. If a person dies leaving heirs, and then any of these heirs die before a distribution of the estate, and leave his own heirs, the heirs of the second deceased are said to have vested interests in the inheritance belonging to him (the second deceased).

Illustrations.

A person dies leaving a son and a daughter. Subsequently, the son dies, before partition, leaving a paternal uncle and a sister (the daughter of the

first deceased). Here, in the first instance, the entire estate was inherited by the son and the daughter as residuaries, the son taking two shares and the daughter one share. The son's two shares which were vested in him are next inherited by his heirs—the sister who got one share as her residuary portion with her brother, and the paternal uncle, the former taking as a sharer a half of the son's interests, and the uncle as residuary takes the other half. Thus, the son's two shares are inherited in equal shares by the sister and the uncle; so that, ultimately, the sister has *two* shares, and the paternal uncle one share of the whole estate.

A woman dies leaving her husband, a daughter, and mother; next the husband dies leaving a wife and both parents; then the daughter dies leaving two sons, a daughter and a grandmother (who was the mother of the first deceased); and lastly, this grandmother dies leaving her husband and two brothers. In such a case the estate of the first deceased should be first allotted to her heirs. Then the vested interests of the *second* deceased (the husband of the first) should be allotted to his heirs; next the vested inheritance of the *third* deceased (the daughter of the first) be similarly distributed among her heirs; and, lastly, the inheritance which vested in the grandmother from the third deceased be likewise distributed, as detailed below :—

I.—Husband $\frac{1}{4}$; daughter $\frac{1}{2}$; mother $\frac{1}{6}$; as it is a case of return, the arrangement of the shares will be—

Husband $\frac{1}{4}$; daughter $\frac{9}{16}$; mother $\frac{3}{16}$.

II.—The husband dies, leaving his $\frac{1}{4}$ to his heirs—the wife and both parents. The wife gets a fourth the mother a third of the residue after deducting the wife's share, and the father gets the residue. Thus:

$$\text{Wife} = \frac{1}{4} \text{ of } \frac{1}{4} = \frac{1}{16}; \text{ mother} = \frac{1}{3} \text{ of } \left(\frac{1}{4} - \frac{1}{16}\right) = \frac{1}{3} \text{ of } \frac{3}{16} = \frac{1}{16};$$

$$\text{Father} = \frac{1}{4} - \frac{2}{16} = \frac{2}{16}.$$

III.—The daughter dies leaving two sons, a daughter, and a grandmother (the mother of the first deceased).

The daughter's share has been found $\frac{9}{16}$.

Her grandmother gets $\frac{1}{6}$ of $\frac{9}{16} = \frac{3}{32}$;

The residue $\frac{9}{16} - \frac{3}{32}$ or $\frac{15}{32}$ is divided into *five* parts, two for each son, and one for the daughter:

Thus each son has $\frac{2}{5}$ of $\frac{15}{32}$ or $\frac{6}{32}$;

Her daughter $\frac{1}{5}$ of $\frac{15}{32}$ or $\frac{3}{32}$;
The grandmother got $\frac{3}{16}$ from the first deceased, her total share is therefore $\frac{9}{32}$.

IV.—The grandmother leaves her $\frac{9}{32}$ to her husband and two brothers.
Husband = $\frac{1}{2}$ of $\frac{9}{32} = \frac{9}{64}$;
Two brothers = the residue $\frac{9}{64}$.

Thus, when the estate is finally distributed, the vested interests are—

the first deceased's husband's wife	=	$\frac{1}{16}$
" " " " father	=	$\frac{2}{16}$
" " " " mother	=	$\frac{1}{16}$
" " " daughter's 2 sons	=	$\frac{12}{32}$
" " " " daughter	=	$\frac{3}{32}$
" " " mother's husband	=	$\frac{9}{64}$
" " " " 2 brothers	=	$\frac{9}{64}$
Total	...	$\frac{64}{64}$

Impediments to Succession.

§318. There are *four* impediments to succession. These are—1. Slavery;—2. Homicide;—3. Difference of religion;—4. Difference of country.

(1) Slavery is either perfect or absolute, as when the slave and all that he can possess are at the disposal of his master; or imperfect and privileged, as when the master has promised the slave's emancipation. Both forms of slavery are impediments to inheritance.

(2) One who unlawfully kills another is incapable of inheriting from him, whether the killing was intentional or by accident. But where the homicide is justifiable, there is no exclusion.

(3) Difference of religion between Mussulmans and infidels, is an impediment to succession, so that an infidel cannot in any case be an heir to a Mussulman, nor a Mussulman to an infidel. But an apostate, that is one who has renounced the Mussulman faith, is no longer excluded from the inheritance. By Act XXI. of 1850, it has been enacted that—"so much of any law or usage as inflicts on any person forfeiture of right or 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 all the Courts of this country." Accordingly, the disqualification of the apostate is removed, but his children would still be excluded from the inheritance on the ground of difference of religion.

(4) Difference of country is an impediment to succession in the case of unbelievers, and does not apply to Mussulmans. So that if a Mussulman dies in a hostile country, his son residing in the country of peace inherits from him.

Case-law.

Mental derangement is no impediment to succession under the Mahomedan law: *Mahar Ali* v. *Amani*, 2 B. L. R. (A. C.) 306.—(*Semble*) According to Mahomedan law, want of chastity in a daughter before or after the death of her father, whether before or after her marriage, is no impediment to her inheritance: *Nornarain* v. *Neemaee Chand*, 6 W. R. 303.

Exclusion from Inheritance.

§319. Exclusion is of two kinds—Imperfect or Perfect.

(1) *Imperfect* exclusion means an exclusion from a larger share, and an admission to a smaller share. As, when the husband's share is reduced from one-half to one quarter on account of the existence of the issue of the deceased, he is said to be partially or imperfectly excluded.

(2) *Perfect* or total exclusion takes place where a person is deprived of the whole of his share. It is the total privation of the right to inherit. This perfect exclusion is brought about by any of the personal disqualifications enumerated under the Impediments to Succession, such as, homicide, slavery, difference of religion or of allegiance, as also by the intervention of an heir in default of whom the person excluded would have been entitled to inherit; as, a mother totally excludes a grandmother of whichever side; a brother or sister is totally excluded by the deceased's own issue or his son's issue.

§320. Imperfect or partial exclusion takes place in the case of *five* persons. These are—the mother, son's daughter, sister by the same father only, husband and wife. The reduction of their shares by the presence of other heirs has already been dealt with.

§321. The entire exclusion is grounded on two principles. (1) *Whoever is related to the deceased through any person, shall not inherit while that person is living.* Thus, a son's son does not inherit while a son is living. But the mother's children can inherit with the mother, and this is an exception to the rule. (2) *The nearest excludes the more remote.* Thus, brothers and sisters are excluded by sons and daughters.

A person who is himself totally excluded by reason of *personal* disqualifications (such as, homicide and the like), does not exclude another person. The son of the killer may inherit, although the killer himself is excluded. But a person who is totally excluded by the intervention of an heir, excludes others who claim through him. Thus, the father's mother is excluded by the father, and yet she herself excludes the mother of the mother's mother.

There are *six* heirs who are never entirely excluded in any case. These are, the father, the mother, the son, the daughter, the husband and the wife.

§322. *Examples of total exclusion* :—

(1) Full brothers and sisters—*by* a son, son's son, father, and true grandfather.

(2) Brothers and sisters on the father's side—*by* the above persons and also by full brothers and sisters.

(3) Brothers and sisters by the same mother—*by* the deceased's children or son's children, a father and a true grandfather.

(4) All grandmothers, whether paternal or maternal—*by* the mother.

(5) Paternal grandmothers—*by* the father.

(6) True grandfathers—*by* the father.

Succession in particular cases.

§323. *Unborn persons.*—A child in the womb is entitled to inherit. Accordingly, it is necessary to determine the term of pregnancy. According to Abu Hanifa, the shortest term is six months, and the longest two years. The latter is, however, a physiological impossibility, and it can only become a matter for consideration when a woman exhibits signs of pregnancy within the usual time from the death of her husband, and the delivery of the child is protracted till two years from that time. Where no such symptons are exhibited and a child is born within two years after the lapse of the usual time, it would be concluded that the gestation took place at a later period, for the Mahomedan law does not provide that such symptoms are also delayed after the usual period in the case of such late delivery. Practically, therefore, this longest period of pregnancy can have no value in ascertaining the parentage of a child born after the lapse of the usual period from its father's death.

§324. Because a child in the womb is entitled to inherit, there should be reserved for the fœtus the share of one son, or of one daughter, whichever of the two is the most. Thus, if a person dies leaving his wife pregnant, and he has left sons, then the share of one son should be reserved for the posthumous son. Security should be taken from the heirs to refund in case of there proving to be more than one child in the womb.

§325. In case of the deceased's wife being pregnant at the time of his death, such of his heirs whose shares are not affected by the subsequent birth of the child, can be paid in full; but heirs whose succession would be impeded by the birth of the child, they can be given nothing to them till the birth of the child. Thus, if a person leaves his grandmother and his pregnant wife, then the grandmother can be given her share in full, for her share will not be affected by the birth of the child whether male or female. But if a person dies leaving a pregnant wife and a full brother, here, the brother would get nothing if a son be born, and consequently his succession will be postponed.

§326. If the child be a partial excluder of some of the heirs, that is, if born alive it would reduce their shares to which they would otherwise be entitled, then such heirs will be given the *smaller* of the two shares they may be entitled to, and the remainder should be reserved. Thus, if a *childless* man dies leaving a pregnant wife, his wife will be entitled to a *fourth* share in case no living child is born, and to an *eighth* if a child is born alive. In distributing the estate before the birth of the child, the wife will be given her *smaller* share, which is an *eighth*, and the remainder should be reserved pending the birth of the child.

§327. If a child is born dead, he does not inherit. But if he is born alive, and dies soon after birth, he acquires a vested interest which passes to his representatives after his death. It is not necessary that the entire body of the child should come out alive.

If half of the child is protruded alive and it then dies, it is entitled to inherit, but not if less than half come out. It may be questioned what should be considered the half of the child's body, and it is laid down that if the head presents first and the breast is protruded, while the child is still alive, it inherits. If the feet are presented, the navel is the region which must come out while yet the child is alive, in order to entitle him to any inheritance.

§328. **Missing Person.**—" A person is said to be lost or missing whose tidings are not received, and it is not known whether he is living or dead.

When a missing person has not been heard of, and *ninety* years have expired from his birth-day, or when no one is alive in the village who was equal to him in age, he will be determined to be dead, and judgment may be given for the division of his property among his heirs. His wife will also commence to observe the *iddat* after the expiration of the above period.

§329. If a missing person re-appears alive, he shall take what was his right. But if judgment has already been given with respect to his death, he will not be entitled to anything. A missing person does not inherit from another who may have died in the meantime. In the language of the law, a missing person is considered to be living as regards his own property, but dead as regards the property of another. The meaning of it is that such a person does not inherit from his relations who may have died before his re-appearance,—he is considered as dead with respect to his heritable rights to the property of others; and, so long as judgment is not pronounced regarding his death, none of his heirs can inherit from him.

Case-law.

Under the Mahomedan law, the heirs of a missing person are not, as such, entitled to divide his estate among themselves, either as a trust, or otherwise, before his death, natural or legal: *Kalee Khan* v. *Jadee*, 5 N.-W. P. 62.

§330. Persons dying together.—When two or more persons have been drowned or burnt together, or they otherwise meet with a sudden death about the same time, and it cannot be ascertained which of them died first, it will be presumed that all of them died simultaneously, and the estate of each will go to his or her respective *living* heirs. The deceased persons do not inherit from each other, unless it can be proved that the death of the deceased heir happened subsequent to the death of any one whose heir he was.

Chapter XIII.—Inheritance (*contd.*).

(SHIAH SCHOOL.)

§331. The right of inheritance proceeds from three different sources: 1. Consanguinity; 2. Marriage; and 3. *Vala*, which means dominion or patronage. Persons inheriting by consanguinity are those who are consanguineous or blood relations. The husband and the wife are heirs of the second order. *Vala* or patronage may be on account of emancipation, or of responsibility for offences, or for leadership in religious matters. The manumittor of an enfranchised slave, the successor by contract, and the *Imam* are heirs of the third description. The heirs by consanguinity, and the heirs by affinity (that is, the husband and the wife) are entitled to succeed together. On their default, the heirs by *Vala* will succeed to the inheritance.

§332. Consanguineous heirs.—The consanguineous heirs are of three classes:—

(1) Those consisting of the deceased's (*a*) immediate parents, that is, his father and mother, and (*b*) his children how low soever;

(2) The second class of consanguineous heirs consists of (*a*) his grandfathers and grandmothers how high soever, and (*b*) his brothers and sisters, and their children how low soever;

(3) In the third class of consanguineous heirs are (*a*) the children of paternal and maternal grandparents how high soever, that is, the paternal and maternal uncles and aunts of the deceased himself and of his male and female ancestors how high soever; (*b*) the children how low soever of these uncles and aunts of the deceased and of his ancestors.

§333. Of the three classes of consanguineous heirs, the heirs of the first class succeed first in preference to those of the second and third classes. So long as there remains a single member of the first class, no individual of the other two classes will have a right to the inheritance. And, a single member of the second class will exclude the individuals of the third class. The heirs entitled to inherit with the consanguineous heirs, are the husband and the wife.

§334. *Order of succession among each class of consanguineous heirs.*—The *immediate* parents of the deceased, that is, his father and mother, inherit with his children who are the nearest or the *then* nearest. The father or the mother will not exclude a son or a daughter or any lower descendant of the deceased; and his child or child's child will not exclude his *immediate* parents. But among the children, the nearest will exclude the more remote. Thus, a son will exclude a son's son or a daughter's son; *a daughter's son will exclude a son's grandson;* but a daughter's son and a son's son will inherit together, as both are of equal degree.

§335. As in the first class, so in the second class of consanguineous heirs, a member of one section will not exclude a member of another section. Thus, a grandfather or grandmother

will not exclude, nor will be excluded by, a brother or sister or their children. But, among the grandparents, the nearer will exclude the more remote; a father's mother will exclude a father's father's father. Among the brother's and sisters and their children, the nearer heir will likewise exclude the more remote; a brother's or a sister's child will not inherit so long as there is a brother or sister living; a sister's son will exclude a brother's grandson, as the latter is more remote.

§336. In the third class of consanguineous heirs, that is, among the paternal uncles and aunts, and the maternal uncles and aunts, and their children, the nearer always excludes the more remote. Thus, the deceased's own uncles and aunts inherit before the uncles and aunts of his parents or other higher ancestors; the children of uncles and aunts do not inherit so long as there are uncles and aunts.—Thus, a paternal uncle's son will not inherit with a paternal or maternal uncle or aunt, and a maternal uncle's child will not inherit with an uncle or aunt of whatever side; a remoter uncle or aunt will not inherit so long as there is a child, how low soever, of a nearer uncle or aunt.—Thus, a father's uncle's son does not inherit when there is an uncle's son or aunt's son of the deceased himself. There is, however, one exception to this rule, namely, when a full paternal uncle's son and a half paternal uncle occur together, the former will exclude the latter; in other words, a father's full brother's son excludes the father's half-brother by the same father, according to the approved traditions, although the latter is nearer in degree. The exception does not hold when there is another uncle with them, who is not excluded, such as, a maternal uncle. The succession of this class of consanguineous heirs, therefore, devolves first upon the deceased's own paternal and maternal uncles and aunts, then upon the children, how low soever, of his own uncles and aunts; failing the preceding, the succession goes to the paternal

and maternal uncles and aunts of the deceased's father and mother, and after them to their children how low soever; failing the preceding, the uncles and aunts of the deceased's grandparents will succeed, and failing them their children; and so on, to the next higher generation, and the children thereof.

§337. The husband and the wife are heirs by reason of marriage. They inherit with the consanguineous heirs, and are never excluded. But in temporary or *muta* marriages, the right of mutual inheritance is not established in either party, unless their mutual heritable rights to the property of each other had been specially declared in the contract of marriage.

§338. In default of all consanguineous relations and the *husband*, the succession devolves upon the manumittor of an enfranchised slave; then upon one who has undertaken by contract with a person having no heirs by blood or affinity, the responsibility for all crimes and offences to be committed by him through error or inadvertency, and thereby requiring expiation by fine. Failing this successor by contract, the entire estate vests in the *Imam* as ultimate residuary. In the case of there being a *widow* of the deceased, and no heirs by blood, the widow will take her legal share, and the residue will pass to the heirs by *Vala* described herein in the order indicated above. The class of heirs described as the distant kindred in the Sunni School do not form a separte group of heirs in the Shiah School, but, as was apparent in the classification of consanguineous heirs, they are incorporated in the category of other blood relations inheriting as sharers or residuaries, and have equal heritable rights with them. Thus, a daughter's daughter of this school is not excluded by a son's daughter, but both of them enjoy equal heritable privileges and disadvantages—where the one is excluded, the other is also invariably excluded by the same excluder.

§339. Of the heirs by consanguinity and by affinity described above, some take only specific shares appointed for them; some take their appointed shares and also their residuary portions, and others inherit as simple residuaries. The heirs by *Vala* inherit only as residuaries. The sharers and their shares are the same as in the orthodox school, but as there are some peculiarities also in their inheritance according to this school, it will be necessary to brie fly notice such peculiarities.

§340. **The sharers and their shares.**—The father gets a *sixth* when there is any issue of the deceased, how low soever; but when there is no son or son's son h. l. s., but there be a daughter or daughters of the deceased, the father would first get his appointed share *one-sixth*, and would also participate *with the daughter* in the residue. In the absence of children h. l. s., the father has a simple residuary title after the satisfaction of other shares, if any.

Examples.—(1) Where the deceased left a son and a father, the father would get only a *sixth*, and the whole of the residue will go to the son. (2) Where the heirs left are a father and a daughter, the father takes, in the first instance, a *sixth*, and the daughter takes a *half*; the residue is then divided between the father and the daughter in proportion to their respective shares, that is, three parts for the daughter, and one for the father. (3) Where the heirs are a father, a mother, and a husband,—the mother takes a *third*, the husband *one-half*, and the father obtains as residuary the remainder *one-sixth*.

§341. The mother's share is a *sixth* when there is any issue of the deceased, and a *third* when there is no such issue, provided there be not two or more *brethren* of the deceased. According to this school, the brethern who exclude the mother from her larger share, are "two or more brothers by both parents or by the same father only,—or, one such brother and two such sisters,—or, only *four* sisters of the above kind." But the mother's children, as when there are two or more brothers and sisters by the same mother, do not affect the mother's title to a *third* of the inherit-

ance in the absence of children. When there is no son, nor any son's son, the mother participates in the residue with a daughter of the deceased.

Examples.—(1) When there are a son of the deceased and a mother, the mother gets her *one-sixth*, and the residue goes to the son. (2) Where there are a daughter and a mother, the daughter takes a *half*, and the mother a *sixth*; then they both divide the residue in proportion to their above shares. (3) When there are a husband, a mother, and a daughter,—the husband takes a *fourth*, the mother her *sixth*, and the daughter *one-half*, and then the residue reverts to the mother and the daughter in proportion to their respective shares. (4) Where the heirs are a daughter and both parents,—*half* goes to the daughter, and *one-sixth* to each parent, and the residue will be divided by all three according to their respective shares, that is, one-fifth of the residue will go to each parent, and three-fifths of it to the daughter. (5) Where there are a daughter, both parents, and *brethren* by the father's side,—the *brethren* are totally excluded, the daughter takes first a *half*, each of the parents a *sixth*, and the residue reverts to the daughter and the father, but not to the mother.

§342. An only daughter gets a *half*, two or more daughters get collectively *two-thirds*. With a son or sons, the daughter or daughters do not get any shares, but inherit as residuaries in the proportion of *two* shares for each son and *one* for each daughter.

§343. An only whole sister gets a *half*; two or more whole sisters get collectively *two-thirds*; provided there is no whole brother *nor a grandfather*, for, according to this school, a grandfather like a brother makes the sister or sisters, of deceased, residuaries with himself. A sister or sisters, by the same father, inherit the same shares as the whole sister in the absence of the latter; and they are likewise made residuaries by a brother by the same father, as also by a grandfather.

§344. The shares of the mother's children are the same as in the other school. A single brother or sister by the same mother gets a *sixth*, and two or more of them get collectively a

third. The brother by the same mother is on the same footing with his own sister, getting an equal portion with her without any pretension to a double share.

§345. The husband gets a *half* when the deceased left no children of her own; with her issue, the husband gets an *eighth* only. Where there is no other heir besides the husband and the *Imam*, the husband takes first his appointed share, and then the whole of the residue by return, that is, he takes the whole.

§346. The share of a widow or widows who were permanently married, is a *fourth* when there are no children of the deceased, and an *eighth* with such children how low soever. The widow does not get any share in the *immoveable* property of her deceased husband. A widow does not, moreover, get any share in the return, even when there are no other heirs besides herself and the *Imam*. The residue in such case goes to the *Imam*, after the widow has obtained her share *one-fourth*. A widow who was married in the temporary or *muta* form, does not inherit except where her right to inherit has been expressly stipulated in the contract of marriage; and, where she inherits, she gets the same interests as a permanently married wife.

§347. The above are the *sharers*, that is, persons having specific shares according to this school. They also sometimes get a residuary portion in addition to their appointed shares, and sometimes they are only residuaries, except the widow who is never a residuary. All other heirs besides these, are only residuaries.

§348. **Grandfathers and grandmothers**, either on the father's side or on the mother's side of the deceased himself or of his male and female ancestors how high soever, are second class consanguineous heirs. They inherit with brothers and sisters, and the children how low soever of brothers and sisters.

No distinction is observed between true and false grandparents. The nearer of them would always exclude the more remote; thus, a father's father will not exclude a mother's father, but he will exclude the father's father's father or the mother's mother's mother. The grandparents nearest to the deceased inherit as residuaries only, and have no specific shares. Special rules for the inheritance of grandparents of equal degree are—

(1) When there are grandfathers and grandmothers related by the father's side and also by the mother's side of the deceased, then *two-thirds* will belong to the grandparents on the father's side, and *one-third* to those on the mother's side.

(2) Among grandfathers and grandmothers on the father's side, and of equal degree, each male will get the double share of each female. Thus, the father's father will get twice the share of the father's mother.

(3) Among grandparents on the mother's side, the males and females get *equal* shares in analogy to the mother's children. Thus, where there is a grandfather and a grandmother on the father's side, and a mother's father and a mother's mother,—the paternal grandparents get two-thirds in the proportion of two shares for the father's father, and one share for the father's mother, and the maternal grandfather and grandmother equally divide between themselves the one-third.

(4) "The grandfathers and grandmothers of any side are like brothers and sisters of the same side." That is, a paternal grandfather or grandmother when associated with a whole brother or sister, is like a whole brother or sister; when associated with a half-brother or sister, is like one such brother or sister; and a maternal grandfather or grandmother when associated with a brother or sister by the same mother, is like one such brother or sister. Therefore, when the claimants are a paternal grandfather, a paternal grandmother, a whole brother, and a whole sister,—

the division will be made as between two whole brothers and two whole sisters, the grandfather getting an equal share with the whole brother, and the grandmother having an equal share with the whole sister, each male having the share of two females. Similar is the distribution when the paternal grandparents are associated with half-brothers by the same father, and there are no whole brothers and sisters. When there are a mother's father, a mother's mother, a uterine brother, and a uterine sister,—all these persons get equal shares. When there are a father's father, a father's mother, a mother's father, a mother's mother, a whole brother, a whole sister, a uterine brother, and a uterine sister,—*two-thirds* will go to the paternal grandparents and the whole brother and sister, and divided between them in the proportion of a double share to the male, and the remainder *one-third* will be divided equally between the maternal grandparents and the mother's children.

(5) When there are no brothers and sisters, and the grandfathers and grandmothers are associated with the *children* of brothers and sisters, they are still considered as brothers or sisters according to the above principles, and divide the inheritance with the children of brothers and sisters. Thus, when there is a paternal grandfather with the sons of a whole brother, *half* belongs to the former, and *half* to the latter; when there is a paternal grandfather with the children of a whole sister, the estate is divided into *three* parts, of which *one* belongs to the sister's children, and *two* to the grandfather,—the division being made as if between a brother and a sister, the brother's share being given to the grandfather, and the sister's portion to her children.

(6) In the absence of brothers and sisters, and their children how low soever, the grandparents take the whole estate, like the the immediate parents of the deceased,—the paternal relations having two-thirds, and the maternal relations having a *third* only,

when there is a mixture of the two. Thus, when there are no first class heirs, and the grandparents stand single in succession, they get the whole inheritance, after deducting the share of the husband or the wife, if any.

§349. **Brothers and sisters.**—A whole brother or a whole sister excludes a brother or sister by the same father only; and the child of a whole brother or sister will exclude a child of a brother or sister by the same father. But the child of a whole brother does not exclude a half brother or sister by the same father, as the latter are nearer in degree. A brother or a sister by the same mother, is not excluded by a whole brother or sister, nor by a brother or sister by the father's side. But when a brother or a sister by the same mother is associated with whole brothers and sisters, the mother's children get their appointed shares, but get no residuary portion in the *Return*. In the absence of whole brothers and sisters, the brothers and sisters by the same father are like whole brothers and sisters, but they do not exclude the mother's children from the residue like whole brothers and sisters. Excepting the mother's children, among brothers and sisters of the same description, the male has double the share of a female.

Examples.—(1) A person leaves a whole brother, a whole sister, a half-brother by the same father, a half-brother by the same mother,—the brother by the same father is totally excluded, the brother by the same mother gets a *sixth*, and the residue is divided by the whole brother and sister in *thirds*, two for the male and one for the female. (2) A person leaves a half-brother and a half-sister by the same father, and a brother and a sister by the same mother. The mother's children will first get a *third* as their appointed share. Then the residue *two-thirds* will again be divided into three shares, *one* of them being given to the mother's children, and *two* to the brother and sister by the same father in proportion of a double share to the male.

§350. Brothers and sisters of any description will exclude the children of all brothers and sisters, even of the whole blood,

Among their children, the nearer will exclude the more remote, and the child of a whole relation (whether brother or sister) will exclude a child of a relation by the same father only, when both are equal in degree. But the child of a brother or sister by the same mother will not be excluded by the child of a whole brother or sister, or by the child of a brother or sister by the same father. *The children of brothers and sisters inherit the shares of the brothers and sisters through whom they are related to the deceased.* Thus, if there be children of a whole brother, of a whole sister, of a half-brother or sister by the same father, and of a sister by the same mother,—the division will be made by first giving a *sixth* to the children of the uterine sister, that being the share of their mother, and the residue will be divided in three parts, of which *two* will go to the whole brother's issue, and *one* to the children of the whole sister, the children of the brother or sister by the same father being totally excluded. Among the children of the same brother or sister, the division will be made by giving two shares to each male and one to each female, except perhaps in the case of children of uterine brothers and sisters, who might inherit equal shares out of analogy to the distribution among the mother's children. The heirs competent to inherit with the children of brothers and sisters, are the grandparents, and either husband or wife.

§351. **Uncles and Aunts.**—The general principles of their succession are—

(1) The nearest of them excludes the more remote. Thus, an uncle or aunt of the deceased himself will exclude the uncles and aunts of his parents and of other higher ancestors.

(2) When there are both paternal and maternal uncles and aunts, *two-thirds* will belong to the paternal uncles and aunts, and *one-third* will go to the maternal relations.

(3) Among paternal uncles and aunts of different descriptions, those who are related by the same mother only get a *sixth* or a *third* of the share belonging to the paternal kindred; those that are related by the same father are excluded by the relations of the whole blood, and only inherit in their absence. The distribution among paternal uncles and aunts of the whole blood, or among those by the same father only, is according to the rule that two shares belong to each male and one to each female of the same description; among the uncles and aunts by the same mother, the division is *equal*, as in the case of uterine brothers and sisters

(4) Among maternal uncles and aunts, those by the same mother get a *sixth* if there is one of them, or a *third* if more than one; those by the same father are excluded by the whole maternal uncles and aunts, and inherit in the absence of the latter. But among the uncles and aunts by the same mother, the division is *equal*, without any distinction of male and female. Among whole maternal uncles and aunts, the male has double the share of a female, and such is also the division among those by the same father.

(5) A single uncle or aunt of any class takes the whole of the interest belonging to that class. When there is only *one* uncle or aunt of whatever class, he or she takes the whole estate after deducting the share of the husband or the wife.

(6) A person related both as a paternal kindred and as a maternal kindred will inherit in both ways.

§352. The children of uncles and aunts do not inherit anything so long as there is a single uncle or aunt of whichever side, except in the case of there being a full paternal uncle's son and a half paternal uncle by the same father, in which case the former excludes the latter. But if with this half paternal uncle there be any other uncle, for instance, a maternal uncle, or an aunt, the full paternal uncle's son will himself be excluded. The rules of

distribution among the children of uncles and aunts, are the same as in the case of children of brothers and sisters, the primary distribution being made among the uncles and aunts through whom the claimants are related to the deceased.

§353. **Aul**, or the **Increase**, is not recognized by the doctors of the *Shiah* School. Whenever the shares cannot be paid in full, the deficiency would fall upon a daughter or daughters, or upon a sister or sisters of the whole blood or of half blood by the same father only. But the shares of other relations are to be paid in full, and the deficiency never falls upon those who are related by the mother's side. Thus, when there are a husband, both parents, and a daughter,—the husband gets a *fourth*; both parents together get *one-third*, and the daughter gets *one-twelfth* less than her appointed share, for the residue is $\frac{5}{12}$ only, and the daughter's full share is a *half* or $\frac{6}{12}$. So, where the heirs are the husband, and two sisters by same father and mother or by the same father only. The husband gets a *half*, and the residue does not suffice to meet the full share of two sisters, which is $\frac{2}{3}$, and they are given a reduced share—a *half*.

§354. The doctrine of the *Return* is recognised, and the surplus reverts to the sharers in proportion to their respective shares, in cases where there are no residuaries. The mother's children do not get anything in return when there are kindred of the whole blood; the husband gets in return when there are no other heirs besides himself and the *Imam*; and the wife never shares in the return.

Cases of inheritance worked out.

Case 1.—A Maho medan dies leaving six daughters, three true grandmothers, and three paternal uncles; what is the share of each? [B. L. 1870.]

Solution.—6 daughters = $\frac{2}{3}$; 3 True grandmothers = $\frac{1}{6}$
3 Paternal uncles = the residue, which is $\frac{1}{6}$.

Therefore, each daughter $\frac{1}{9}$; each grandmother $\frac{1}{18}$; each uncle $\frac{1}{18}$.

According to the *Shiah* School, the whole inheritance goes to the *six* daughters in equal shares.

Case 2.—*A* dies leaving moveable and immoveable property, and leaving only a brother and a sister; what interests will they take according to Mahomedan law? [B. L. 1871.]

Answer.—Moveables and immoveables are inherited alike without any distinction. The brother and sister divide the estate between themselves as residuaries, the brother taking *two* shares, and the sister one share. Thus, the brother = $\frac{2}{3}$; the sister = $\frac{1}{3}$. The division is also the same according to the *Shiahs*.

Case 3.—A Mahomedan dies leaving a father, widow, and four daughters: divide the inheritance. [B. L. 1871.]

Solution.—Four daughters = $\frac{2}{3}$; widow = $\frac{1}{8}$; father takes the residue $\frac{5}{24}$.

According to the *Shiahs*, the father is first given his legal share, a *sixth*, and the others their own shares as above; the residue $\frac{1}{24}$ reverts to the daughters and the father in proportion to their shares.

Case 4.—A Mahomedan dies leaving a widow, mother, and daughter: divide the inheritance. [B. L. 1872.]

Solution.—Widow = $\frac{1}{8}$; mother = $\frac{1}{6}$; daughter = $\frac{1}{2}$.

The shares are $\frac{3}{24}$, $\frac{4}{24}$, and $\frac{12}{24}$; and their sum is $\frac{19}{24}$. The residue $\frac{5}{24}$ *returns* to the mother and the daughter only, as the widow is not entitled to share in the Return when there are other heirs by consanguinity. Therefore, after giving the widow her *eighth*,

we must divide the remainder *seven-eighths* in the proportion of *three* parts to the daughter and *one* to the mother. Thus—

Widow = $\frac{1}{8}$ or $\frac{4}{32}$

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

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

The division is also the same according to the *Shiahs*.

Case 5.—*A* dies leaving four wives, three grandmothers, and twelve paternal uncles. What would be the shares (1) among Sunnis, (2) among Shiahs? [**B. L. 1873.**]

Solution.—(1) Among Sunnis—

Four wives = $\frac{1}{4}$

Three grandmothers = $\frac{1}{6}$

Twelve paternal uncles = $\frac{12}{24}$, the residue.

(2) Among Shiahs—

Wives get a *fourth* as sharers.

Paternal uncles get nothing.

Grandmothers get the residue.

Case 6.—*A* has two sons, *B* and *C*. *B* has one son *D*. *B* dies in *A*'s lifetime. What becomes of *A*'s estate? [**B. L. 1874.**]

Answer.—*D* gets nothing, being a son's son, and therefore excluded by the deceased's son *C*, who takes the whole estate.

Case 7.—Show how in the case of husband, father, mother, and daughter, there are more sharers than shares, and how this can be rectified. [**B. L. 1874.**]

Answer.—The shares are—

Husband, $\frac{1}{4}$; daughter, $\frac{1}{2}$

Father, $\frac{1}{6}$; mother, $\frac{1}{6}$

Reducing to L. C. M., the sum of the fractions = $\frac{13}{12}$.

∴ The estate falls short of $\frac{1}{12}$, to meet the shares in full.

The defect is rectified by *increasing* the denominator to 13, so that the shares are proportionately reduced.

Husband gets $\frac{3}{13}$; daughter $\frac{6}{13}$

Father $\frac{2}{13}$; mother $\frac{2}{13}$.

According to the *Shiahs*, the deficiency would fall upon the *daughter* only, who will get $\frac{5}{12}$ only, and the others their full shares as above.

Case 8.—A Mahomedan dies intestate, leaving a son, two daughters, a wife, a father, a mother, a sister, and two uncles. What becomes of his property? [B. L. 1875.]

Solution.—Wife $= \frac{1}{8}$; father $= \frac{1}{6}$; mother $= \frac{1}{6}$; the son and two daughters divide the residue, two shares being taken by the son, and one by each daughter. The sister and the uncles are totally excluded by the son. The division is also the same according to the *Shiahs*.

Case 9.—*A* dies leaving two sons *B* and *C*, a son's son *D*, a daughter's son *E*, and a widow *F* the mother of *B*. How will his estate be divided? [B. L. 1881.]

Answer.—*D* is excluded by *B* and *C*.

E is excluded as he is a distant kindred, and there are a sharer and residuaries.

Therefore, widow gets $\frac{1}{8}$; *B* and *C*, the residue.

The division would be the same according to both schools.

Case 10.—(*a*) *A* dies leaving his father and mother, 3 sons, 3 grandsons by a son who died during his lifetime, 2 other grandsons by another son who also died during his lifetime, a widow, 2 daughters, 2 grandsons by a daughter predeceased, and 2 brothers who were living with him joint in food and estate. Who will succeed? and in what shares? (*b*) In the same case, supposing *A* to have left no sons. (*c*) In the same case, supposing *A* to have left no sons, nor grandsons by sons who died before him. (*d*) In the same case, supposing *A* to have left no sons, nor grandsons, nor a widow. [B. L. 1883.]

Solution—(*a*) The son's sons are excluded by the sons, the daughter's sons for being distant kindred, and the brothers by the sons as also by the father.

Father $= \frac{1}{6}$; mother $= \frac{1}{6}$; widow $= \frac{1}{8}$; residue between the sons and daughters, in the proportion of two shares for each male and one for each female.

(*b*) and (*c*).—Mother $= \frac{1}{6}$; daughters $= \frac{2}{3}$; widow $= \frac{1}{8}$; father $= \frac{1}{6}$, and the residue, since there is no son and there are daughters. But it is found by adding the shares, that the sum of the fractions exceeds unity, and the case is to be met hy increasing the L. C. M. of the fractions to the sum of their numerators, so that all get reduced shares, and the father does not get any re-

siduary portion. According to the *Shiahs* the daughter will get a reduced share, and the others in full.

(*d*) Father $\frac{1}{6}$; mother, $\frac{1}{6}$; daughters $\frac{2}{3}$; no residuary portion left for the father.

Case 11.—*A*, a Mussalman, dies leaving—(1) husband, (2) a father, (3) Mother, and (4) a daughter. How will you distribute the inheritance among (1), (2), (3), and (4)? Do you notice any peculiarity? [**B. L. 1884.**]

Solution.—Husband $= \frac{1}{4}$; father $= \frac{1}{6}$; mother $= \frac{1}{6}$; daughter $= \frac{1}{2}$. Reducing to L. C. M. and adding up the fractions, we get $\frac{13}{12}$. It is a case of increase and we must re-arrange the reduced fractions, with 13 as denominator, instead of 12. According to the *Shiahs*, the daughter's share alone will be reduced.

Case 12.—A Mahomedan dies leaving a wife, eight daughters, and four paternal uncles. Distribute the inheritance among them, according to the Shiah and the Sunni Schools. [**B. L. 1887.**]

Solution.—(1) Among the Shiahs—

The wife gets $\frac{1}{8}$; the daughters get $\frac{2}{3}$ as sharers, and the residue ($\frac{5}{24}$) by Return. The paternal uncles are excluded as there are heirs of a superior class—the daughters.

(2) Among the Sunnis—

The paternal uncles take the residue $\frac{5}{24}$ as residuaries, and the wife and the daughters get the above shares.

Case 13.—*A* dies leaving behind him a daughter's daughter and a brother's son. *B* dies leaving behind him a daughter and a brother. Who will take the property left by *A*, and who that left by *B*, (1) according to the Shiah law, and (2) according to the Sunni law? [**B. L. 1896.**]

Solution.—(1) According to the Shiahs—

In *A*'s case, the daughter's daughter and the brother's son do not inherit together, as they are members of different classes of con-

sanguineous heirs. The daughter's daughter takes the whole. In *B*'s case, the daughter takes the whole, and the brother is excluded.

(2) According to the Sunnis—

In *A*'s case, the brother's son is a residuary and inherits the whole, excluding the daughter's daughter who is a distant kindred. In *B*'s case, the daughter takes $\frac{1}{2}$ as her legal share, and the other half goes to the brother who inherits as a residuary.

INDEX.

*** *The references throughout are to sections.*

	Sec.
Acknowledgment—	
the doctrine of	91
by a man	92, 93
by a woman	94, 95
of a child	91, 95
of parents	92
of husband	94
of other kinsmen	92—95
of debts	156(12)
Adopted child—	
does not inherit from adoptive parents	288
Agency—	
in marriage	31
in divorce	57
in pre-emption	232
Apostacy—	
no longer a bar to succession	318(3)
Assets—	
how distributed	242
Authorities—	
of the *Sunni* school	3
of the *Shiah* school	3
Brother—	
of the whole blood, a residuary	290
when excluded	275
of the half blood, by the father	290
by the mother...	266
Burial—	
to be performed without superfluity or deficiency	242
Child—	
by whom to be maintained	108, 109
who is entitled to its custody	10
its parentage how established	83
parentage of an illegitimate	87
its descent from the mother	82
acknowledgment of a	91
in the womb, inherits when born alive	323
a *still-born*, does not inherit	327
of curse or imprecation	287
adopted, does not inherit	288
Computation—	
of shares	...256—277

	Sec.
Conditions—	
in marriage	19
in pre-emption	...220—225
of a valid gift	124
Contract—	
marriage is a kind of	16
Country—	
difference of, when a bar to inheritance	318(4)
Creditors—	
payment to	242
Custody—	
of male infants	10
of female infants	10
Daughter—	
a legal sharer	262
when becomes a residuary	262, 293, 342
entitled to share in the return	279
when gets a reduced share (*Shiah school*), renders the father a residuary	258
Daughter's son—	
a distant kindred of the first order	300
Difference—	
of country, impedes succession	318
of religion, impedes succession	318
Devices—	
legal, to avoid pre-emption	240
Debts—	
should be paid before the distribution of the assets	242
Death-illness—	
divorce passed in	55
gifts made in (Case-law on p. 86)	128
Devolution—	
of the inheritance	243
Distant kindred—	
who are	299
the four classes	300
when entitled to inherit	299
order of their succession	302
Distribution—	
of assets, among creditors	242
among heirs	243
Divorce—	
different kinds of	59, 60
different forms	59
Sunni or regular	59
Badai or irregular	68
Ahasan form of	64
Hasan form of	65
by whom can be effected	54, 57
by a dumb person	54
by an infant	54
when revocable	65, 68
when irrevocable	67, 71
effects of	77

	Sec.
Dower—	
definition of	35
a necessary thing in marriage	35
presumed by law	35
the proper dower	38
its minimum	38
its maximum	38
what can be a fit subject for	37
muajjal or prompt	41
mowajjal or deferred	41
when exigible	41
what portion prompt and what deferred	42
when confirmed	44
when it drops	47, 48
how much payable upon divorce	45—49
when not mentioned in the marriage contract	46
the wife may refuse herself for nonpayment of	43
when it can be sued for	41
may be sold or given in gift	36
under invalid marriage	50
Emancipator—	
of a slave, inherits	298
Equality—	
in marriage	22
Exclusion—	
from inheritance	319—322
when perfect	319(2), 321
when imperfect	320
who are never excluded	321
Father—	
as a sharer	258
as a residuary	258
as both sharer and residuary	258
authority of, as guardian in marriage	29
power over the property of his infant child	14
Foetus—	
entitled to inherit if born alive	323
reservation of a share for	324, 325
does not inherit if still-born	327
Fosterage—	
what establishes	32
a prohibition against intermarriage	33
what foster-relations can intermarry	34
Funeral—	
the expenses of	242
Gift—	
definition of	122
essentials of	123
valid conditions	124
death-bed gifts	127, 128
of life-interest	134
to infants and lunatics	129

	SEC.
Gift (*contd.*)—	
to a partner	132
revocation of	139—148
Grandfathers—	
who are true	253
who are false	253
inherit as father	265
maternal, are among distant kindred	301
Grandmother—	
who is true	254
who is false	254
her share	276
by whom excluded	277
Guardians—	
different kinds of	13
for the custody of infants	10
authority of	14
in marriage	28
Hadis—	
what are they	1
Heirs—	
different kinds, *Sunni* school	243
classification of, *Shias*	331
Hiba—	
see GIFT.	
Hiba-bil iwaz	149
Hiba-ba-shart-ul-iwaz	150
Hizanat—	
what it means	10
Homicide—	
an impediment to succession	318
Husband—	
a sharer	263
when entitled to in the Return	279
Iddat—	
defined	63
on whom incumbent	73
on whom not so	74
when it is incumbent	73
the term in divorce	75
„ for a pregnant woman	75
„ upon husband's death	75
„ for illegal marriage	75
Ila—	
defined	60
effect of	71
Illegitimate Child—	
heritable rights of	287
Imam—	
heritable rights of, ...	338
Impediments to Succession—	
four kinds of	318

	SEC.
Impotency—	
separation caused by	72
Imprecation—	
effects of, as constituting divorce	60
Increase—	
the principle of	278
not recognised in the Shiah school	353
Infidel—	
not to inherit from a Mussulman	318
Inheritance—	
right to	244
Insanity—	
is no bar to succession	318
is no ground for dissolution of marriage	72
Khula—	
definition of	60
rules regarding	71
Kyas—	
what is it	1
Lian—	
Separation caused by	71
Legacy—	
when payable	242
to what extent payable	242,314
to an heir	156
to a stranger	156
Maintenance—	
what includes	100
of wife, when compulsory	102
of wife by *muta* marriage	27
of divorced wife	104
of children	108
of parents	112
of other relatives	115
Marriage—	
defined	16
essentials of	18
necessary conditions of	19
when unlawful	22, 25
when presumed	20
parmanent	17
temporary	17, 27
Maternity—	
how established	82
Majority—	
of boys	5
of girls	5
Minority—	
when it ceases	5
Minors—	
their capacities	8
their incapacities	8
responsibilities of	8

	Sec.
Missing person—	
what becomes of his property	329
Mother—	
a sharer	260
Mubarat—	
significance of	60
Mutawalli—	
meaning of	214
appointment of	214
powers and duties of	216
Option—	
of puberty by a male	26
„ by a female	29
Order of Succession—	
among sharers	255
among residuaries	280
among distant kindred	310
according to the *shiah* school	333—338
Origin—	
of Mahomedan Law	1
Parentage—	
how established	83
Pre-emption—	
the right of	219
not applicable to moveables	220
who can exercise the right	228
when it cannot be set up	222—225
how the demand is made	232
how invalidated	240
devices for evading	240
Primogeniture—	
partially recognised in *Shiah* school	248
Rajat—	
what it means	76
how effected	76
Relationship—	
by acknowledgment	91—99
Remarriage—	
of wife irrevocably divorced	76
Repudiation—	
See DIVORCE.	
Residuaries—	
different kinds of	281—283
order of their succession	280
Return—	
the principle of, *Sunnis*	279
„ „ *Shias*	354
Revocation—	
of divorce	76
of gift	140
Sects—	
of Mahomedans in India	2

	SEC.
Shares—	
six in number	251
Slavery—	
an impediment to succession	318
Shufa—	
See PRE-EMPTION.	
Son—	
a residuary heir	256
Son's Son—	
means any male descendant in the direct male line	267
inherits in default of Son 245,	285
Son's daughter—	
a sharer	267
when a residuary	267
Step-mother—	
not among the heirs	261
Sister—	
heritable rights of, (1) of whole blood	270
(2) by same father	273
(3) by the mother	266
Successor by contract—	
when inherits	312
Sunnat—	
what are they	1
Sunnis—	
who are they	2
their authorities	3
Shiahs—	
who are they	2
their authorities	3
Temporary marriage (*muta*)—	17
recognised in Shiah school	27
Vala—	
a cause of succession	331
Vested inheritance—	
explained	317
Wakf—	
definition of	194
how constituted	197
religious and charitable endowments	200
family settlements ... ...201—	207
disbursement of profits	211
mutawalli or governor or *wakf* property	214
Widow—	
heritable rights of	264
Wife—	
entitled to maintenance	102
Zihar—	
meaning of	60
effect of	60