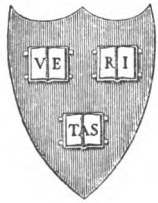

AN EPITOME
OF
MAHOMEDAN LAW.

Bombay, Printed at the "Examiner Press."

AN EPITOME

OF

MAHOMEDAN LAW.

BY

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AUTHORS OF

"AN EPITOME OF HINDU LAW"

AND

"AN EPITOME OF THE PRINCIPLES OF EQUITY."

THIRD EDITION.

1903.

TO

THE HONOURABLE MR. BUDRUDDIN TYABJI,

Of the Middle Temple, Barrister-at-Law,

JUDGE OF H. M.'S HIGH COURT OF JUDICATURE AT BOMBAY,

This Work

IS,

AS AN HUMBLE TOKEN OF ADMIRATION

FOR

HIS LORDSHIP'S SURPASSING FORENSIC ABILITIES

AND

GREAT LEGAL ACQUIREMENTS,

BY KIND PERMISSION,

MOST RESPECTFULLY DEDICATED.

PREFACE TO THIRD EDITION.

The second edition of the work being exhausted and a new one being demanded the authors have the satisfaction of publishing its third edition with necessary changes and alterations.

The authors hope that the present edition in its revised and up-to-date form will be found as useful and popular alike among the students and the profession as its predecessors.

Bombay, *September*, 1903.

PREFACE.

Encouraged by the reception accorded to their work on Hindu Law, the first edition whereof has been nearly exhausted within the short space of ten months, the authors now lay before the public the present volume on Mahomedan law. In doing so, they think it right to premise that the want of such a work has not been unfelt. For though there exist the works of Baillie, MacNaughten, Ameer Ali and others, which are admirably adapted to the practitioner, yet it will be acknowledged that besides being generally inaccessible, some are not approached on account of their formidable size, others do not do equal justice to the different portions of the law, while it is no disparagement of them to say that none deals with the subject in a form in which students can easily grasp it. As for Mr. Sadagopah Charloo's abstract of MacNaughten, it is evident that it contains merely the rudiments of the law.

The object of the authors has been to present in a handy volume and in a concise and connected form all the most important principles of both the chief schools, to illustrate the same by apt cases, and generally to bring the law on the subject down to the present time. How far they have succeeded in their attempts is left for the public to decide.

The book is intended mainly for students. It is trusted, however, that practitioners amidst the oppressive details of professional work will find in it, besides much that will be acceptable, a key to the treasures that lie in more elaborate and exhaustive works.

A table of cases and an exhaustive index have been appended.

Any suggestions in the way of making the work more useful will be welcome.

Bombay, *September*, 1895.

EXPLANATION OF ABBREVIATIONS.

All.	Indian Law Reports, Allahabad Series.
B. H. C.	Bombay High Court Reports.
B. L. R.	Bengal High Court Reports.
Bai. H.	Baillie's Digest of Mahomeden Law, Hanifeea Code, 2nd Edition.
Bai. Im.	Baillie's Digest of Mahomedan Law, Imameea Code, 2nd Edition.
Bom.	Indian Law Reports, Bombay Series.
Bom. L. R.	Bombay Law Reporter.
C. L. R.	Calcutta Law Reports.
Cal.	Indian Law Reports, Calcutta Series.
Elb	Elberling's Treatise on Inheritance, Gift, &c.
Intro.	Introduction.
M. H. C.	Madras High Court Reports.
M. I. A.	Moore's Indian Appeals.
Mac. N.	W. H. MacNaughten's Principles and Precedents of Mahomedan Law 1890.
Mad.	Indian Law Reports, Madras Series.
Morley.	Analytical Digest by W. H. Morley.
N. W. P.	Decisions of the High Court of the N. W. Provinces.
P. J.	Printed Judgments of the Bombay High Court.
Rumsey.	Rumsey's Mahomedan Law of Inheritance (1880.)
W. R.	Weekly Reporter.
Wilson.	Wilson's Digest of Mahomedan Law.

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EPITOME OF MAHOMEDAN LAW.

CHAPTER I.

NATURE, SOURCES, AND AUTHORITIES.

Nature of Mahomedan Law.

Mahomedan law, like that of the Hindus, is professedly founded upon revelation. The Koran, though variously interpreted, is regarded by the Mussulmans of every denomination as the fountain-head and first authority of all law—religious, civil, and criminal. (*Morley. Intro.*)

Mahomedan law may be divided into two parts: (1) relating to spiritual (comprehending the rights and ceremonies of religion), and (2) to temporal matters (civil, criminal, and international law).

Mahomedan law may be said to be written and unwritten; the former contained in many recognized treatises of Mahomedan law; the latter gathered from the practice of the country, as expounded by the law officers in cases for which there was no positive written law. (*Bai. F. Alum. Intro.*)

Sources of Mahomedan Law.

The (*Sunni*) Mahomedans recognize four sources of their law, *viz.*, the Koran, the *Sunnat* or *Hadis*, the *Ijmáa*, and the *Keyás*.

The Koran consists of a collection of the revelations made by Muhammad, and is the original source.

The *Sunnat* or *Hadis*, the second authority of Mahomedan law, comprises the actual precepts, actions, and sayings of the Prophet himself, preserved by tradition, and handed down by authorized persons, and which after his death were collected and transcribed into a book called the "*Sunnia*" or "Oral law."

The *Ijmáa* (concurrence) is composed of the decisions of the companions of Muhammad, the disciples, and the pupils of the disciples.

The *Keyás* (ratiocination) consists of analogical deductions derived from a comparison of the Koran, the *Sunnat*, and the *Ijmáa*, where these do not apply either collectively or individually to any particular case. (*Morley. Intro.*)

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

Schools of Law.

Mahomedan law is divided into two schools, called the Sunni or orthodox and the Shiah or heterodox. (*Grady. Intro.*)

On the death of the Prophet a great and irreconcilable schism broke out amongst his followers as to the right to the succession of the Caliphate. On the murder of the third Caliph, Usman, and the elevation of Ali, Muhammad's cousin and son-in-law, to the dignity of Amir-al-Muminin, the breach became complete and final, the faithful separating themselves into two sections, afterwards known as the *Sunnis* and the *Shiahs*. The *Sunnis* are so called from the great deference they pay to the *Sunnia*, or traditions of the Prophet's precepts and examples. The term *Shiah* is applied to the rival faction, apparently in reproach, as it signifies dissenter. These two parties being cut off from intercommunication, naturally diverged from each other in their interpretation of the law. They form, therefore, the two great schools of law. (*Ibid.*)

The question of the Imâmate, or the title to the spiritual and temporal leadership of Islâm forms the chief point of difference between the two sects. The *Sunnis* are the advocates of the principle of election; the *Shiahs* of apostolical descent by appointment and succession. (*Ameer Ali.*)

The *Sunnis* are sub-divided into the *Hanafis*, *Shafeis*, *Mâlikis* and *Hanbalis*; the *Shiahs* into the *Usuils* and *Akhbaris*.

The Mussulmans of India are generally Sunnis of the *Hanifa* sect. But practices peculiar to the Shiahs have long prevailed to a great extent in certain localities. Of the two sects, the Shiah is the earlier as a school of law.

The great majority of Mahomedans in India follow the *Hanifâ* doctrine, and to such an extent, that that doctrine seems to be the only one recognized in Courts in India, and the *Hedaya* (*Hanifa* work) is used in all Mahomedan Courts in India. (*Muhammad V. Gulam*, 1 B. H. C. at p. 248.)

The leading differences between the two schools are the following :—

1. The *Hanifites* regard the presence of witnesses as essential to a valid contract of marriage, the *Shiahs* do not deem it to be in anywise necessary.

2. The *Shiahs* do not appear to make any distinction between *invalid* and *void* marriages, all that are forbidden being apparently void according to them.

3. As to repudiation (*talak*), while the *Hanifites* recognize two forms, the *Sunnee* and *Budawee*, or regular and irregular, the *Shiahs* reject these distinctions altogether, recognizing only one form, *viz.*, the *Sunnee*, or regular.

4. The *Hanifites* do not require intention (in *talak*) when express words are used; while according to the *Shiahs*, both intention and the presence of witnesses, in all cases, are essential.

5. With regard to parentage, maternity is established, according to the *Hanifites*, by birth alone, without regard to the connection of the parents being lawful or not. According to the *Shiahs* it must in all cases be lawful.

6. As to *nasub*, or descent, according to the *Hanifites*, it is enough if the information be received from two just men, or one just man and two just women, while the *Shiahs* require that it should have been received from a considerable number of persons in succession, without any suspicion of their having got up the story in concert.

7. According to the *Hanifites*, the right of *shoofa*, or pre-emption may be claimed, firstly, by a partner in the thing itself; secondly, by a partner in its rights of water and way; and thirdly, by a neighbour. According to the *Shiahs*, the right belongs only to the first of these, with some slight exception in favour of the second. The claim of the third they reject altogether.

8. In respect of inheritance there are many and important differences between the two sects. The impediments to inheritance according to the *Hanifites* are slavery, homicide, difference of religion and difference of country. Of these the *Shiahs* recognize the first; the second also, with some modification, *i.e.*, the homicide must be intentional, in other words, murder. For difference of religion, the *Shiahs* substitute infidelity; and the last they reject entirely. (*Bai. Im. Intro.*)

N. B.—As to the principal points of difference between the *Shiah* and the *Sunni* law of inheritance see last page.

Authorities on Mahomedan Law.

The *Hanafi* sect is the one which obtains most commonly, and indeed almost entirely, amongst the Mahomedans of India; but the doctrines of its great founder, Abu Hanifa, are sometimes qualified, in deference to the opinion of two of his most famous pupils, Abu Yusuf and Imam Muhammad. Although Abu Hanifa is the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shewn to Abu Yusuf and the lawyer Muhammad,

that, when they both dissent from their master, the judge is at liberty to adopt either of the two decisions. Where the two disciples differ from their master and from each other, the authority of Abu Yusuf, particularly in judicial matters, is to be preferred to that of Muhammad. In the event, however, of one disciple agreeing with Abu Hanifa, there can be no hesitation in adopting that opinion which is consonant with his doctrine. (*Morley Intro.*)

The three great traditional leaders of the *Hanifites* were its founder *Imam Abu Hanifa,* his most illustrious disciple *Imam Abu Yusuf*, and next in order and authority to these, his other disciple *Imam Muhammad.* (*Rumsey.*)

It is a general rule of interpretation of Mahomedan law that in cases of difference of opinion amongst the jurisconsuls, Abu Hanifa and his two disciples Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed ; and in the application of legal principles to temporal matters the opinion of Abu Yusuf is entitled to the greatest weight. (*Abdul Kadir v. Salima*, 8 All. 149.)

The English works of authority on Mahomedan law in use and relating to the Sunni civil law prevalent in India, are :— Sir W. H. MacNaughten's Principles and Precedents of Mahomedan law; Mr. Baillie's Law of Inheritance ; The Law of Sale by Mr. Baillie ; Elberling's Treatise on Inheritance, Gift, Will, Sale and Mortgage ; The Hedaya or Guide, a commentary on the Mussulman laws, civil and criminal, translated by Mr. Hamilton. The Sirrajeyyah and its commentary the Sharifiyah are standard Arabic works on the Sunni system of Inheritance. Both have been translated by Sir William Jones. The Fatawa Kazi Khan and the Fatawa Alamgiri are other works of reference. (*Mac. N. Intro.*)

Where by the writers of the highest authority on the law of a particular sect a point of law is admitted to be doubtful, regard should be had to the practice of the Courts. (*Daim v. Asooha Bibee*, 2 N. W. 360.)

The interpretation of the rules of Mahomedan law now rests with the British Courts, and case-law has already formed a part and parcel of this law.

Application of Mahomedan Law.

In India the law is universally personal and the Legislature has preserved intact the laws of Mussalmans in all matters relating to inheritance and to dispositions of property.

In the Islâmic system the different schools and sub-schools are so intimately connected with the different persuasions, sects, or communions to which they appertain, that when a person belonging to one communion or sect or sub-sect goes over to another, his status and dispositions made by him, as well as succession to his inheritance, are thenceforth governed by the rules of the school to which he now belongs; *e. g.* a Shiah on adopting the Sunni persuasion would subject himself to the Sunni law. So a Hanafi becoming a Shâfeite would be governed by the Shafei principles and *vice versâ*. From this point of view it may be said that the entire Mussalman law is a personal law. (*Ameer Ali.*)

In a suit to obtain a widow's share under Mahomedan law in the estate of the deceased, it was proved that the plaintiff and deceased had been married in 1855 as professed Christians in a Church at Meerut; that subsequently, having reverted to Mahomedanism they were married a second time according to Mahomedan law in *Nikah* form, which second marriage had not been dissolved by a Mahomedan divorce. In 1886 the husband died, leaving a will excluding the wife from all participation in his estate. *Held*, that the personal status of the deceased being at the time of his death that of a Mahomedan, and the plaintiff's status being that of his wife under the same law, she was entitled to a share in his estate notwithstanding his will, which purported, but under Mahomedan law was inoperative, to exclude her. (*Robert Skinner v. Charlotte Skinner*, 25 Cal. 537.)

Although the Mahomedan law, pure and simple, is a part of the Mahomedan religion, it does not of necessity bind all who embrace the Mahomedan creed. (*Abdull v. Ahmed*, 10 Bom. 1.)

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

Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established. They are governed by the Hindu law of inheritance in the absence of proof of special custom. (*In re Ismail*, 6 Bom. 452; *Mahomed Sidick v. Haji Ahmed*, 10 Bom. 1.)

In the absence of satisfactory proof of a custom, differing from the Hindu law, the Hindu law of inheritance and succession is applied to *Khojas* and *Cutchi Memons*. In matrimonial matters they are governed by Mahomedan law. (*Hirbai v. Gorbai*, 12 B. H. C. 294; *Asitabai v. Haji Tyeb*, 9 Bom. 115; *Mahomed Sidick v. Haji Ahmed*, 10 Bom. 1.)

The rule that Hindu law as administered in the Bombay Presidency, in the absence of proof of custom to the contrary, is the law applicable to *Khoja* Mahomedans is not to be understood in its widest sense, but as confined to simple questions of inheritance and successions, and there is not any recognized right of a son to demand partition in the lifetime of his father unless the son succeeds in establishing such a right. (*Ahmedbhoy v. Cassumbhoy*, 13 *Bom.* 534.)

A majority of the **Borahs** are Ismailias, and are governed by the general principles of the Mahomedan *Shiah* law. (*Ameer Ali.* Vol. II. 31.)

The **Sunni Borah** Mahomedan Community of the Dhanduka Taluka in Gujrat are governed by the Hindu law in matters of succession and inheritance. (*Bai Baiji v. Bai Santok*, 20 Bom. 53.)

CHAPTER II.

Marriage and Maintenance.

Marriage.

Betrothal and Marriage.

The institution of *Mangni* or betrothal, though it exists in India, is not legally binding on either side. Under Mahomedan law an action for breach of promise cannot lie. It is only after the *akd* (the formal conclusion of the marriage) has been performed and the contract actually executed, that a suit can lie on behalf of either of the married parties for restitution of conjugal rights. (*Ameer Ali. Vol. II.* 298.)

A promise of marriage, whether written or oral, cannot be legally enforced. But whatever is given to the parents of the girl solicited in marriage, or sent to their house in consideration of marriage, is legally recoverable. (*Mac. N.* 250, 251.)

Marriage is a contract founded on the intention of legalizing generation. Among Mahomedans marriage is not a sacrament, but purely a civil contract. (*Mac. N.* 56 ; *Abdul Kadir v. Salima*, 8 All. 149.)

Under Mahomedan law a *nikah* is a legal marriage. The legal position of a *shadi* (or first) wife, and a *nikah* (or subsequent) wife, is the same. The offspring of both marriages inherit alike.

Nikah is the proper and distinctive name of marriage, though in Bengal it is restricted to what is deemed an inferior kind of marriage, in opposition to *shadi*, which properly means *joy* or *festivity*, but is commonly applied to the first or principal marriage, usually celebrated with festivities and a good deal of expense. The nikah form of marriage is well known and established among the Mahomedans. The issue of such a marriage is legitimate, by Mahomedan law. (*Bai. H. I*; *Mooneerooddeen v. Ramdhan* 18 W. R. 28.)

Essentials and Conditions of Marriage.

Marriage, like other contracts, requires declaration and acceptance for its constitution. (*Bai. H.* 4.)

Proposal and consent are essential to a contract of marriage. A proposal of marriage may be made personally, or by means of agency, or by letter ; provided there are witnesses to the receipt of the message or letter, and to the consent on the part of the person to whom it was addressed. (*Mac. N.* 56, 57.)

The conditions necessary to constitute a valid marriage, under Mahomedan law, are discretion, puberty, and freedom of the contracting parties. In the absence of the first, the contract is void *ab initio* ; for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions the contract is voidable ; for the validity of marriages contracted by discreet minors, is suspensive on the consent of their guardians. Further there should be no legal incapacity on the part of the woman ; each party should know the agreement of the other ; there should be witnesses to the contract, and the proposal and acceptance should be made at the same time and place. (*Mac. N.* 56.)

The requisites to the competency of witnesses to a marriage contract are freedom, discretion, puberty, and profession of the Mussulman faith. (*Ibid.*)

Under the *Shiah* law, the presence of witnesses is not necessary in any matter regarding marriage. And though among the *Sunnis* their presence is necessary to the validity of a marriage, their absence only renders it invalid, which is cured by consummation. (*Ameer Ali. Vol. II.* 270).

The consent of the woman is also a condition, when she has arrived at puberty, whether she be a virgin or not, so that a woman cannot be compelled by her guardian to marry. (*Bai. H.* 10.)

The same conditions are necessary in the case of a girl as in the case of a boy.

Effect of Marriage-contract.

The effect of a contract of marriage is to legalize the mutual enjoyment of the parties; to place the wife under the dominion of the husband; to confer on her the right of dower, maintenance, and habitation; to create, between the parties, prohibited degrees of relation and reciprocal rights of the inheritance; to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife, and to invest the husband with a power of correction in cases of disobedience. (*Mac. N.* 57.)

Marriage, however, confers no right on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of the property, of entering into all contracts regarding it, of suing and being sued without his consent or concurrence as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend; and is in no respect under his legal guardianship. On the other hand, he is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time, without assigning any reason. (*Bai. H. Intro.*)

Under the law of Islam, a woman occupies a very much higher position than an English woman, so far as her rights of property and inheritance are concerned. She is entitled to inherit and acquire property exactly in the same way as her husband. Her legal status or position as regards her property is in no way

changed by her marriage; she has the same power and dominion over her own property after and during her marriage as before her marriage. By marriage her husband acquires no interest whatever in his wife's property. In short, the husband and the wife are in the eyes of the Mussulman law perfectly distinct and independent—each being entitled to the protection of the law against the other—so far as his or her rights of property are concerned, as if they were perfect strangers. (*A. v. B.*, 21 Bom. at pp. 83, 84.)

The wife is in practice, entirely dependent on her husband, and subject to his control. He is bound to maintain her while the coverture lasts; and in the case of divorce, until the term of probation has expired. The term of probation is four months and ten days, called *iddat* during which the condition of converture is not entirely extinguished. The wife is entitled during that period to maintenance, and forbidden to re-marry until its expiration. Should her husband die in the interval, she will inherit from him, and she ranks also amongst the heirs of her parents brothers, and other relations, though, in general, she is entitled to but half the share of a male standing in the same degree of proximity. (*Grady.* 236, 237.)

Causes of Prohibition in Marriage.

The women who are unlawful or prohibited to a man in marriage are:—

I.—Women who are prohibited by reason of *nasab*, or *consanguinity*.

These are mothers, daughters, sisters, aunts paternal and maternal, brothers' daughters, and sisters' daughters.

II.—Women who are prohibited by reason of *affinity*.

These are the mothers of wives, and their grandmothers by the father's or mother's side, the daughters of a wife or of her children, how low soever, the wife of a son, or of a son's son or of a daughter's son, how low soever, and the wives of father's and grandfathers, whether on the father's or mother's side, and how high soever.

III.—Women who are prohibited by reason of *fosterage*.

It is a rule that whatever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule; for instance, a man may marry his sister's foster-mother or his foster-sister's mother, or his foster-son's sister, or his foster-brother's sister. (*Mac. N.* 59.)

IV.—Women who *cannot lawfully be joined together.*

It is not lawful for any man to have more than four wives at the same time. Nor is it lawful to join together any two women, who, if we suppose one of them on whichever side to be a male, could not lawfully intermarry, by reason of consanguinity or fosterage.

Polygamy is permitted amongst Mahomedans—a free man being allowed four wives, although a woman can have but one husband at the same time.

V.—Women who are prohibited by being *involved in the rights of others.*

It is not lawful for a man to marry the wife of another.

VI.—Women prohibited by reason of *Polytheism.*

It is not lawful to marry fire worshipers nor idolatresses.

Christians, Jews, and persons of other religions, believing in one God, may be espoused by Mahomedans. (*Mac. N.* 58.)

A Mahomedan woman of the *Shiah* sect cannot contract a valid marriage according to Mahomedan rites with any other than one of her own religion. (*Bakhshi v. Thakurdas*, 19 All. at p. 377.)

VII.—Women prohibited by reason of *divorce.*

It is not lawful for a man to marry a free woman whom he has repudiated three times, till another husband has consummated with her. (*Bai. H. Chap.* III.)

N.B.—Female slaves married upon free woman (that is, while marriage with a free woman is still subsisting), or together with them, and women who are prohibited by reason of property are among the classes of women prohibited to a man in marriage, but as slavery is abolished these two classes would now be of little importance.

Enumeration of Prohibited Relations.

A man may not marry his mother, nor his grandmother, nor his mother-in-law, nor his step-mother, nor his step-grandmother, nor his daughter, nor his grand-daughter, nor his daughter-in-law, nor his grand-daughter-in-law, nor his step-daughter, nor his sister, nor his foster-sister, nor his niece, nor his aunt, nor his nurse. Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relationship to each other, as that, if one of them had been a male, they could not have intermarried. (*Mac. N.* 57.)

A man may not marry his wife's sister during the wife's lifetime, unless she be divorced. There is no objection in Mahomedan law to a man's marrying the sister of his deceased or divorced wife. Marriage with the sister of a wife who is legally married being void, children of such marriage are illegitimate and cannot inherit. (*Mac. N. 258* ; *Aizunissa v. Karimunnisa, 23 Cal. 130.)*

Persons who have power to enter into contract of marriage.

A father or a grand father can enter into a contract of mariage on behalf of an infant. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage ; and in default of maternal guardians, the Government may supply their place. (*Mac. N.* 59.)

A marriage contracted by the mother and grandmother of a Mahomedan minor is lawful and valid when a nearer guardian is precluded by absence from acting. (*Kaloo v. Guribollah*, 13. B. L. R. 163.)

The consent of the father is not necessary to the marriage of a Mahomedan girl, if he be an apostate from the Mahomedan faith ; and in such a case the mother's consent is sufficient. (In the matter of *Mahin Bibi*, 13 B. L. R. 160.)

A girl not having attained the age of puberty, cannot contract herself in marriage without the consent of her guardians ; but she may do so without such consent, if she have attained such age. The guardians are not authorized to prevent the match, if she enter into a contract of marriage with a person equal in point of condition ; but if he be her inferior, they have a right to come forward and cause the marriage to be set aside, at any time before the birth of issue. (*Mac. N.* 54.)

The distinction between the case of a female who has attained the age of puberty contracting marriage and one who has not attained that age is, that in the former case the marriage is valid but voidable by the guardians where inequality appears ; and that in the latter case the contract is void *ab initio*, if entered into without the consent of the guardians ; but such consent may be implied as well as express. (*Ibid.*)

No one, not even a father or the Sultan, can lawfully contract a woman in marriage who is adult and of sound mind, without her permission, whether she be virgin or not. And if any one should take upon himself to do so the marriage is suspended on her sanction; if assented to by her it is lawful; if rejected, it is null. (*Bai. H.* 55.)

Option of Puberty.

Under Mahomedan law, when a child is given in marriage by any person other than the father or grandfather, he or she has the option of either ratifying it or repudiating it on attaining puberty. This is called *option of puberty.*

A contract of marriage entered into by a father or grandfather, on behalf of an infant, is valid and binding and the infant has the option of annulling it on attaining maturity; but if entered into by herself, or by another guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay does not take place as may be construed into acquiescence. (*Mac. N.* 58.)

The option must be exercised by a female immediately on the appearance of physical signs of puberty, or at least on the formal announcement of the fact, otherwise she loses it altogether. But a male retains his option until he has ratified the contract by express declaration or by some act equivalent thereto, as by payment of dower or commencement of cohabitation. (*Wilson.* 19.)

Though by the law of the *Sunnis*, the option of dissent must be declared by the girl as soon as puberty is developed, yet by the doctrine of the *Shiahs*, the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. (*Mulka Jehan v. Mahomed*, 26 W. R. 26.)

The only difference between the *Sunni* and the *Shiah* law on the question of option of puberty is that whereas according to the latter school a marriage contracted for a minor by a person other than the father or grandfather is wholly ineffectual until it is ratified by the minor on attaining puberty, according to the Sunni school it continues effective until it is cancelled by the minor. Both schools give to the minor an absolute power either to ratify or to cancel the unauthorized marriage. The Sunni law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage. (*Badal Aurat v. Queen Empress*, 19 Cal. 82.)

A minor has an option even in the case of a marriage entered into on his behalf by a father or grandfather if the latter was a prodigal or addicted to evil ways, or the marriage was *manifestly* to his or her advantage. (*Ameer Ali. Vol*, II. 290.)

The repudiation of an adult of a marriage contracted for him or her during minority does not *ipso facto* dissolve it, but renders it the duty of a civil judge to decree its dissolution. In the meantime the parties remain man and wife in this sense that if either of them dies, the other will inherit to him or her in the capacity of wife or husband as the case may be; sexual intercourse between them is not unlawful but the consummation consented to *before the option has been exercised* has the effect of extinguishing the option and establishing the marriage. (*Wilson.* 19.)

Illegal and Invalid Marriages.

Connections which are *illegal* are null and void *ab initio*, and create no civil rights and obligations between the parties. The wife has no right of dower against the husband (unless the marriage is consummated), and neither of them is entitled to inherit from the other, in case of the death of either, during the period when the contract is supposed to have existed. Such are marriages contracted within prohibited degree. They are illegal and are null and void *ab initio*. So, too, the union of a man with a woman who was already married to another, with or without a knowledge of that fact, would be absolutely *illegal*. (*Ameer Ali. Vol.* II. 318.)

An *illegal* marriage is considered as totally non-existing in fact as well as in law, and the issue of such marriage are illegitimate.

An *invalid* marriage is one that is wanting in some of the conditions of validity. A contemporaneous marriage with two sisters, or a marriage with one sister during the *iddat* of the other; or a marriage with a woman during her *iddat*; a marriage without witnesses; a marriage with a fifth woman; a marriage with an idolatress, etc., are all classed as *invalid* marrriages. (*Bai. H.* 150; *Ameer Ali. Vol.* II. 319.)

An *invalid* marriage does not confer any inheritable rights on either of the parties to the property of each other. (*Bai. H.* 694.)

An *invalid* marriage has no legal effect before consummation; but after consummation it is joined to valid marriages as to its effects, one of which is the establishment of *nasab*, or the child's

paternity. Though the issue of an *invalid* marriage are legitimate and have a right to the inheritance of the father, the mother has no such right. If the parties are separated before consummation, the woman has no right to dower; but after consummation she is entitled to her proper dower or the specified dower, whichever is less. There is no divorce in such a marriage, but after consummation the husband may relinquish his marital right, provided it is done in express terms. The woman is not bound to observe the *iddat* in an invalid marriage. (*Bai. H.* 157 ; *Ameer Ali. Vol. II.* 320.)

Where a contract is merely *invalid* the legitimacy of children conceived during its subsistence is not affected. But where the parties are so nearly related to each other by consanguinity, affinity, or fosterage, that sexual intercourse between them is universally allowed to be unlawful, the contract is altogether futile, or *void* as to all its effects, and the paternity of the offspring is not established from the husband, or in other words, the children conceived during its subsistence are illegitimate. (*Bai. H.* 150.)

Under the *Shiah* law there is no distinction between *illegal* and *invalid* marriages, and every marriage, to which there is an objection, even within the prohibited degrees, is *invalid*, if the illegality was not known to the parties or either of them. (*Ameer Ali. Vol. II.* 310.)

It is a general principle in Mahomedan law that any illegal conditions annexed to a contract, may be infringed without affecting the validity of the contract itself. They are considered void *ab initio*, or rather as if they had never been made at all. (*Mac. N.* 256.)

Proof and Presumption of Marriage.

Marriage may be proved directly or presumptively. Directly by means of the oral testimony of the witnesses present during the marriage, or by documentary evidence in the shape of a deed of marriage. Marriage may be proved presumptively by the statement of the parties or their general conduct towards each other. (*Ameer Ali. Vol.* II. 315, 316.)

In cases in which the marriage of the parties is not capable of being easily proved, the Mahomedan law presumes a legal marriage from continual cohabitation and the acknowledged position of the parties as husband and wife, provided there is

no insurmountable obstacle to such a presumption, and provided the relationship existing between the parties was not "a mere casual concubinage" but was permanent in its character, justifying the inference that they were lawfully married. (*Baker Hussain v. Surfunnissah Begam*, 8 M. I. A. 151.)

A Mahomedan cohabited for many years with a Mahomedan woman who had been a prostitute and who lived in his house. At his death she claimed to be his wife and called witnesses to prove an actual marriage, but which fact she failed to establish. *Held*, that the Court of the last resort could not presume, in such circumstances, that a woman once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was that there had been no marriage. (*Mt. Jaimtool Butool v. Mt. Hoseinee Begam*, 11 M.I.A. 194.)

A public acknowledgment of paternity will, of itself, raise a presumption of marriage between the person who makes it, and the mother of the child, without the father specially connecting his paternity with any particular woman. To rebut this presumption, the onus of proving the impossibility of the marriage is on the other side. (*Rook Begam v. Shazadah Walagowhar Shah*, 3 W. R. 187.)

Mutaa or Temporary Marriage.

Under the *Hanafi* (Sunni) law, a marriage for a term of years is unlawful, but if the parties have lived together as husband and wife, it takes effect as a permanent contract and gives rise to all the consequences of a valid marriage. (*Ameer Ali. Vol.* II. 310.)

Among the *Akhbâri Shiahs*, a temporary contract of marriage, or a contract for a limited term is recognized as valid. Such marriage gets dissolved either by efflux of the period fixed or may be put an end to by mutual agreement. There is no divorce in such a marriage. The children of such unions are legitimate and inherit from their parents, though the married parties do not, unless there is a contract to that effect. (*Ibid.* 352.)

Although the ordinary law of divorce does not exist in respect of marriages by the *mutaa* 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 or acceptance on the part of the wife is not necessary for the dissolution of the marriage. (*Mahomed Abid Ali v. Lindden Sahiba*, 14 Cal. 276.)

A *mutaa* marriage cannot be entered into by Mahomedan woman with any other than a Mahomedan. (*Bakhshi v. Thakur*, 19 All. at p. 377.)

Effect of Apostasy.

Apostasy from *Islâm* by one of a married pair, is a cancellation of their marriage, which takes effect im-

mediately without requiring the decree of a judge, and without being a repudiation, whether the occurrence is before or after consummation; yet if the husband be the apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not. If the wife be the apostate, she is equally entitled to the whole dower in the former cause, but to no part of it in the latter. (*Bai. H.* 182, 183.)

The Native Converts Marriage Act has made a variation in this rule of Mahomedan law. Under the provision of this Act if the husband were to apostatise, he can still demand that his wife should maintain conjugal relations with him, and in case of her refusal he can sue for a divorce from her. (*Ameer Ali. Vol.* II. 343.)

If they apostatise together, and then together reembrace the faith, the marriage remains valid; but if one only returns to the faith a separation takes place between them. (*Bai. H.* 183.)

Conversion to *Islamic* faith on the part of a man following any of the revealed religions (Judaism or Christianity) does not lead to a dissolution of his marriage with a woman belonging to his old creed. Thus, if a Hebrew or a Christian husband were to adopt *Islâm*, and the wife were to continue in the religion of her race, the marriage would remain lawful and binding.

When the parties are idolaters and one of them embraces the Mussulman faith, *Islâm*, is to be presented to the other, and if the other adopt it, good and well; if not, they are to be separated. (*Ameer Ali. Vol.* II. 343, 344.)

When a non-Moslem female, married to a non-Moslem husband, adopts Islâm, her marriage would become dissolved in the following manner. If the conversion takes place in an Islâmic country, where the laws of Islâm are in force, she will have to apply to the Kâzi to summon the husband to adopt the Moslem faith, and on the husband's refusal to do so, the marriage would be dissolved. Should the conversion take place in a non-Islâmic or alien country, the marriage would become dissolved on the expiration of three months from the date of the adoption of Islâm by the woman. (*Ibid.* 346.)

India is not a non-Islamic country, and consequently when a married non-Moslem woman adopts the Mahomedan faith, and thereafter contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islâm, she is guilty of bigamy. (*In the matter of Ram Kumari*, 18 Cal. 264.)

Conjugal Domicile.—(*Where should the wife reside?*)

The Mahomedan law lays down distinctly: (1) that a wife is bound to live with her husband and to follow him wherever he desires to go; and (2) that on her refusing to do so without sufficient or valid reason, the Courts of Justice, on a suit for restitution of conjugal rights by the husband, would order her to live with her husband. The obligation of the woman, however, to live with her husband is not absolute. She is justified in refusing to live with him, if he has habitually ill-treated her, if he has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so. The bad conduct or gross neglect of the husband, is a good defence to a suit brought by him for restitution of conjugal rights. (*Ameer Ali. Vol. II.* 370.)

A suit for restitution of conjugal rights will lie in a Civil Court by a Mahomedan husband to enforce his marital rights. By the Mahomedan law, such a suit is in the nature of a suit for specific performance, being founded on a contract of marriage, the Mahomedan law regarding it as a civil contract, and the Court will enforce all the obligations which flow from such contract. If, however, there be cruelty to a degree rendering it unsafe for the wife to return to her husband's dominion, the Court will refuse to send her back to his house; so also, if there be a gross failure by the husband of the performance of obligations which the marriage contract imposes on him for the benefit of his wife, it affords sufficient ground for refusing him relief in such a suit. (*Moonshee Buzloor v. Shumsoonnissa Begam*, 11 M. I. A. 551.)

The law recognizes the validity of express stipulations, entered into at the time of marriage, respecting the conjugal domicile, provided the stipulations are express, or are entered in the deed of marriage; a mere verbal understanding is not

sufficient in the eye of the law. If the wife, however, once consent to leave the place of residence agreed upon at the time of marriage, she would be presumed to have waived the right acquired under the express stipulation, and to have adopted the domicile chosen by the husband. (*Ameer Ali. Vol.* II. 372.)

The Mahomedan matrimonial contract involves separate and independent contracts by the husband and wife. The wife is by contract bound to submit herself to her husband, and he is bound to pay the prompt dower or other dower according to the contract, or, if no sum agreed on, according to the provision of the law. Each has separate remedy against the other for non-performance of the contract. The wife could not, therefore, refuse cohabitation on the plea that her dower had not been paid. (*Kinhi v. Moidin*, 11 Mad. 327.)

A wife's lien for upaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other ; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt. (*Abdul Kadir v. Salima*, 8 *All. 149.*)

Non- payment of prompt dower is not a sufficient plea in bar of a suit by a Mahomedan husband for the restitution of conjugal rights, the marriage having been consummated. (*Humidunnecssa v. Zohiruddin*, 17 Cal. 670.)

A second marriage of a woman during her first husband's lifetime is invalid, if no divorce have taken place ; and such second marriage forms no bar to the recovery of her person by her first husband, on civil action, notwithstanding her unwillingness to go back to him. (7 S. D. A. Ben. Rep. 27.)

Maintenance.

There are three causes for which it is incumbent on one person to maintain another :—(1) marriage, (2) relationship, and (3) property. (*Bai. H.* 441.)

Under the last head, *i. e.*, property, comes the maintenance of slaves which is now of little importance, as slavery is abolished.

Maintenance of Wives.

The right of a woman to maintenance is expressly recognized ; so much so, that if the husband be absent and have not made any provision for his wife, the law will cause it to be made out of his property ; and in case of divorce, the wife is entitled to maintenance, during the period of her probation. It is incumbent on a husband to maintain his wife, whether she be *Mooslim* or *Zimmee*, poor, or rich, enjoyed or unenjoyed, young or old, *if not too young for matrimonial intercourse.* (*Mac. N.* 57 ; *Bai. H.* 441.)

A husband is not entitled to the custody of the person of a minor wife whom he is not bound to maintain. (*In re Khatiji Bibi*, 5 *B. L. R.* 557.)

When a wife is too young for matrimonial intercourse, she has no right to maintenance from her husband, whether she be living in his house or with her father. Refusal, however, of the husband to maintain his wife, cannot justify her in seeking a divorce. An adult woman not yet removed to her husband's house, is entitled to maintenance, unless he has called upon her to remove. If she refuses without right, as when her dower is paid, or deferred, or has been given to her husband, she has no claim to maintenance. So too, if she be rebellious, or is imprisoned, and he has no access to her and if the obstruction to intercourse is on her part, she has no title to maintenance. The wife's right to maintenance is not affected by her undertaking a journey with his permission, or without it in performance of an incumbent duty such as pilgrimage. (*Bai. H.* 441—443; *Bai. Im.* 98.)

By Mahomedan law a husband's duty to maintain his wife is conditional upon her obedience, and he is not bound to maintain her if she disobeys him by refusing to live with him or otherwise :—*Bai. H.* 438. A Mussalman wife defying her husband, refusing to live with him and bringing scandalous charges against him, cannot claim to be maintained separately at the expense of her husband. (*A. V. B.*, 21 *Bom. at pp.* 82,85.)

The English law which makes the husband in divorce proceedings liable *primâ facie* to the wife's costs, except when she is possessed of sufficient

separate property, does not apply to divorce proceedings between Mahomedans. A Mahomedan husband cannot be compelled to provide funds or to give security for his wife's costs of litigation against him. (*A. V. B.*, 21 Bom. 77, 84.)

The refusal of mother to surrender an illegitimate child to the father is no ground for stopping a maintenance allowance previously ordered. (*Lal Doss v. Nelcunja*, 4 *Cal.* 374.)

When a separation is induced by any cause proceeding from the husband, or by any cause proceeding from the wife in exercise of a right, or by any cause proceeding from a third party, the wife is entitled to maintenance during her *iddat*. But if the separations is induced by any fault of the wife she is not entitled to it. (*Bai. H.* 455.)

A woman separated by *khula* or *eela*, or by reason of the apostasy of her husband, is entitled to maintenance and lodging. If a woman should apostatise, she would have no title to maintenance.

Arrears of maintenance are not due until after a decree or a mutual agreement of the parties, nor even then, if the marriage is dissolved by death or repudiation. (*Bai. H.* 447, 448.)

The order of a magistrate directing a husband to pay maintenance to his wife, does not deprive him of his inherent right to divorce his wife, and after such divorce the order can no longer be enforced. (*In re Kasam Pirbhai*, 8 B. H. C. 95; *In re Abdul Ali Ismailji*, 7 Bom. 180 ; *In Re Suleman v. Sakinabai*, 1 Bom. L. R. 346.)

Such an order, however, does not become inoperative until after the wife's *iddat*. (*In re Din Mahomed*, 5 All. 226.)

Maintenance of Children.

A father is bound to maintain his young children and no one shares the obligation with him. A father must maintain his female children absolutely until they are married, when they have no property of their own. But he is not obliged to maintain his adult male children unless they are disabled by infirmity or disease. The mother is liable next after the father for the maintenance of her children.

The mother is the first of kindred to take the burden of maintenance; so that, if the father is poor, and the mother is rich, and the young child has also a rich grandfather, the mother should be ordered to maintain the child out of her own property, with a right of recourse against the father; and the grandfather is not to be called upon to do so.

(*Bai. H.* 459, 461, 462.)

The right of children to be maintained by their actual father is a statutory right and the duty is created by express enactment independently of the personal law of the parties. If the children are illegitimate, the refusal of the mother, to surrender them to the father is no ground for refusing maintenance. If the children are legitimate the question of the mother's right to their custody would depend on the question by what law the parties are governed, because if they are governed by Mahomedan Law the mother may have the right to the custody until the children attain the age of seven years. (*Kariyadan v. Kayat Beeram*, 19 *Mad.* 461.)

Maintenance of Relatives.

All persons not themselves poor are obliged to maintain their poor relatives within the prohibited degrees in proportion to their shares in their relative's inheritance. No adult male, if in health, is entitled to maintenance, though he is poor. Among relations within the prohibited degrees the liability for maintenance, is regulated 1*st* by propinquity, and 2*ndly* by inheritance, *i. e.*, in proportion to their shares as heirs. (*Bai. H.* 467.)

There is no provision of Mahomedan law, requiring that an individual should maintain his widowed stepmother, there being between the two no tie of consanguinity to call for such act of maintenance. (*Budday v. Zoonoo*, Mad. S. A. Decr. 199.)

According to the *Shiahs*, the support of any relations besides the children, the parents, and the wife, is a mere moral obligation. (*Ameer Ali. Vol.* II 376.)

In the case of a wife, child, parents and grandparents, difference of faith, according to the *Hanafi* (Sunni) doctrines, makes no difference in the obligation of maintenance, but it is otherwise in the case of other relatives. (*Ibid; Bai. H.* 470.)

CHAPTER III.

Minority, Custody of Children, and Guardianship.

Minority.

Period of Minority.

Under Mahomedan law, all persons, whether male or female, are considered minors until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period. (*Mac. N.* 62.)

The Indian Majority Act 9 of 1875 determines the limit of minority in certain cases :—

"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 ; or (*c*) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him." (S. 2.)

"Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall notwithstanding anything contained in the Indian Succession Act 10 of 1865, or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before. Subject as aforesaid, every other person, domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before." (S. 3.)

Acts and Responsibilities of Minors:

A minor is not competent *sui juris* to contract marriage, to pass a divorce, to make a loan or contract a debt, or to engage in other transactions of a nature not manifestly for his benefit, without the consent of his guardian.

He may, however, receive a gift ; but he can sue only with the consent of his guardians.

Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others and are bound to discharge necessary debts contracted by any guardian for their support or education, on their coming of age.

(*Mac. N.* 63, 64, 310.)

Custody of Children.—(*Hizanat.*)

The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband. Mothers have the right to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty. (*Bai. H.* 435, *Beedhum Bibee v. Fuzuloollah*, 20. *W. R.* 411 ; *Mac. N.* 63 : *In the matter of Ameeroonissa*, 11 *W. R.* 297.)

The Mahomedan law takes a more liberal view of the mother's right with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while under the Mahomedan law a mother's title to such custody remains till the children attain the age of seven years. (*Idu v. Amiran*, 8 *All.* 322.)

The mother is entitled to the custody of a female minor who has not attained puberty although married in preference to the minor's husband. (*In re Khatija Bibi*, 5 B.L.R. 557 ; *Mir Kadir v. Zulrikha Bibi*, 11 *Cal.* 649.)

When the children are no longer dependent on the mother's care, the father has a right to educate and take charge of them, and is entitled to the guardianship of their person in preference to the mother. (*Ameer Ali. Vol. II.* 248.)

In an absolute divorce the parties being *Sunnis* the husband is not entitled to the custody of his infant daughter until she attains puberty. (*Hamid Ali v. Imtiazan*, 2 *All.* 71.)

After the child has been weaned, according to the *Shiahs*, the father has a preferable right to its custody if a male, and the mother if a female, until the child has attained the age of seven years. (*Bai. Im.* 95 ; *Lardli Begam v. Mahomed*, 14 Cal. 615.)

Order of Persons entitled to Custody of Children.

Mother ; mother's mother, how high soever ; father's mother, how high soever ; full sister ; half sister by the mother ; daughter of the full sister ; daughter of the half sister by the mother ; maternal aunts in the same way ; and paternal aunts also in like manner. (*Bai. H.* 436.)

The custody of an infant belongs of right to its mother's relation ; and her side are preferred to those who are related to the child only by its father. The daughters of uncles and aunts whether paternal or maternal, have no right whatever to the custody of children. (*Alimodid v. Syfoora Bibee*, 6 W. R. 125 ; *Bhoocha v. Elahi Bux*, 11 Cal. 574.)

After the female relatives, the right of custody passes to the father, the paternal grandfather, how high soever, the full brother, the half brother by the father, the son of full brother, the son of half brother by the father, the full paternal uncle, the half paternal uncle by the father, then the sons of paternal uncles in the same manner.

No male has any right to the custody of a female child, but one who is within the prohibited degrees of relationship to her.

(*Bai. H.* 437.)

The *Shiahs* are in agreement with the *Sunnis* with regard to general principles governing the right of (*hizanat*) custody. But among them, in the absence of the mother, the right passes to the father and failing him to the grandparents and other ascendants. Where there are no ascendants, the right passes to the collaterals within the prohibited degrees, the nearer excluding the more remote. (*Ameer Ali. Vol. II.* 253.)

Custody how lost.

The rights of all the abovementioned women are made void by marriage with strangers. But if they are married to relations of the infant within the prohibited degrees, the right is not invalidated. And when the right of a person drops by marriage, it revives on the marriage being dissolved. 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. (*Bai. H.* 436: *Beedhum Bibee v. Fuzuloollah*, 20 W. R. 411.)

Misconduct, *e. g.*, unchastity, also deprives the person of the custody, as also change of domicile so as to prevent the father or tutor from exercising the necessary supervision over the child. (*Ameer Ali. Vol. II.* 255.)

When plaintiff sued for the custody of her minor sister as her legal guardian under Mahomedan law, the fact of the plaintiff being a prostitute, although she was legally entitled to the custody of such a minor, was a sufficient reason for dismissing the suit in the interests of such minor. (*Abasi v. Dunne*, 1 *All.* 598.)

Apostasy is a bar to the exercise of the right of custody. (*Bai. H.* 435.)

The provisions of Act 21 of 1850 make no alteration in the principles of Mahomedan law bearing on this subject. The effect of that Act is confined to questions of inheritance. Consequently a pervert to Christianity, though she may not lose her right of inheritance, would still forfeit her right of guardianship in respect of her infant relations. (*Ameer Ali. Vol. II.* 257.)

Custody of Illegitimate Children.

The custody of illegitimate children appertains exclusively to the mother and her relations. A bastard child belongs, legally speaking, to neither of its parents, and it is in every sense of the word *filius nullius* ; but for the purposes of securing its due nourishment and support, it should, until it has attained the age of seven years, be left in charge of the mother. After that age it may make its own election with which of the parents it will reside, or it may live apart from them altogether, if so inclined. (*Mac. N.* 298.)

Guardianship.

Kinds of Guardians.

Guardians are either natural, testamentary, or appointed, by the ruling power. They are also near and remote. (*Mac. N.* 62.)

The father has at all times the amplest power to make by will such dispositions as he may think best relative to the guardianship of his minor children and the protection of their interests. (*Ameer Ali. Vol. II.* 474.)

Natural and Near Guardians.

1. The father; 2. in his default, his executor; 3. where there is no such executor, the grandfather; 4. in default of grandfather, his executor. (*Bai. H.* 509.)

Among the *Shiahs* when the grandfather is alive he is entitled to the guardianship of his minor grandchildren in preference to the father's executor. (*Ameer Ali. Vol. II.* 473.)

The more proximate guardians have the power over the property of the minor for purposes beneficial to him, in whose default this power does not vest in the remote guardians, but devolves on the ruling authority. (*Mac. N.* 62, 63.)

Remote Guardians.

The more distant paternal kindred are remote guardians, and their guardianship extends only to matters connected with education and marriage of their wards. They come in according to the proximity of their claim to inherit the minor's estate. (*Mac. N.* 63.)

Under the Mahomedan law remote guardians, among whom are brothers, can under no circumstances alienate the property of a minor; their guardianship only extends to matters connected with the education of their wards, and the near guardians alone have limited power over the immovable property. (*Rutton v. Doome Khan*, 3 Agra. 21.)

Maternal relations are the lowest species of guardians, as their right of guardianship, for the purposes of education and marriage, takes effect only where there may be no paternal kindred, nor mother. (*Mac. N.* 63.)

A mother is not a natural guardian. She is entitled to the custody of the person of her minor children, but she has no right to the guardianship of their property. (*Baba Walad v. Shivappa*, 20 Bom. 199.)

A widow's position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons 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. (*Sitaram v. Amir Begam*, 8 All. 324.)

A mother is not *de facto* guardian of her minor children and unless she is appointed a guardian *de jure* or is especially authorized by the District Judge, she has no power to bind their estate by mortgage or otherwise. Such an act by the mother is entirely void. (*Moynabibi v. Banku*, 29 Cal. 473.)

Guardian's Power over Property of his Ward.

Every contract entered into by a near guardian on behalf and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of his near guardian, as far as regards his *personal* property, is valid and binding upon him, provided there be no circumvention or fraud on the face of it.

If a *de facto* or actual guardian has entered into an agreement on the minor's behalf, and it is shown to have been for the minor's benefit, a Court of Equity will hesitate to disturb it but if the agreement is not shown to have been for the minor's benefit the Court will certainly refrain from giving effect to it. (*Amirbibi v. Abdul*, 3 Bom. L. R. 658.)

The guardian of a minor is competent to exercise on behalf of the minor, or to refuse to exercise, a right of preemption accruing to the minor, and if he refuses in good faith and in the interest of the minor, the minor is bound by such refusal.—*Lal Bahadur v. Durga*, 3 All. 437. (*Umrao v. Dalip*, 23 All. 129.)

The acts of a guardian with regard to the minor's *immovable* property are not binding on him, unless they are for necessary purposes, or for his benefit, and he can sell such property, only under the following circumstances :—

1. Where he can obtain double its value. (*Bukshon v. Maldai Kooeri*, 3 B. L. R. 423.)

2. Where the minor has no other property, and the sale of it is absolutely necessary to his maintenance. (*Husain Begam v. Zia-ul-nisa Begam*, 6 Bom. 467.)

3. Where the late incumbent died in debt which cannot be liquidated but by the sale of such property. (*Hasan Ali v. Mehdi Hussain*, 1 All. 533.)

To authorize a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale, or it must be for the minor's benefit. (*Hurbin v. Hiran*, 20 Bom. 116.)

4. Where there are some general provisions in the will which cannot be carried into effect without such sale.

5. Where the produce of the property is not sufficient to defray the expenses of keeping it.

6. Where the property may be in danger of being destroyed.

7. Where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

(Mac. N. 64.)

By the Mahomedan law, guardians cannot sell the immovable property of their wards, the title to which property is not disputed, except under certain circumstances. But where disputes, existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardians, were thereby 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. (*Kalu Dutt v. Abdul Ali*, 16 Cal. 627.)

CHAPTER IV.

Dower, Divorce, and Parentage.

Dower.—(*Mahr.*)

What is Dower?

Dower is defined to be the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself as opposed to the usufruct of the wife's person. It is not the exchange or consideration given by the man to the woman for entering into the contract of marriage, but an effect of the contract imposed by the law on the husband as a token of respect for its subject, the woman. (*Bai. H.* 91.)

The *Mahr* of the Islamic system is similar in all its legal incidents to the *donatio propter nuptias* of the Romans. It is a settlement in favour of the wife made prior to the completion of the contract of marriage in consideration of the marriage. (*Ameer Ali.*)

The mention of dower is by no means a condition of validity in a contract of marriage. If, therefore, a person should marry a woman without any mention of dower, or with an express condition that there shall be none, the contract would be valid. (*Kamarunnissa v. Hussaini Bibi*, 3 All. 266.)

Dower fixed by a minor husband is not recoverable, unless his marriage was contracted with the consent of his guardian and the sum agreed upon as dower, was fixed conformably to his directions. (*Mac. N.* 272.)

A deed is not necessary in cases of dower. A claim of dower, supported by witnesses, though not reduced to writing is in all respects valid according to law. (*Mac. N.* 286 ; *Husseena v. Husmutoonissa*, 7 W. R. 495.)

Its amount and extent.

By the *Sunni* doctrine of *Hanifi*, the extent of dower is not limited ; the parties may extend it by agreement to whatever amount they please. Ten dirms is the *lowest* rate. (1 S. D. A. Ben. Rep. 276.)

Amongst the *Shiahs* the lowest or highest rate is not fixed; anything possessing a legal value may lawfully be given as dower; but the proper dower is 500 dirms; a greater sum is not illegal, although improper. (*Ibid.*)

By the Mahomedan law excessive dower, however improper, is not illegal.

As dower becomes payable on divorce it is a frequent practice in India to stipulate on the wife's behalf for a larger amount than the husband is capable of paying, with a view to prevent the possibility of divorce. (*Mac. N.* 288.)

Among Mahomedans it is usual as a safeguard against capricious divorces to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a defendant who has divorced his wife, without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband. (*Nowab Tajdar Bahoo v. Mirza Jehan*, 10 *M. I. A.* 252.)

A Mahomedan widow is 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, or had not left assets enough to pay the dower-debt. (*Sugrabibi v. Masumabibi*, 2 All. 573.)

An addition to the dower is valid during the subsistence of the marriage, and it becomes incorporated with the original dower. But an addition cannot be made to the dower after a complete separation of the parties. (*Bai. H.* 111, 112.)

Different Kinds of Dower.

Customary Dower.—(*Mahr-ul-misl.*)

The dower which is due by the marriage contract itself is termed *mahr-ul-misl*, which means literally dower of the like, or the woman's equals, and has been well rendered by Mr. Hamilton as 'the proper dower.' (*Bai. H.* 91.)

Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family. (*Mac. N.* 59.)

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; the

Mahomdan dower being the consideration paid by the bridegroom for the marriage, and therefore regulated by the position and conduct of the bride, especially as Mahomedan men often contract most unequal marriages though the means and position of the bridegroom must not altogether be excluded from consideration. (*Nujeemuddeen v. Hosseinee*, 4 W. R. 110.)

Prompt and Deferred Dower.

When any dower has been specified by the contract of marriage, it supersedes the proper dower. When it is thus expressly mentioned in the contract, it is usual to divide it into two parts—one termed prompt (*mahr-ul-muajjal*), which is immediately exigible, the other termed deferred (*mahr-ul-muwajjal*), which is not exigible till the dissolution of the marriage either by death or divorce. (*Bai. H.* 92.)

Dower how Confirmed or Perfected.

Dower (whether it be named, or be the proper dower) is said to be confirmed and made binding on the husband by consummation, or by its substitute, a valid retirement, or by death (of either the husband or wife), or divorce, which by terminating the marriage, puts an end to all the contingencies to which it is exposed; and the woman becomes entitled to it as soon as she has surrendered her person. (*Bai. H.* 91.)

Under the *Hanafi* (Sunni) law, a presumption of consummation is raised from the retirement of the husband and the wife into the nuptial chamber, under circumstances which lead to the natural inference of matrimonial intercourse. This is what is called *valid retirement.*

Valid retirement gives completion to the marriage and marks the time when the conjugal rights commence and assures her entire dower to the wife. It establishes the *nasab* of the child, entitles the woman to her dower, maintenance and lodgment, makes it incumbent on her to observe the *iddat*, renders her sister unlawful to the man, creates the unlawfulness arising from the completion of the number, and makes it incumbent on him to observe the time for *talak* in respect of her.

(*Ameer Ali. Vol. II.* 313-315.)

When a man has repudiated his wife before consummation or a valid retirement, she is entitled to half the specified dower; and when none has been specified she is entitled to a present only. (*Bai. H.* 96.)

Under the *Shiah* law the same is the rule according to some lawyers, while according to others the wife is entitled only to a present. (*Ameer Ali. Vol. II.* 390.)

Dower when Due and Payable.

Where it has not been expressed whether the payment of dower is to be prompt or deferred, it must be held that the whole is due on demand. (*Mac. N.* 59; *Mirza V. Mirza*, 19 W. R. 315.)

According to Mahomedan law dower being consideration for marriage is, unless payment of the whole or part of it is expressly postponed, presumed to be prompt and exigible on demand—*Tadiya v. Hasanebyari*, 6 *M. H. C.* 9. (*Masthan v. Assan*, 23 Mad. 371.)

The **Allahabad** High Court has, in the case of *Taufik-un nissa v. Gulam Kadar*, 1 All. 506, *held* that the more approved rule on the subject is that given by Mr. Baillie at page 127, which is as follows:—

"When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *muajjal* or prompt, accordingly; but what is customary must also be taken into consideration. Where, however, it has been stipulated that the whole is to be *muajjal* or prompt, the whole is to be so, to the rejection of custom altogether."

It was held in the case of *Fatma Bibi v. Sadruddin*, 2 B. H. C. 291, that a wife cannot claim the whole of her dower as *exigible*, while her husband is alive, where *no specific amount* has been expressly declared to be so (and where there is no clear evidence of what is customary), and then one-third of the whole might be considered exigible during the life of the husband, the remaining two-thirds being claimable on his death as deferred.

When at the time of marriage the payment of the dower has not been stipulated to be deferred, payment of a portion

of the dower must be considered prompt. The amount of such a portion is to be determined with reference to custom. Where there is no custom, it must be determined by the court with reference to the status of the wife and the amount of the dower. (*Eidan v. Mazhar Husain*, 1 All. 483.)

Limitation does not run against *deferred* dower until it has become due, either by death of either of the parties, or by divorce. The *prompt* dower is a debt always due, and demandable during the subsistance of the marriage, and certainly payable on demand. On a clear and unambiguous demand by the wife for its payment, and its refusal by the husband, a cause of action accrues, against which limitation would begin to run; the option being with her to demand the dower or not, and to elect her time for demanding it. (*Ranee Khajooroonissa v. Ranee Ryeesoonissa*, 2 I. A. 235.)

Deferred dower becomes payable on the dissolution of the marriage, whether by divorce or by the death of either of the parties. (*Mahr Ali v. Amani*, 2 B. L. R. 306.)

The period of limitation does not begin to run in the life-time of her husband against a Mahomedan woman's claim for dower, until she has demanded such power. Her separation does not make it incumbent on her to make any such demand. It would be inconvenient if a married woman was obliged to bring an action against her husband; it would be full of danger to the happiness of married life. She is not obliged to sue her husband immediately or in his lifetime. (*Nothi v. Daud*, 2 B. H. C. 296; *Bai. H.* 92.)

A Mahomedan of the *Shiah* sect, by a deed of dower, charged his whole estate with a certain sum when demanded by his wedded wife, but did not impignorate his estate to secure the sum put in settlement. The dower was not demanded during the husband's life-time, and his widow, after his death, took possession of his estate in satisfaction of her claim. *Held* that the widow had a lien upon her deceased husband's estate as being hypothecated for her dower and could either retain property to the amount of her dower, or alienate part of the estate in satisfaction of her claim; that a demand during the husband's life-time was not necessary. (*Ameeroonissa v. Mooradoonissa*, 6 M. I. A. 211.)

Subject of Dower.

Anything that is *mál*, or property, and has a tangible value, is a valid subject for dower. (*Ameer Ali. Vol. II.* 380.)

Any valuable commodity may be assigned in satisfaction of dower provided it admits of identification. The assignment of a husband's whole property in lieu of an unspecified portion of her dower, is null and void. (*Mac. N.* 276, 289.)

By the Mahomedan law property non-existent cannot be made the subject of gift whether in lieu of dower or otherwise. (6 S. D. Ben. Rep. 30.)

When something is mentioned as a dower which is not in existence at the time, *e. g.*, the future produce of certain trees or of certain land, the assignment is bad, and the woman is entitled to her proper dower. (*Bai. H.* 94.)

Immediate seisin is not necessary in cases of property exchanged for dower, as it is an exchange or sale and not a gift. The absence of seisin, however, within the statutory period would render the exchange inoperative. (*Mac. N.* 276.)

An exchange of property for dower is called a *Bai Mukàsa.*

Nature of Widow's claim for Dower.

Dower is considered as a debt and is discharged as such. The law makes no distinction between a claim of dower and other debts; no preference is given to one description of claim over another and a *pro ratá* distribution must be made with respect to all. (*Mac. N.* 274.)

Landed or other immovable property left by the husband, cannot be taken by the widow in satisfaction of her claim of dower without the consent of the heirs or competent judicial authority. (*Grady.*)

There is this distinction between money and other property in cases of dower, namely, that the widow is at liberty to take the former description of property, over which she has absolute power, but as to the other property, she is entitled to a lien on it, as security, for the debt, and it does not become her property absolutely, without the consent of the heirs or a judicial decree. (*Ibid.*)

The widow's claim for dower under Mahomedan law is only a debt against the husband's estate. It

may be recovered from the heirs to the extent of assets come to their hands. It does not give the widow a lien on any specific property of the deceased husband so as to enable her to follow that property, as in the case of a mortgage into the hands of a *bonâ fide* purchaser for value. (*Wahidunnissa v. Shabratun*, 6 B. L. R. 54 ; *Amanat-un-nissa v. Bashir-unnissa*, 17 All. 77.)

A widow's claim for dower under Mahomedan law is not a lien on her husband's property such as is obtained by a mortgagee. The Mahomedan law has no where placed a claim for dower as high as a mortgage, but has ranked it on a par with ordinary debts—*Wahidunnissa v. Shabratun*, 6 B. L. R. 54. The fact of a widow being in possession since the death of her husband does not, by such possession, get any right for her, as against a purchaser in execution of a decree for sale passed on a mortgage executed by her husband. (*Ameer Ammal v. Sankaranarayanan*, 25 Mad. at p. 659.)

The lien which a Mahomedan widow, whose dower is unpaid, may obtain on lands which have belonged to her deceased husband, is a purely personal right and does not survive to her heirs. (*Hadiali v. Akbarali*, 19 All. 262.)

Where, however, she has obtained actual and lawful possession of the estate of her husband, without force or fraud, under a claim to hold it for her dower, she will be entitled to retain possession, until the debt is satisfied, with the usual liability to account to the heirs. It is immaterial to such widow's right to retain possession that such possession was obtained originally without the consent of the other co-heirs. (*Ahmed Husain v. Khadgia*, 14 I. A. 398 ; (*Amani Begam v. Muhammad*, 16 All. 225.)

There is nothing to prevent a Mahomedan widow in possession of property of her late husband in lien of dower from suing to recover her dower from the heirs of the deceased husband. A Mahomedan widow lawfully in possession of her husband's estate in lieu of dower occupies a position analogous to that of a mortgagee.—*Azizullah v. Ahmad*, 7 All. 353. (*Ghulamali v. Sagirunnissa*, 23 All. 432.)

When the widow has obtained possession under a claim of dower, the heirs can sue to recover the property on the ground that the dower debt has been satisfied from its usufruct. (*Ameer Ali.*)

A Mahomedan widow in possession of immoveable property of her late husband in lieu of her dower has no power to mortgage such property. (*Chuhi Bibi v. Shams-un-nissa Bibi*, 17 All. 19.)

Death-bed acknowledgment of Dower.

According to law, the acknowledgment of a man, on his death-bed in favour of heirs, is null and void; and a wife is an heir. But should a man, in his last sickness, acknowledge a debt to be due to his wife on accout of dower, the acknowledgment will be good to such extent of the property as amounts to her proper dower, or such as it has been customary for her equals in condition to receive but to no more. (*Mac. N.* 273.)

Remission of Dower.

If a wife, during her husband's lifetime, remits to him the debt due to her on account of dower such remission of dower on the part of the wife is legally correct. It amounts only to making a debtor the proprietor of the debt due from him. The remission by a wife of her claim to dower, however, does not by any means affect her right to the share of the inheritance to which she is entitled by law.

The claim on account of dower cannot be extinguished by a will which the husband and wife mutually execute in favour of each other, to the effect that they should be reciprocal heirs, and that whichever of them dies first the estate of the survivor should not be subjected to any charge on account of the deceased. (*Mac. N.* 277-279.)

Divorce.

The greatest facilities are afforded by Mahomedan law to both parties to relieve themselves from the chains of marriage and to contract new ones. The husband can at his own will and pleasure divorce his wife and replace her by another; she, too, may purchase a divorce from him, should the union prove distasteful to

her and marry again. The Kâzi has also the power of dissolving the contract on the application of either the husband or the wife on the ground of cruelty, desertion, and like causes. He can also cancel the marriage for initial disability on the part of either of the parties to fulfil the contract, or on the ground of deception or fraud practised on either side. (*Graddy.* 244 ; *Ameer Ali. Vol. II.* 411.)

Talak or Repudiation.

A divorce by *talâk* is the mere arbitrary act of the husband, who may repudiate his wife with or without cause ; but in a divorce of that kind a husband is liable to repay the wife's dower and *semble*, to give up her jewels and paraphernalia. Before such a divorce become irreversible, it must be repeated three times, and between each time the period of one month must have intervened ; and in the interval he may take her back either in an express or implied manner. (*Moonshi Buzul-ul-Raheem v. Lutufuloonnissa,* 8. M. I. A. 379 ; *Mac. N.* 59, 60.)

Repudiation or *talâk* is either revocable (*rajai*), or irrevocable (*bâin*). A revocable repudiation may be revoked at any time until the expiration of the *iddat* or probationary term, usually about three months, prescribed by law for ascertaining if a woman is pregnant; on the expiration of that term the repudiation becomes irrevocable, and the divorce is complete. A repudiation may, however, be made at once irrevocable by the force of the peculiar expressions employed, or by pronouncing it three times. A triple repudiation is not only irrevocable, but has this further consequence, that it prevents the parties from re-marrying until the woman has been intermediately married to another husband, and the marriage has been actually consummated. (*Bai. H.* Intro.)

Provision is made by the Mahomedan law for divorce in either of the two forms, first *talâk*, and secondly *Khula*.

Forms of Repudiation.—*Talak.*

There are two forms of repudiation ; one termed *talak-us-sunni*, or that which is agreeable to tradition or regular, and the other termed *talak-us-badai*, or that which is new and irregular. (*Bai. H.* 207.)

The *talâk-us-sunni* is of two kinds :—*(a)* *ahsun*, or *(b)* *hasun*.

(a) The *ahsun* or best, is when a man gives his wife one revocable repudiation in a *tahr*, or period of purity, during which he has had no sexual intercourse with her, and then leaves her for the completion of her *iddat*, or the birth of her child, if she happens to be pregnant; whereupon the repudiation, unless revoked in the meantime, becomes complete, or in other words a *divorce*. *(b)* The *hasun* or goods, is when he gives her one repudiation in a *tahr*, or period of purity, in which he has had no sexual intercourse with her, and then gives her another repudiation in the next *tahr*, and a third in the *tahr* after that. The third being irrevocable completes the divorce without waiting for the expiration of the *iddat*, or delivery, if she happens to be pregnant.

The *talâk-us-badai* is of two sorts :—*(a)* where the innovation is in respect of number, or *(b)* where it is in respect of time.

(a) Where the innovation is in respect of number and is when a man repudiates his wife three times in one *tahr*, and the repudiations become a complete divorce as soon as they amount to three. *(b)* When the innovation is in respect of time and is when a man repudiates an enjoyed wife who is subject to monthly courses, and the repudiation does not become divorce until the completion of the *iddat*.

The Shiahs recognize only one form of repudiation, viz—The *sunni*, or regular. (*Bai. Im.* 118.)

What constitutes Divorce.

Under Mahomedan law no special expressions are necessary to constitute a valid divorce. It is sufficient if they clearly indicate an intention to put an end to the relation of husband and wife. Nor need the expression be repeated three times except when the repudiation is final and irrevocable. If the divorce pronounced is liable to be reversed, and if it is not reversed within the period of *iddat*, it becomes thereafter final and irrevocable. (*Ibrahim v. Syedbibi*, 12 Mad. 66.)

The words by which repudiation according to the *sunnis* may be effected or given are of two kinds ; plain and express or ambiguous. The former are sufficient in themselves, the latter require intention.

Where a Mahomedan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his paternal uncle's daughter meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife, *held* that the expression used by the husband to the wife, being used with intention, constituted under Mahomedan law a divorce which

became absolute if not revoked within the time allowed by that law. (*Hamid Ali v. Imtiazan*, 2 All. 71.)

The mere pronouncing the word *talák* three times by the husband without addressing it to any person, does not constitute a valid divorce under Mahomedan law. *Semble*—A divorce pronounced in due form by a man against a woman who is in fact his wife dissolves his marriage, though he pronounces it under the belief that she is not his wife. (*Furzund Hossein v. Janubibi*, 4 Cal. 588.)

According to the *Shiahs* repudiation does not take effect if it be made dependent upon or subjected to any condition.

Neither the *Sunnis* nor the *Shiahs* require that the *talák* should be pronounced in the presence of the wife. But so long as it does not come to her knowledge she is entitled to her maintenance.

According to *Shiahs*, repudiation to be effective must be pronounced expressly only. The *Shiahs* require two witnesses present together at the time of the repudiation. The *Sunnis*, on the contrary, do not require the presence of witness.

(*Ameer Ali. Vol. II.* 413, 422.)

Mere separation without divorce does not dissolve the marriage-tie. (*Mac. N.* 298.)

A wife has no right to separate herself from her husband, unless by reason of a divorce. A husband, therefore, may recover the person of his wife by a civil action. (5 S. D. A. 200.)

The mere fact of a Mussulman and his wife living separately is not sufficient evidence of a divorce to enable the wife to recover dower not exigible. (7 S. D. A. Ben. Rep. 40.)

A divorce cannot be referred back to an antecedent period. It must take effect from the date on which it is declared. (*Mac. N.* 296.)

A divorced wife is entitled to maintenance and habitation during the term of her *iddat* or probation. (*Ibid.* 298.)

Persons competent to pronounce Divorce.

Repudiation by any husband who is sane and adult is effective whether he be willing or acting under compulsion ; and even if it were uttered in sport of jest, or by a mere slip of the tongue, instead of another word. Repudiation by a drunken man is effective, unless the drinking be against his will, or for a necessary purpose, e. g., medicinally. (*Bai. H.* 208—210 ; *Ibrahim v. Enayetur*, 4 B. L. R. 13.)

Under the *Shiah* law there are three conditions essential to the capacity of pronouncing a valid *talâk*:—(1) the husband should have attained majority; (2) he should be sane and possessed of sound understanding; (3) there should be a distinct intention to dissolve the marriage tie.

According to *Shiah* law, a repudiation pronounced under compulsion, or obtained by fraud or given under undue influence, by mistake or inadvertently, in anger or in jest, or when the words have been uttered whilst talking in sleep, or a *talâk* pronounced by a person in a state of intoxication, is invalid, intention being a necessary element to the validity of all *talâks*. (*Ameer Ali. Vol. II.* 415, 416.)

Death-bed Divorce.

If a man divorcel his wife on his death-bed, she is nevertheless entitled to inherit, if he died before the expiration of the term (4 months and 10 days) of probation, which she is bound to undergo before contracting a second marriage. (*Mac. N.* 60.)

When a man has given his wife a revocable repudiation, whether it were given in health, or in sickness, or with or without her consent, and either of them happens to die before the expiration of her *iddat*, they are reciprocally entitled to inherit, since the effect of the marriage continues in every way until the expiration of the *iddat*. When a man in his death-illness repudiated his wife irrevocably or gave her three repudiations, and has then died while she is still in her *iddat* she inherits from him in like manner; but if her *iddat* should expire and he were then to die, she would not inherit. (*Bai. H.* 279.)

Khula and Mubarat·

A wife has no right to separate herself from her husband, unless by reason of a divorce. But she is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage.

When a divorce takes place at the instance of the wife, she has to give up to her husband either her settled dower, or some other property in order to obtain a discharge from the matrimonial tie; such a divorce is called *khulâ*. The woman's right is a qualified right, since the husband has the option of refusing to assent to the *khulâ*. (*Ameer Ali. Vol. II.* 437.)

A *khulâ* divorce is with the consent and at the instance of the wife, for which she gives a consideration to her husband for release of the marriage-tie. Non-payment of the consideration money by the wife does not, however, invalidate such a divorce.

"The matrimonial law of the Mahomedans, like that of every ancient country, favours the stronger sex. The husband can dissolve the tie at his will subject to the conditions of paying the wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called *khulâ*, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband. (*Moonshi Buzul-ul-Raheem v. Lutufuloonnissa*, 8 M. I. A. 379.)

The Mahomedan law does not permit a wife to separate from her husband, except upon a divorce; and where there is no divorce the wife should be compelled to go back to her husband. A wife cannot divorce herself but the husband can divorce his wife whenever he pleases. There is, however, a ceremony called *khulâ* by which a wife may possibly obtain a separation from her husband, but this requires also the consent of the husband and it does not appear that the wife can by any possibility separate herself, except by the consent of her husband. (*Moonshi Buzaloor Raheem v. Shumsoonnissa Begam*, 11 M. I. A. at pp. 559, 560.)

It cannot be disputed that whilst the tie subsists the husband's power over his wife is considerable. From the time she enters his house, she is under restraint and can only leave it legitimately by his permission, or upon legal divorce or separation made with his consent. On the other hand the law assures to the wife considerable rights as against her husband. She may insist on maintenance according to her rank and his ability; and if he fails to give it she may enforce that right before the *Kazi*. If he has power to keep her within the *zenanah*, and to prevent access to her, subject to certain qualifications, he is bound to provide her with separate apartment exclusively appropriated to her use. The husband may use personal violence for correction; but this right to corporeal chastisement is expressly said to be restricted to the condition of safety. As regards legal cruelty there must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it. (*Moonshi Buzul-ul Raheem v. Lutufuloonnissa*, 8 M. I. A. at pp. 610, 611.)

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Divorce by *talak* is not complete and irrevocable by the single declaration of the husband, but a *khulâ* divorce is at once complete and irrevocable from the moment the husband repudiates the wife and a separation takes place. (*Moonhsi Buzul-ul-Raheem v. Lutufuloonnissa*, 8 M. I. A. 379.)

When a divorce is effected by mutual consent on account of incompatibility of temper or otherwise, it is called *mubarat*. It signifies a mutual discharge from the marriage tie. (*Ameer Ali. Vol.* II. 437.)

Khulâ and *mubarat* cause every right to fall or cease which either party has against the other depending on marriage. (*Bai. H.* 306.)

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

Established impotency is also a ground for admitting a claim to separation on the part of the wife.

The *kazi* has the power of granting a divorce not only for habitual ill-treatment, for non-fulfilment of ante-nuptial engagements, or for insanity, but also for incurable impotency existing prior to marriage. A separation by decree of the Judge can take place also when the husband fails to carry out or to abide by the terms of the matrimonial contract. (*Ameer Ali.*)

A separation, which comes from the side of the wife without any cause for it on the part of the husband, or, more generally, every separation of a wife from her husband for a cause not originating in him, is a cancellation of the marriage; while every separation for a cause originating in the husband is termed a *talâk*, or divorce. Cancellations differ from divorces in so far that, if a cancellation takes place before the marriage has been consummated, the wife is not entitled to any part of the dower; whereas though a divorce should take place before consummation, she is entitled to half of the specified dower, or a present, if none has been specified. (*Bai. H.* Intro.)

Eela and Zihar.

In ancient times there were two other modes of separation between husband and wife—*ella and zihar*, which however, have now become almost obsolete. A vow of abstinence made by a husband and maintained inviolate for a period of four months amounts to an irreversible divorce. This is the mode known as *eela*. The mode of divorce technically called *zihar* was a species of reversible divorce effected by the husband comparing his wife to any member of his mother or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. (*Ameer Ali. Vol. II.* 456, 457; *Mac. N.* 60.)

Laan.

Another mode of separation known as *laân* is by the husband's making oath accompanied by an imprecation as to his wife's infidelity ; and if he in the same manner deny the parentage of the child of which she is pregnant, it will be bastardized. (*Mac. N.* 60.)

Laân may be incurred by the denial of a child of which a wife is pregnant, but the denial does not affect the child, unless it is made after its birth. When a man has once acknowledged the child, either expressly or circumstantially, his denial of it afterwards is not valid whether it be at the time of the birth or after it. (*Bai. H.* 342.)

The legal effect of *laân*, as soon as it has passed between the parties is to render sexual intercourse between them, and all excitement to it unlawful ; but a separation is not effected by the mere *laân*. If the man should retract, by declaring that he lied, intercourse would again become lawful without a renewal of the marriage tie. After *laân* the parties must be separated by a decree of the Judge. (*Ibid.* 335.)

According to the legists of the primitive schools, the husband has the power of dissolving the marriage-contract at his own free will, and he may delegate his power of *talâk* to any body he likes, even to the wife herself. Accordingly it often happens that at the time of marriage it is specially agreed between the parties that should the husband contravene any of the conditions of marriage or take a second wife, the first would be entitled to *talâk* the husband. This is called *tafwîz* or *delegation of authority*, and consistutes a valid agreement. (*Ameer Ali.*)

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

Iddat.

Iddat is the waiting for a definite period, which is incumbent on a woman after the actual or apparent dissolution of marriage and is made obligatory by consummation or the husband's death. When a man has married a woman by a lawful contract, and has repudiated her after consummation, or after a valid retirement, it is incumbent on her to observe an *iddat.*

The *iddat* of a woman from the death of her husband is four months and ten days, whether the marriage was consummated or not, or the woman be an infant or adult, provided she does not appear to be pregnant. This *iddat* is not incumbent except for a valid marriage. The *iddat* of a pregnant woman continues till her delivery. (*Bai. H.* 352, 355.)

Iddat is the period of probation of three months to see if the woman is *enciente* or not.

The Mahomedan women who are not subject to the operation of the rule of *iddat* are:—1, a woman who has been repudiated before consummation; 2, an alien, who has come under protection into the country of Islâm, having left her husband in a hostile country; 3, two sisters married by one contract which has been cancelled; 4, more than four women connected together in one contract which has been dissolved. (*Bai. H.* 353.)

Parentage.—(*Status of Legitimacy.*)

The extreme solicitude of the Mussalman law with respect to the legitimacy of children, and its aversion to bastardize the offspring of lawful or *semblable* unions has led to the *formulation* of the rule of *iddat.* Every woman separated from her husband, and every widow is required to abstain for a specific period from contracting a fresh union, until it is known with certainty whether she is *enciente* or not. This prohibition guards against confusion of parentage. (*Ameer Ali. Vol. II.* 322.)

How Paternity is established.

Paternity does not admit of positive proof. But it may be established by the word of the father himself, or by a legally constituted relation between him and the mother of the child. (*Bai. H.* 392.)

Maternity admits of positive proof. Descent from a mother is established by mere birth. For all that is required is identification of the child. (*Ibid.* 391.)

The first degree in the establishment of paternity is a valid marriage, or an invalid one that comes within the meaning of one that is valid. An invalid marriage that has been consummated is joined to valid ones in some of their effects, among which is the establishment of paternity. The effect of marriage is to establish paternity without a claim, and to prevent its rejection by a mere denial, though it may be rejected by *laân*, or imprecation, in the case of a valid marriage, but not where the marriage is invalid; but if the case does not admit of *laán*, the paternity of the child cannot be rejected. The right of rejection continues only until the husband has expressly acknowledged the paternity of the child, or has made some manifestations of acquiescing in it. (*Ibid.* 392.)

Under the *Hanafi* law, the children of a marriage void *ab initio* would not have the status of legitimacy, however unknowingly the marriage might have been contracted, unless there has been deception on one side or the other. According to the *Shiah* jurists, however, legitimacy is established by a valid marriage or a *semblable* contract of marriage. If a man should enter in *good faith* into a contract of marriage, which turns out to be invalid, the offspring of such marriage would be legitimate in the eye of the law. Similarly, would *nasab* be established though the union was *ab initio* null and void. (*Ameer Ali. Vol. II.* 208.)

The first-born child of a man's female slave is considered his offspring provided he claim the parentage, but not otherwise ; but if after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part. (*Mac.N.* 61.)

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. (*Saiyad Waliula v. Miran Saheb*, 2 B. H. C. 285.)

The mere residence of a woman in the house of a Mahomedan, and the circumstance that she has a son, do not raise the presumption of marriage or legitimacy of the son. Cohabitation means something more than mere residence in the same house. It should be shown that cohabitation continued, that children were born, that the woman was treated as a wife, and lived as such and not as a servant. (*Kureemoonisa v. Attaoola*, 2 Agra. 211.)

By the Mahomedan law continual cohabitation and acknowledgment of parentage is presumptive evidence of marriage and legitimacy. (*Khaja Hidayat Collah v. Raijan Khanum*, 3 M. I. A. 295.)

Period of Gestation.

A child born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of the husband or after divorce. (*Mac. N.* 61.)

The general principle regarding gestation is that when a man has married a woman and she is delivered of a child at less than six months from the day of his marriage, its descent from him is not established; but if she is delivered at six months or more, its descent from him is established, whether he acknowledge it or remain silent, and if he should reject the paternity, it would be established by the testimony of one woman to the fact of its birth, so if the husband should die leaving her, whether before or after consummation (an *iddat* being required in both cases) and she is subsequently delivered of a child at any time up to two years, its descent is established from him and if the delivery should not take place till after the expiration of two years its descent would not be established. (*Bai. H.* 396, 397.)

The *Shiahs* consider ten months as the maximum limit, which in exceptional cases may extend to twelve months. (*Bai. Im.* 90.)

In order to establish the paternity of the child from a man, conception should take place *after* the marriage. (*Bai. H.* 393.)

The *Shiahs* require that the birth of the child should be six months from the *consummation* of the marriage, and not like the *Sunnis* six months from the *marriage*. (*Ameer Ali. Vol. II.* 201.)

By Section 112 of the Indian Evidence Act the fact of a person being born during a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried is conclusive proof of his legitimacy, unless non-access be proved.

Acknowledgment of Paternity.

The Mahomedan law does not recognize adoption in the sense of the Roman or Hindu legal systems or "any mode of *filiation* where the parentage of the person adopted is *known* to belong to a person other than the adopting father," but only the form of filiation created by *ikrar* or "acknowledgment," which can be established by the father alone, to the total exclusion of the mother and other relations. (*Ameer Ali. Vol.* II. 216; *Muhammad v. Muhammad*, 10 All. at p. 290.)

The acknowledgment of a man is valid with regard to his child, but the acknowledgment of a woman with regard to a child is not valid, unless assented to by her husband for it is burdening him with the paternity. (*Bai. H.* 470)

Under the *Sunni* law, the father alone has the right to establish the relationship. Neither the mother nor any other relation has any right to acknowledge the status of sonship to another. Among the *Shiahs* a woman whose husband is dead may acknowledge a child as the lawful issue of her marriage with her deceased husband.

The use of acknowledgment is always to legitimatize children whose legitimacy is doubtful. The system originated in the practice of cohabitation with slave girls, who had opportunities of promiscuous intercourse, and whose children, brought up in the master's house, were often of uncertain parentage. (*Muhammad v. Muhammad*, 10 All. at p. 300).

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child, but this presumption follows the bed, and is not ante-dated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied (from the father's conduct and his continued treatment of the child as his own), directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy, by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubinage may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified,

though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive —*Mahomed Bauker v. Shurfoonnissa Begum*, 8 M. I. A. at p. 159. (*Ahmed Hussain v. Hyder Hussain*, 11 M. I. A. at pp. 113, 114; *Muhammad v. Tadli Begum*, 8 *Cal.* 422.)

According to Mahomedan law, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marragie between the parents, or of any formal act of legitimation. In the absence of evidence or circumstances sufficient to found such a presumption, or inference, a claim by a party as a legitimate son to share in an intestates' estate cannot be allowed. (*Mahomed Bauker v. Shurfoonnissa Begum*, 8 *M. I. A.* 136.)

Conditions for valid Acknowledgment.

If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established. (*Mac. N.* 61.)

To render the ackowledgment by a man of a child valid and effectual in law three conditions are essential: —

1. The ages of the parties must admit of the party acknowleged being born to the acknowledger.

The acknowledger must be twelve years and a half older than the child. When the acknowledeger is a female, she must be nine years and a half older than the child. (*Bai. H.* 411.)

2. The descent of the person acknowledged must not be already established from another. He must be of *unknown* descent.

The doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known, and it cannot therefore be called in to legitimatize a child which is illegitimate by reason of the unlawfulness of the marriage of its parents. (*Aizunnissa v. Karimunnissa*, 23 *Cal.* 130.)

3. He must believe himself to be acknowledger's child, or at all events, assent to the fact. (*Bai. H.* 408.)

An infant who is too young to understand what the relationship implies, or to give an account of himself, is not required to agree to the acknowledgment, nor is his assent a condition precedent to the validity of an acknowledgment, as it is in the case of an adult. (*Ameer Ali. Vol. II.* 216; *Kedarnath v. Donzelle*, 20 *W. R.* 352.)

Effect of Acknowledgment.

The rules of Mahomedan law relating to acknowledgment by a Mahomedan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Birth during wedlock, that is to say, legitimate birth necessarily confers a right to inherit; illegitimate birth, that is, without wedlock subsisting between the father and the mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth, and the paternity of a child is unknown, in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category.

When legitimacy cannot be established by direct proof of a valid marriage, acknowledgment is recognized by Mahomedan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. (*Muhammad v. Muhammad*, 10 All. 289.)

The legitimation of a son, born out of wedlock, may be effected by the force of his father's acknowledgment of his being of legitimate birth: but a mere recognition of sonship is insufficient to effect it. Acknowledgment in the sense meant by Mahomedan law is required, *viz.*, of antecedent right and not a mere recognition of paternity. (*Abdul Razak v. Aga Mahomed*, 21 Cal. 666.)

A Mahomedan could not by acknowledging him as his son render legitimate a child whose mother at the time of his birth he could not have married by reason of her being a wife of another man. (*Liaqat Ali v. Karim-un-nissa*, 15 All. 396; *Aizunnisa v.* Karimmissa, 23 Cal. 130.)

The denial of a son, either of regular or irregular marriage, after an established acknowledgment, is untenable, though supported by a deed of disclaimer and repudiation by the father. (*Ahmed Husain v. Hyder Hussain*, 11 M. I. A. 94 ; *Muhummad v. Muhammad*, 10 All. 289.)

The acknowledgment by a man of paternity of a child as his legitimate offspring gives to the child as well as to the mother the right of inheritance to him, the law presuming from the acknowledgment of legitimacy of the child a lawful union between the parents. (*Mahatalabibi v. Halimuzzaman*, 10 Cal. L. R. 293 ; *Wise v. Sunduloonissa*, 11 M. I. A. 193)

Acknowledgment of other Relationships.

Acknowledgment also establishes certain other relationships besides parentage. The acknowledgment of a man is valid with regard to his child, his parents, wife and *mowla*, since in all these cases he acknowledges an obligation (of maintenance) ; but it is not valid except for these. (*Bai. H.* 407.)

A man cannot acknowledge a brother so as to establish the *nasab*. The acknowledgment by one man of another as his brother is not, by Mahomedan law, valid, so as to be obligatory on the other heirs, but is binding against the acknowledger. (*Himmat Bahadoor v. Shaheb Zadi Begam*, 13 B. L. R. 182.)

In order that the acknowledgment by a man of a woman as his wife should be valid, she should confirm it, she must not have been married to another husband, she must not have been in *iddat*, and the acknowledger must not have already her sister or four others in subjection to him. (*Bai. H.* 408.)

Such acknowledgment if valid would give her the right of inheritance. The acknowledgment of a wife which the Mahomedan law requires as proof of marriage should be specific and definite. The mere fact of a man keeping a woman within the *purdah*, and treating her to outward semblance as a wife, does not necessarily in the absence of express declaration and acknowledgment constitute the *factum* of marriage. (20 W. R. 352.)

In cases of acknowledgments of other relationships besides parentage, there is no distinction between an acknowledgment made by a man and that made by a woman. The acknowledgment must be *expressly* assented to by the acknowledged, and the parties must be of *unknown* descent. If the acknowledger

has any *known* heir, his acknowledgment of any blood relationship other than that of paternity to a child, does not exclude the former from his or her natural right of inheritance, nor vest any right in the acknowledged. (*Ameer Ali. Vol. II.* 222, 223.)

Illegitimate Child. (*Walad-uz-zina.*)

The offspring of a connection where the man has no right, nor semblance of right in the woman, by marriage or slavery, is termed *walad-uz-zina*, or child of *zina*, and is necessarily illegitimate. (*Bai. H.* 3.)

A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatized by acknowledgment. (*Muhammad v. Muhammad*, 10 All. 290.)

Illegitimate children and children of curse do not inherit, except from the mother's side, because their parentage on the father's side is wanting; so they do not inherit from their putative fathers; but as their parentage on the mother's side is established, they on account of such parentage, inherit only from their mothers and half-brothers by the mother's side the legal shares and no more. (Tag. L. L. 1873, 123.)

For the establishment of parentage, according to the *Shiahs*, the connection of the parents must in all cases be lawful; for a *walad-uz-zina*, or illegitimate child, has no descent, even from its mother; nor are there any mutual rights of inheritance between them. An illegitimate child, according to them, has no *nasab* or parentage, and his only heirs are his children, and failing them the Imam. (*Bai. Im.* 373, 375.)

CHAPTER V.

Sale and Pre-emption.

Sale.

The principles of Mahomedan law applicable to sales have been practically abrogated by the Indian Contract Act and the Transfer of Property Act.

Sale in its ordinary acceptation is a transfer of property in consideration of a price in money. In Mahomedan law it has a more comprehensive mean-

ing, being defined to be an exchange of property for property with mutual consent. It thus includes not only Barter but also Loan. (*Bai. H.* 775.)

With reference to the thing sold, sale is of four kinds; consisting of commutation of goods for goods; of money for money; of money for goods; and of goods for money; which last is the most ordinary species of this kind of contract.

Considered absolutely, sale is of four kinds; operative, suspended, imperfect and void. (*Ibid.* 784.)

Its Requisites and Conditions.

A contract of sale may be effected by the express agreement of the parties, or by reciprocal delivery. It is required that the contracting parties have understanding and sufficient discretion; and sale by a minor or a lunatic who understands the nature of sale and its effect is valid. (*Mac. N.* 42; *Bai. H.* 784.)

Among the conditions of sale it is necessary that the thing sold and the price should be so known as to preclude future dispute. It is also necessary that the thing sold be in existence. Further, that it be property having value in law, and be susceptible of delivery either immediately or at some future period. (*Bai. H.* 786.)

It is unlawful to stipulate for any extraneous condition, involving an advantage to either party, or any uncertainty which might lead to future litigation; but if the extraneous condition be actually performed, or the uncertainty removed, the contract will stand good.

It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days. The condition of option is annulled by the purchaser's exercising any act of ownership, such as to take the property out of *statu quo*.

(*Mac. N.* 43, 45.)

Where the property sold differs, either with respect to quantity or quality, from what the seller had described it, the purchaser is at liberty to recede from the contract. (*Ibid.* 44.)

By the sale of land, nothing thereon, which is of a transitory nature, passes. Thus the fruit on a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land. (*Ibid.*)

To a contract of sale partnership, indefiniteness and want of consent on the part of joint proprietors, and non-specification of the boundaries, are no objections. (*Ibid.* 166.)

The validity of a death-bed sale to one heir depends on the consent of other heirs of a deceased person. If they express their sanction to it, the sale is legal and binding; otherwise it is null and void. (*Mac. N.* 177.)

Pre-emption.—(*Shoofa.*)

What is *Shoofâ.*

Shoofâ, or the right of pre-emption, is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser. (*Mac. N.* 47.)

The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. (*Brij Mohan v. Abul Hasan*, 7 All. 775.)

The right of pre-emption is the right possessed by one person to purchase a property in preference to another; and, in the Mahomedan system, is based upon considerations of convenience and the avoidance of the presence of a stranger among co-sharers or neighbours. (*Lalla Nowbutt, v. Lalla Jewan*, 4 Cal. 831.)

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. (*Baboo Mohesh Lall v. Christian*, 8 W. R. 446.)

According to the rulings of the Allahabad High Court, it is neccssary that both the vendor and the pre-emptor should be Mahomedans or quasi-Mahomedans, but the personal law of the vendee is immaterial, while according to Calcutta decisions it is necessary that the pre-emptor, the vendor and the vendee, should all be persons governed by Mahomedan law of Pre-emption. (*Wilson.* 318.)

In cases 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. A person entitled to a right of pre-emption is not bound to claim pre-emption in respect of all the sales which may be executed in regard to the property, although every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer. (*Amir Hasan v. Rahim Bakksh*, 19 All. 467.)

Unless a prescriptive usage and local custom be clearly established, a Hindu defendant is not bound by Mahomedan law in a case in which a Mahomedan seeks to enforce his right of pre-emption. (*Sheraj Ali v. Ramjan Bibee*, 8 W. R. 204; *Dwarka Doss v. Husain Bakash*, 1 All. 564.)

The existence of a local custom as to the right of pre-emption among the Hindus of Gujarat is recognized. Such a custom, where it exists, is regulated by the rules and restrictions of Mahomedan law. (*Gordhandas v. Pramkor*, 6 B. H. C. 263; *Hira v. Kallu*, 7 All. 916.)

Its Conditions.—(*When it arises.*)

(*a*) There must be a contract of exchange, that is, a sale or something that comes into the place of sale.

The right of pre-emption does not arise out of gift, charity, inheritance, or bequest. But if the gift be a *heba-bashurtal-ewaz*, or with a condition that something shall be given in exchange for it, and mutual possession is taken, the right arises.

It applies to sales only, and cannot be enforced with reference to *leases in perpetuity.* (*Ram Golam v. Nursing Sahoy*, 25 W. R. 43.)

(*b*) There must be an exchange of property for property.

The right of pre-emption takes effect, with regard to property, whether divisible or indivisible; but it does not apply to movable property. When however, movable property is inseparable from, or is sold in one bargain with, immovable property which is the subject of litigation, right of pre-emption exists with reference to movable property.

(*c*) The thing sold must be *âkar* (a space covered with building).

(*d*) There must be an entire cessation of all right on the part of the seller.

There is no right of pre-emption for an invalid sale.

The privilege of *Shoofâ* refers to cases in which the sale has been actually completed by the extinction of the rights of the vendor. (*Ladun v. Bhyro Ram*, 8 W. R. 255).

No right of pre-emption arises upon a sale which according to Mahomedan law, is invalid, e. g., by reason of uncertainty in the price or the time of delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale.—*Begam v. Muhammad*, 16 All. 344. (*Najmunnissa v. Ajaibibi*, 22 All. 343.)

(*e*) There must be ownership of the pre-emptor, at the time of the purchase, in the thing on account of which he claims the right of pre-emption.

He has no right on account of a property of which he is merely the tenant for hire, or if he has sold it before the purchase, or has converted it into a *musjid* or place of worship. (*Gooman Singh v. Tripool Singh*, 8 W. R. 437.)

(*f*) There should be no acquiescence by the pre-emptor, in the sale or its effect, either expressly or by implication. (*Bai H.* 475—477.)

If a pre-emptor enters into compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he is taken to have acquiesced in the sale and to have relinquished his pre-emptive right. (*Habib-un-nissa v. Barkat Ali*, 8 All. 275.)

Where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right and in his character of pre-emptor 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 of pre-emption. (*Muhammad v. Abdul Husan*, 16 All. 300; *Muhammad Yunus v. Muhammad Yusuf*, 19 All. 334.)

The right can be claimed after a sale notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right and such refusal has been made simply in consequence of a dispute as to the actual price of the property. (*Abadi Begum v. Inam Begum*, 1 All. 521.)

Who may claim pre-emption.

Islâm on the part of the pre-emptor is not a condition. Neither are manhood, puberty, and justice, or respectability of character, conditions of its exercise. The right may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion. (*Bai. H.* 477 ; *Mac. N.* 47 ; *Punna v. Guggurnath*, 1 Agra. 236.)

The following persons may claim the right of pre-emption in the order enumerated :—

1. A partner in the property sold.

A co-parcener has a higher right of pre-emption than a neighbour, and there is nothing in Mahomedan law to prevent his enforcing his right when the purchaser happens to be a neighbour. (*Hur Dyal v. Heera Lall*, 16 W. R. 107.)

2. A participator in its appendages.

In order that two persons may become persons having a right of pre-emption in virtue of the common enjoyment of e. g., a road, it is necessary that such road should be a private road and not a thoroughfare. Among such persons, all those who are sharers in such right of way have equal rights of pre-emption, although one of them may be a contiguous neighbour. (*Karim Bakhsh v. Khuda Bakhsh*, 16 All. 247.)

The right of support is not an appendage to the property; it is merely included in the incident of neighbourhood. (*Ranchoddas v. Jugaldas*, 24 Bom. 414.)

The owner of a easement of irrigation channel has a superior claim to a mere neighbour. (*Chand Khan v. Naimat Khan*, 3 B. L. R. 296.)

The owner of a servient tenement, which has to receive and carry off the water from the roof of a house, the dominant tenement, has a right of pre-emption preferable to a neighbour whose house has to support that house. (*Ibid ; Ranchoddas v. Jugaldas*, 2 Bom. L. R. 41.)

3. A neighbour.

To support a claim on the ground of vicinage, the plaintiff must be the owner of the neighbouring property to that claimed not merely in possession of it.

A *Shiah* Mahomedan could not maintain a claim for pre-emption based on the ground of vicinage under the Mahomedan law when both the vendors and the vendee were *Sunnis*. (*Qurban Husain v. Chote*, 22 All. 102.)

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. (*Maharaj Singh v. Lalla Bheechuk Lall*, 3 W. R. 71.)

One of two joint sharers has no preferential title to the right of pre-emption 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 Mahomed v. Mahomed*, 7 W. R. 150.)

Under the *Shiah* law, the right of *Shoofâ* belongs to every partner; but not to a mere neighbour. It affects only the case of two partners. (*Bai. Im.* 179.)

In case of competition between pre-emptors to different categories the first category entirely excludes the second, and the second entirely excludes the third. But if the claim be made by two or more persons belonging to same category, they are entitled to equal shares of the pre-empted property on tendering the rateable proportions of the purchase money. (*Wilson.* 320; *Karim Bak'sh v. Khuda Baksh*, 16 All. 247.)

Forms to be observed to enforce pre-emption.

To entitle a person, otherwise favourably situated to the right of pre-emption, two conditions must be fulfilled: *first*, on receiving information of the sale he must immediately declare his intention to assert his right, called *talab-i-mowasibat;* and *secondly*, he must, as soon as possible, make the demand of the vendor or purchaser, or upon the premises, and in the presence of witnesses, called *talab-i-ishteshhâd.* (*Jhotee Sing v. Komul Roy*, 10 W. R. 119.)

When a person claiming a right of pre-emption has performed the *talab-i-mowasibat* in the presence of witnesses, but not in the presence of the seller or of the purchaser, or on the premises, it is necessary that, when performing the *talab-i-ishteshhâd*, he should declare that he has made the *talab-i-mowasibat*, and at the same time should invoke witnesses to attest it. (*Rujjab Ali v. Chundi Churn*, 17 Cal. 543.)

When in asserting a claim for pre-emption, the making of the *talab-i-ishteshhâd* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mowasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same.—*Abasi Begam v. Afzul Husain*, 20 All. 457. (*Abid Husen v. Bashir Ahmad*, 20 All. 499.)

In the making of the *talab-i- ishteshhâd* the servants of the per-emptor are competent witnesses. The disability in this respect imposed by the Muhammedan law is limited to minors and persons convicted of slander. (*Muhammad Yunus v. Muhammad Yusuf*, 19 All. 334.)

Invocation of witnesses is required only in order that the pre-emptor may be provided with proof, in case the purchaser should deny the demand and not to give validity to that demand. (*Ibid.* at p. 337.)

The words in which the immediate demand should be made to express his intention might be any words that intelligibly express the demand. (*Bai. H.* 487.)

The legal forms to be observed by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person. Any act or omission on the part of such a duly authorized agent or manager has the same effect upon pre-emption, as if the same had been made by the pre-emptor himself. (*Abadi Begam v. Inam Begam*, 1 All. 521; *Harihar Dat v. Sheo Prasad*, 7 All. 41.)

Minority does not extend the limitation in case of claim of a pre-emptor who was a minor when the sale took place.

The pre-emptor must offer to pay the same price which has been paid by the vendee. Refusal, however, to pay the amount demanded by the seller, previous to the sale, does not defeat the right. (*Mac. N.* 196.)

The first purchaser has a right to retain the property until he has received the purchase-money from the claimant by pre-emption, and so also the seller in a case where delivery may not have been made. (*Ibid.* 48.)

The pre-emptor must be ready to pay the same price for the property and to give the same terms as the purchaser is shown to have given; this is not a mere formality but an essential going to the very root of the right of pre-emption. (*Bai Rewa v. Dulabhdas*, 4 Bom. L. R. 811.)

The right of pre-emptor is rendered void in two different ways after it has been established :—*ikhtyaree* voluntarily or *zuroorse* necessary. It may be relinquished either expressly or impliedly, or it may be destroyed by operation of law, *e. g.*, by death of the person claiming the right.

Legal Devices to evade this Claim.

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 neighbours, and where he is apprehensive of the claim 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. (*Mac. N.* 49.)

Where property which is subject to a right of pre-emption declared by the *majib-ul-arz*, is sold to a stranger, such stranger may defeat the claim of a co-sharer having a right of pre-emption by sale to a co-sharer having a similar right ; but in order that the resale may have such effect, it must be completed before any suit for pre-emption is brought by a co-sharer entitled to pre-empt. (*Naramsingh v. Parbatsingh*, 23 All. 247.)

In cases of pre-emption based on a *wajib-ul-arz* the right of pre-emption does not survive, if the land, which is the subject of pre-emption, having been sold to a stranger, is subsequently resold by the stranger vendee before suit to a co-sharer having equal rights with those seeking pre-emption. (*Serhmal v. Hukansingh*, 20 All. 100.)

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, *i.e.*, a person who has no such right, he thereby forfeits his right to pre-empt.—*Ram Nath v. Badri Narain*, 19 All. 148. (*Bhupalsingh v. Mohansing*, 19 All. 324.)

CHAPTER VI.

Gifts, Wakfs and Wills.

Gifts.

Kinds of Gifts.

A gift (*heba*) is defined to be the conferring of property without a consideration. Gift is of two kinds —it is either *unqualified* and void of any consideration (*heba*), as where the donor makes an absolute gift of property; or *qualified*, of which there are two descriptions :—(1) *heba-ba-shurt-ul-ewaz* (a gift on stipulation), which is accompanied by the expression of a condition, and consists in a person offering to give to another something on *condition* of his receiving from the donee something else; and (2) *hiba-bil-ewaz* (mutual gift), or gift for a consideration, which resembles a sale both in principle and effect. (*Mac. N.* 40,220,221.)

The fundamental conception of a *hiba-bil-ewas*, or a gift for an exchange, as understood in Mahomedan law, is that it is a transaction made up of two separate acts of donation, *i.e.*, of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately 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-ewaz* in its proper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Mahomedan law provides. (*Bai. H.* 541,543; *Rahim Bakhsh v. Muhammad Hasam*, 11 All. 5, 6.)

In a *hiba-bil-ewaz* there must be an exchange of property for property, or property for money, or for a legal appreciative value. (*Ranee Roshun Jehan v. Rajah Syud Enaet Hossain*, 5 W. R. 4.)

Hiba-bil-ewaz, or a gift for a consideration, *is not* vitiated by confusion and non-possession, but a *hiba-ba-shurt-ul-ewaz*, or a gift on a consideration of a return, *is*.

A gift may be made verbally or in writing. The Transfer of Property Act does not affect this provision of Mahomedan law. (*Mac. N.* 234; *Kamar-un-nissa v. Hussain Bibi*, 3 All. 206.)

Conditions Essential for Valid Gift.

1. Relinquishment on the the part of the donor.

A gift cannot be implied. It must be express and unequivocal, *i.e.*, it cannot be implied from circumstances and must be expressed in words. The intention of the donor must be demonstrated by his entire relinquishment. When, however the gift is to a minor, or to one's wife or to one already in possession, immediate relinquishment of possession is not necessary to make a gift valid. (*Mac. N.* 51; *Azim Unnissa Begam v. Clement Dale*, 6 M. H. C. 455.)

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, it was held that the gift was null and void as there was no entire relinquishment of the house by the donor. (*Bava Saib v. Mahomed*, 19 Mad. 343.)

2. Acceptance and seisin on the part of the donee.

By Mahomedan law a gift by a person not in possession is null and void. Delivery and seisin are the essence of a gift, and, therefore, no right of any description passes without them. The observations made in *Kalidas v. Kanhyalal*, 11 I. A. 218 (which appear to be consistent with Hindu law), have no application to the texts of Mahomedan law, the language of which distinctly lays down that in a gift, seisin is necessary and absolutely indispensable to the establishment of proprietary right. A donor, therefore, must be in possession. (*Mohinudin v. Manchershah*, 6 Bom. 650; *Meher Ali v. Tajudin*, 13 Bom. 159.)

As to the validity of gifts the essential acts are tender, acceptance and seisin; but the manner in which seisin is to be effected must be considerably modified to suit the peculiar relations between husband and wife. A wife can make to her husband a valid gift of the house in which both are residing, although it contain her separate property and though both continue to reside in it afterwards. The husband can, similarly make a gift to his wife. His legal right to reside with her and to manage her property rebut the inference which in case of parties standing in different relation would arise after a continued residence in the house after making the *heba*. (*Amina Bibi v. Khatija Bibi*, 1 B. H. C. 160-2; *Emnabai v. Hajirabai*, 13 Bom. 312.)

Under the Mahomedan law when there is on the part of the father or other guardian a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession and will presume the subsequent holding of the property to be on behalf of the minor. (*Hussain v. Shaik Mira*, 13 Mad. 46.)

3. The giver must be free, sane, adult, and the owner of the thing given.

4. The thing itself must be in existence at the time of the gift.

According to the Mahomedan law a gift cannot be made of anything to be produced *in future*, although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of its donation. (*Amtal Nissa v. Mir Nurudin*, 22 Bom. 489.)

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 sum of Rs. 4,000 per annum out of his undivided share in certain Jaghir villages, which he had 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 villages to the extent of Rs. 4,000 per annum. (*Ibid.*)

A gift of trees growing on the land of the donor, or their unrealized produce, is invalid without the gift of the land. (*Mac. N.* 205.)

Anything over which the right of property can be exercised, or which can be reduced to possession, or which exists as a specific entity, or as an enforceable right or anything in fact which comes within the meaning of *mal*, may form the subject of a gift. (*Ameer Ali. Vol. I.* 58.)

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. Nizam-ud-din*, 21 All. 165.)

5. The subject of the gift must also have legal value.

6. Possession must be taken of it to establish in it the right of the donee, either actually or constructively, *e. g.*, when the donor delivers key of a house to the donee, or title deeds of a property, it amounts to a valid gift.

Gift (*heba*) strictly speaking, requires words of gift and words of acceptence, coupled with possession, taken by the donee.

The donee when competent to take possession, has the right to take it, when he is a minor or insane, the right to take possession for him belongs to his guardian.

Possession is absolutely necessary to establish the validity of a *heba*. Registration does not cure the defect of possession, *i.e.*, it gives the donee neither actual, constructive, nor symbolical possession, and therefore cannot be regarded as equi-

valent to delivery and acceptance. (*Shahjan Bibee v. Shib Chunder*, 22 W. R. 314; *Mogulsha v. Mahomad Asheb*, 11 Bom. 517; *Ismal v. Ramji*, 23 Bom. 682.)

For the purpose of completing a gift of immovable property by delivery and possession no formal entry or actual physical departure is necessary; it is sufficient if the donor and donee are present on the premises, and an intention to transfer has been unequivocally manifested. (*Ibram v. Suleman*, 9 Bom. 146.)

The Mahomedan law adopted by the Courts in the Madras Presidency 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 adopted 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, 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. The certainty, publicity and formality which attend delivery of possession are at least as well secured by a registered and attested instrument, and there appears no case in which a transfer evidenced in this way has been held to be invalid in this Presidency for want of delivery of possession. (*Alabi v. Mussa*, 24 Mad. at p. 522.)

7. If it is in its nature divisible, it must be divided and distinguished from, and not joined to, or occupied with, anything else that is not given.

The doctrines of Mahomedan law which lay down that a gift of an undivided share in property 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 of gift which are capable of partition. (*Mullick Abdool Guffoor v. Muleka*, 10 Cal. 1112.)

The law relating to the invalidity of gifts of "*musha*," *i. e.*, 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 on Mahomedan law show that possession taken under a gift even although this gift might with reference to "*musha*" be invalid without it, transfer effectively the property given, according to the doctrines of both the *Shiah* and the *Sunni* Schools. Possession once taken under a gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession. (*Muhammad v. Zubaida Jan*, 11 All. 460.)

Shares in *Zamindaries*, from the special legislation relating to them in themselves, and before any partition of the land, are definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore, do not fall within the principle and reason of the law relating to "*musha*." (*Ameeroonissa v. Abedoonissa*, 23 W. R. 208; *Mullick Abdool Guffoor v. Muleka*, 10 Cal. 1112.)

According to the *Sunni* law an assignment of an undivided share (*musha*) of property is invalid. (*Ebrahimbhai v. Fulbai*, 26 Bom. 577.)

8. A gift must not be dependent on anything contingent; nor be referred to a future time. (*Yusuf Ali v. Collector of Tipperah*, 9 Cal. 138.)

(*Bai. H.* 515, 516.)

Invalid Gifts.

(*a*) Any person may receive a gift without distinction of sex, or age or creed, provided he or she is in existence at the time of the gift. A gift, therefore, to an unborn person, one not *in esse*, either actually or presumably, is invalid, but a gift to a child *en ventre sa-mére* is valid, if the child be born within six months from the date of the gift.

(*b*) Gifts coupled with restrictions on alienation are absolutely invalid. (*Amiruddaula v. Nateri*, 6 M. H. C. 356; *Nasir Husain v Sughra Begam*, 5 All. 505.)

(*c*) Conditional gifts are invalid. If, however, seisin has taken place, the gift is to be upheld, but the condition is to be cancelled. (*Elb.* 120.)

There is a great difference between *conditional gifts* and *gifts with conditions attached to them*. The former are gifts which are made dependent for their operation upon the occurrence of certain contingencies, and are void according to all the schools. Whilst with regard to the latter there exists a certain divergence between the *Shiahs* and the *Sunnis*. According to the *Sunni* law any derogation from the completeness of the gift is null; and if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void. A life grant, under the *Sunni* law, takes effect as a *heba*, the condition limiting the gift being held void. The *Shiah* law, however, recognizes the validity of limited estates. (*Ameer Ali. Vol. I.* 108.)

(*d*) Any indefiniteness as to the subject-matter of the gift, would render invalid the gift. (*Valimia v. Gulam Kadar*, 6 B. H. C. 25.)

In a deed of gift of lands, it is not necessary to specify the boundaries, if well known, and no doubt exists regarding them. Specification is not requisite when the gift comprises the whole property of the donor, and is made in favour of only one donee. (*Mac. N.* 209, 211.)

(*e*) The gift of a thing not in possession of the donor during his life time is null and void. (*Ibid.* 202.)

A gift of immovable 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 Mahomedan law. (*Rahim Bakhsh v. Muhammad Hasan*, 11 All. 1.)

When a gift is public and authorizes a donee to take possession, which is in fact taken subsequently, the gift is not invalidated, because the donor was not at the time in possession, and did not, therefore, at the time transfer it. (*Mahommad v. Hosseini Bibi*, 15 M. I. A. 81.)

(*f*) A gift is null and void where the owner continues to exercise any act of ownership over it. The cases of a house given to a husband by a wife, and of property given by a father to his minor child form exceptions to this rule. (*Mac. N.* 51.)

The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee—*Mohinudin v. Manchershaw*, 6 Bom. 650 ; *Meher Ali v. Tajudin*, 13 Bom. 159. (*Ismal v. Ramji*, 23 Bom. 682.)

Under Mahomedan law a registered deed of gift is not valid if it is not perfected by possession. (*Ibid.*)

Gifts in Health and Sickness.

A person is at liberty to give away his own property as it suits his inclination. If he pleases he may give it all to one of his children, or to strangers, or to beggars. No one of his children or descendants has a right to oppose his inclination, for the right of the heirs to the property does not accrue until after his death and not during his lifetime. (*Mac. N.* 237.)

The policy of Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property

may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. (*Khajooroonissa v. Roshan Jehan*, 2 Cal. 184.)

A gift of an entire property to one heir to the exclusion of all the rest, is good and valid, notwithstanding the immorality of the act. (*Mac. N.* 197.)

A person can validly make over all his property by gift to one of his heirs if at the time of making that gift, the donor was in a state of health and sound disposing mind; and even though at the time he was sick, the gift is valid, provided he subsequently recovers from the sickness. (*Ibid; Mahomed Gulshere v. Mariam Begam* 3 All. 731; *Ibram v. Suleman*, 9 Bom. 146.)

A gift made in contemplation of death (*donatio mortis causa*) though not operative as a gift operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one-third of the deceased's whole property, the remaining two-thirds going to the heirs. If such a death-bed gift or will is 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 other heirs.

Under 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 with the disease an apprehension of death. Under the same law a person labouring under such a disease 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. When a gift is made by a person labouring under such a disease, it is good to the extent of one-third of the subject of the gift, if the donee is not an heir and he has been put in possession by the donor. (*Lubbi Bibee v. Bibum Bibee*, 6 N. W. P. 159.)

The provisions of 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. Hurmal*, 2 All. 854.)

Revocation of Gifts and Causes that prevent it.

The revocation of a gift is abominable under any circumstance; but it is valid nevertheless. All gifts

may be revoked before delivery to the donee, whether he were present or absent at the time of the gift and whether he were permitted to take possession or not. But after delivery, the donor has no right of revocation when the gift is to a relation within prohibited degrees. With regard to all others besides these he has the right of revocation, except that after delivery he cannot revoke of himself, and the revocation requires the decree of a Judge or the consent of the donee. (*Bai. H.* 533.)

The causes that prevent revocation are of various kinds. Of those there is :—

(1) The loss of the thing given.

(2) The passing of it from the property of the donee, by whatever means that may be effected, as by sale, gift, or the like.

(3) The death of the donee and the subject-matter of gift has devolved on his or her heirs.

(4) The death of the donor. The option of revocation is personal and dies with the donor.

(5) An increase of the thing given, of such a nature as to be united to it.

(6) An exchange received for the gift prevents its revocation.

(7) . So also, a change in the subject of it as grinding when it is wheat, baking when it is flour.

(8) The marriage relation prevents the r evocation of gift.

Such a gift to be irrevocable must be made during the subsistence of the relationship. Thus, a gift made prior to marriage may be revoked. But when a gift is made during marriage, and the relationship is afterwards dissolved, the gift cannot be revoked. Difference in the creed of the married parties makes no difference in the irrevocable character of the gift. (Ameer Ali.)

(9) Relationship within the forbidden degrees prevents the revocation of a gift, whether the relative be a *Mooslim* or an infidel.

(*Bai. H.* 534.)

According to *Shiah* law after possession has been taken of a gift, it cannot be lawfully retracted when made in favor of parents, nor even when the donee is any other relative, by consanguinity, of the donor, or stands in relation of husband and wife. But if the gift be to a stranger, it may be revoked at any time so long as the substance of the thing given is in existence. (*Ameer Ali.*)

Wakf.

Legal Meaning and Effect of *Wakf.*

The legal meaning of *wakf*, or appropriation is the detention of a specific thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited, and the owner loses his right thereto the moment he appropriates. (*Bai. H.* 558.)

Wakf is an endowment to religious and charitable uses. The term designates in Mahomedan law a trust and corresponds in many respects to the charitable trusts of English law.

Royal grants are of two descriptions:— (1) *Altumgha* is made for personal purposes. To such an estate, on the death of the grantee, the sharers and residuaries succeed to their legal portions according to the law of inheritance. (2) *Wakf* is made for charitable, and religious purposes. With respect to this latter, no claims of inheritance are admissible. In the award of shares to persons entitled to participate in the benefit of an endowment, the law makes no distinction between males and females. A partition of the endowment itself is illegal, but a partition of the profits arising therefrom is allowable. (*Mac. N.* 329.)

The term *Altumgha* or *Altumghainam* in a royal grant does not, of itself, convey an absolute proprietary right to the grantee, where from the general tenor of the grant, it is to be inferred, that a *wakf* was intended and property so endowed cannot be alienated by the grantee or his representatives. (*Jewan Doss v. Shah Kabeerooldeen*, 2 M. I. A. 390.)

The property appropriated to an endowment is also irrevocable, except one made *in extremis*, which is revocable at any time before his death, and takes effect only to the extent of a third of the appropriator's property unless assented to by other heirs. An appropriation, by a sick person, in favour of an heir is not valid without the consent of the other heirs. (*Bai. H.* 614.)

A *wakf* having been once made cannot be recalled. The interposed private interests which might or might not endure, do not avoid the ultimate charitable trust. If the intermediate purposes of the dedication fail, the final trust for charity does not fail with them. It is but accelerated. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognised in the gra ntor. (*Fatmabibi v. Advocate General of Bombay*, 6 Bom. 42.)

Conditions of *Wakf*.

The necessary conditions for the legal declaration of *wakf* are :—

(1.) Understanding and puberty on the part of the appropriator.

(2.) The subject of *wakf* must belong to the appropriator at the time of making it.

(3.) The absence of uncertainty is also required.

(4.) The *wakf* should not be contingent.

The appropriation should be at once complete, and not suspended on anything.

According to the *Shiah* law it is one of the essential conditions prece dent to the validity of a *wakf* that it should not be rendered contingen upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month or occurrence of the death of the *wakf—Aga Ali v. Altaf Husan*, 14 All. 429. (*Syedabibi v. Moghal Jan*, 24 All. 231 ; *Hamid Ali v. Mujawar*, 24 All. at p. 272.)

(5.) The *wakf* must be free from option.

According to the *Shiah* law a *wakf* cannot be created by will. (Hamid Ali v. Mujawar, 24 All. at p. 271.)

(6) The ultimate destination to which the rent or produce is to be applied must be one that can never be cut off or fail, and unless such be mentioned in the *wakf*, it is not valid.

A *wakf* must be certain as to the property appropriated, unconditional, and not subject to an option. It must have a final object which cannot fail and this object must be expressly set forth. It is not rendered invalid merely by an intermediate settlement on the founder's children and their descendants, if the condition of an ultimate dedication to a pious and unfailing purpose be satisfied. (*Fatmabibi v. Advocate General of Bombay*, 6 Bom. 42 ; *Amrutlal v. Shaik Hussain*, 11 Bom. 492 ; *Deoki Prasad v. Inait-ullah*, 14 All. 375 ; *Hamid Ali v. Mujawar*, 24 All. at p. 270.)

(7) There should be no reservation of a power to sell.

When a *wakf* is created, the reservation in the deed of settlement of the annual profits of the property to the donor for life does not invalidate the deed. If, however, there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donor the settlement is invalid. (*Fatmabibi v. Advocate General of Bombay*, 6 Bom. 42.)

(8) Perpetuity is a necessary condition of *wakf*. (*Bai. H.* 560-566.)

The essential requisites of a valid *wakf* are :—It must be perpetual, absolute and unconditional ; possession must be given of the dedicated thing, and it must be entirely taken out of the appropriator himself.

Words which create *Wakf* and its Objects.

There is no essential formality or the use of any express phrase requisite for the constitution of a *Wakf*. It is not also necessary to use the word *Wakf* to constitute it. So long as it appears that the intention of the donor is to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or of a series of objects recognized as pious by Mahomedan law it amounts to a valid and binding dedication. (*Jewan Doss v. Shah Kubeerooddeen*, 2 M.I.A. 390 ; *Piran v. Abdool Karim*, 19 Cal. 203.)

The mere declaration of the approriator that he constitutes, or has constituted a property *Wakf* is sufficient to impress on it the character of a valid *wakf*. Consignment to a trustee is not necessary. (*Deod Jaun Bibee v. Abdollah Barber* Fulton, 345.)

Where the primary and general object of the endowment is for the furtherance of religious or charitable purposes, or for the worship of God, such endowment is valid, although the *wakfnámá* may also provide for the support of the family, and descendants of the founder; but where the *wakfnámá* has for its real object nothing connected with the worship of God or religious observances, and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist. (*Abdul Ganne v. Hussen Miya*, 10 *B. H. C.* 7; *Nizamudin v. Abdul Gafur*, 13 *Bombay.* 274; *Murtazai Bibi v. Jumna Bibi*, 13 All. 261; *Hamed Ali v. Mujawar*, 24 *All. at p.* 276.)

The charitable purpose, in order to establish a *wakf*, must be substantial, and not illusory. 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 the 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 conferred on the latter. (*Abdul Fata v. Rasamaya*, 22 Cal. 620.)

Although the making provision for the grantor's family out of property dedicated to religious or charitable purposes may be consistent with the property being constituted *wakf*, yet in order to render it *wakf*, the property must have been substantially, and not merely colourably, dedicated to such purposes. (*Mahomed Ahsanulla v. Amarchand*, 17 Cal. 498.)

Where a *wakfnámá* 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*, 17 Bom. 1.)

A mere change for some charitable purposes on the profits of an estate strictly settled on the settlor's family in perpetuity and not dedicated in substance to charitable uses is not sufficient to constitute a good and valid *wakf*. (*Muhomed V. Rasulanbibi*, 21 All. 329.)

A settlement in which no religious purpose at all is expressed is no valid *wakf* settlement. (*Sayad Mahomed v. Sayad Gohar*, 6 Bom. 88.)

In order that a document may amount to a valid deed of *wakf*, the effect of it must be to give the property in substance to charitable uses. Where a deed purports to give the property in substance to the family or leaves the amount to be applied to charity in absolute and uncontrolled discretion of the *mutawali* and no one is given any right to demand an account, the deed does not constitute a valid *wakf*. (*Mujib-un-nissa v. Abdul Rahim*, 3 Bom. L. R. 114.)

In determining whether a disposition of property made by a Mahomedan is or is not a valid *wakf*, the intention of *wakif* may be interpreted by reference to custom prevailing at the time the *wakf* was made 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*. (*Phulchand v. Akbar*, 19 All. 211.)

In the construction of a deed of *wakf*, the words 'charitable' and 'religious' must be taken in the sense in which they are understood in Mahomedan law. Every "good purpose," which God approves, or by which approach is attained to the Deity, is a fitting purpose for a valid and lawful *wakf*. A provision for one's children, for one's relations, and under the *Hanafi Sunni* law for one's self is as good and pious an act as a dedication for the support of the general body of the poor. A *wakf*, therefore 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 for his own use during his lifetime, is valid. (*Meer Mahomed v. Sashti Churn*, 19 Cal. 412, 417.)

In the case of *Bikani Mia v. Shuk Lal Poddar*, 20 Cal. 116, it was, however, decided that the course of the decisions should not be disturbed by reference to texts which may favour the idea that a settlement on a settlor and his descendants in perpetuity is a poius act.

According to *Sunni* law it is essential to the validity of a *wakf* that the appropriator should actually divest himself of possession of the appropriated property. (*Muhammad Aziz-ud-din v. Legal Remembrancer to Government*, 15 All. 321.)

A settlement as a deed of gift to the settlor's next of kin after the determination of the life estates granted to his wives and daughters is invalid, first because the donor has not parted with possession of the property till his death, and secondly because the grant of a life estate is quite inconsistent with the Mahomedan law, the grantee in such a case taking an absolute estate. (*Nizamudin Gulam v. Abdul Gafur*, 13 Bom. 265.)

According to the law applicable to the *Shiah* sect of Mahomedans a testamentary *wafk* is not valid unless actual delivery of possession of the appropriated property is made by the appropriator himself to the superintendent appointed by him. According to the same law, the death of the appropriator before actual delivery of possession of the appropriated property by him to the superintendent or the beneficiaries of the trust renders the *wakf* null and void *ab initio*. Consequently, where the appropriator dies, before actual delivery of possession of the appropriated property, the consent of his heirs to the testamentary *wakf* cannot validate such *wakf*. (*Agha Ali Khan v. Altaf Hasan Khan*, 14 All. 429.)

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 Mahomedans. (*Fatmabibi v. Advocate General of Bombay*, 6 Bom. 42.)

A dedication to a musjid, to cravansaries, cemeteries, inns, is lawful and valid. (*Bai. H.* 620.)

The proper subjects of *wakf* are lands, houses and shops, or immoveable property generally and any movables that may be attached to it. Movables, with a few exceptions, cannot by themselves be made the subjects of appropriation. *Wakf* of undivided property is lawful. (*Ibid.* 570, 573.)

According to Mahomedan law a *wakf* of movable property may be validly constituted. (*Abu Sayed v. Bakar Ali*, 24 All. 190.)

Who may be Superintendent.—(*Mutwalli.*)

Puberty and understanding are essential in all cases to a valid appointment of a superintendent. The maker may lawfully appoint himself and his children the superintendent of the *wakf*, but he cannot resume the *wakf*, after appointing another to be so, without an express condition to that effect. He may himself be removed for malversation. The Judge may also remove one appointed by the appropriator, when it is for the advantage of the *wakf*. (*Bai. H.* 601, 602.)

It is essential, for the exercise by the donor of the power of removing a superintendent, that such power be specially reserved at the time of the endowment. (*Aji Ajam Vadallah Saib v. Gulam Hussaine*, 4 M. H. C. 44.)

On the death of a *mutwalli*, or superintendent, the right of appointment of his successor belongs to the appropriator or his executor; failing whom, the appointment of an administrator is with the judge. (*Phate Saheb Bibi v. Damodar Premji*, 3. Bom. 84.)

No right of inheritance can attach to an endowment. It is by appointment that one officer succeeds to another, appointment either by the original appropriator, or by his successor or executor, or by the superintendent for the time being, or failing all these, by the ruling power.

"It is usual to prefer the late incumbent's family to persons who are entirely strangers;" and "in conferring the trust, regard should be had to superiority of qualification, and supposing all the sons to be equal in this respect, respect should be paid to seniority." Thus Mahomedan law appears decidedly to favour the appointment of a son and of an eldest son as a successor. (*Sayad Abdula v. Sayad Zaim*, 13 Bom. 561, 562.)

A superintendent may at his death commit his office to another. But he, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust. (*Bai. H.* 604.)

According to Mahomedan law, a female cannot manage the spiritual affairs of a mosque, though she may the temporal ones. (*Hussain Bibee v. Hussain Sheriff*, 4 M. H. C. 23.)

The performance of the services of *imamat* (preaching by being a priest), *moujani* (calling to prayer), and *khitabat* (reading the koran at the mosque) can only be done by male members of a family; and it is not open to female members to have them done by a proxy where there are already male members of the family in existence. (*Mirazamalli v. Hidayatbi*, 3 Bom. L. R. 772.)

A woman is not competent to perform the duties of a mujavar of a durga, which are not of a secular nature. (*Ibrambibi v. Hussain Sheriff*, 3 Mad. 95.)

A Mahomedan office to which are attached substantially the conduct of religious worship and the performance of religious duties, is not legally saleable, any custom to the contrary notwithstanding. (*Sarkum v. Rahaman*, 24 Cal. 84.)

Management of *Wakf*.

The specific property endowed cannot be exchanged for other property, unless a stipulation to this effect may have been made by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage be derivable from the exchange; nor should endowed lands be farmed out on terms inferior to their value; nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment.

Endowed property, though not a fit subject of sale, may yet be sold by judicial authority, when the sale may be absolutely necessary to defray the expense of repairing its edifices or other indispensable purposes, and where the object cannot be attained by farming or other temporary expendient. (*Mac. N.* 69, 70.)

Generally speaking, the gift or sale of endowed lands is illegal. It is incumbent on the superintendent to apply the profits of the lands, in the first instance, to defray the expense of repairing the buildings of the endowment, and the surplus may be applied to other purposes connected with the institution; although the person who founded the endowment may not have specified the repairing them as a condition. If the profits of the land are not sufficient to cover the expense of necessary repairs, the trustee is at liberty to dispose of such portion of the lands as may enable him to effect this purpose, because the preservation of buildings is, in all cases of endowment, a matter of indispensable necessity. A sale of endowed lands made by a superintendent for purposes other than to defray the necessary expenses of repairs is illegal. (*Ibid.* 328, 329.)

Wakf property cannot be alienated, and any person interested in the endowment can sue to have alienations set aside and the property restored to the trust. (*Kazi v. Sagun*, 24 Bom. 170.)

Where an appropriator appoints two persons joint superintendents, it is not competent to either of them to act separately ; but where he himself retains a moiety of the superintendence, associating another individual, he (the appropriator) is at liberty to act singly and of his own authority in his self-created capacity of joint superintendent. (*Mac. N.* 71.)

The injunctions of the appropriator should be observed except in the following cases :—(1) If he stipulate that the superintendent is not to be removed, such person is nevertheless removable on proof of misconduct. (2) If he stipulate that the appropriated land shall not be let out to farm for a longer period than one year and a tenant cannot be obtained for so short a time, and a longer lease would promote the interests of the establishment, the ruling authorities can act without the consent of the superintendent. (3) If he stipulate that excess of the profits be distributed among persons who beg for it in the mosque, it may, nevertheless, be distributed in other places, among the necessitous, though not beggars. (4) If he stipulate that daily rations of food be served out to the necessitous, the allowance may, nevertheless, be made in money. (5) The endowed property may be exchanged, when it may seem advantageous by order of the ruling authorities; even though the appropriator may have expressly stipulated against an exchange. (*Ibid.* 70. 71.)

Wills.

Definition.

A *wasiat*, or will, signifies an assignment of property by its owner to take effect after his death, or as if one should say to another "give such an article to such a person after my decease." To bequeath is, in the language of law, to confer a right of property in a specific thing, or in a profit or advantage, in the manner of a gratuity, postponed till after the death of the testator. (*Mac. N.* 245; *Bai. H.* 623.)

There is but little difference in the provisions regarding gifts and those regarding legacies. With respect to legacies, the entire relinquish-

ment of the donor must take place physically, and the exigency of the law is consequently so far fulfilled. But acceptance on the part of the donee is essential to the validity of gift; and a legacy is of course voidable at the pleasure of a legatee. The chief distinctions seem to be, that a legacy may be made, the subject of which is not in possession of the testator at the time of the execution of his will, whereas a gift under such circumstances is null and void, and that a testator, in willing away property to several individuals, is not bound to separate and define the portions of each. (*Mac. N.* 242.)

There is no preference shown to a written over a nuncupative (verbal) will, and they are entitled to equal weight, whether the property which is the subject of the will, be real or personal. Where the testator, however, does not die soon after making the will, a verbal one will be inoperative, as he might have subsequently altered his intentions. (*Ibid.* 53 ; *Elb.* 142; *Tanneeg Begam v. Furhit Hossein*, 2 N. W. P. 55.)

A nuncupative will can be admitted to probate in this country as well as in England. (*Re Mariambai*, 24 Bom. at p. 12.)

A nuncupative will by a Mahomedan of the *Shia* sect, bequeathing property less in amount than one-third of his estate is valid by the Mahomedan law, and effect is to be given to the bequests. *Semble.*— Such verbal bequests would be valid even if beyond a third of the testator's estate, provided the heirs concurred in the bequests. (*Nawab Aminood-dowlah v. Syed Roshun Ali Khan*, 5 M. I. A. 199.)

Conditions of Valid Bequest.

The testator must be competent to make a transfer of property, the legatee must be competent to receive it, and the subject of bequest must be something which is susceptible of being transferred after the testator's death, whether it were in existence at the time of bequeathing or not. It is also a condition that the bequest be accepted, either expressly or by implication, which is by the legatee's dying before rejection, or acceptance, whereupon his death becomes an acceptance, and his heirs inherit the legacy. (*Bai. H.* 624.)

It is not necessary that the subject of the legacy should exist at the time of the execution of the will. It is sufficient for its validity that it should be in existence at the time of

the death of the testator. It is not also necessary that the property should exist in the possession of the testator at the time of his death. (*Mac. N.* 53, 54, 242.)

There is this difference between testate and intestate succession—that an heir enters upon the possession of inherited property without acceptance (by mere operation of law) but a legatee does not enter upon the possession of bequeathed property without acceptance.

The acceptance of a bequest must be made *after* the death of the testator. (*Bai. H.* 624.)

According to Shiahs, if the legatee should accept *before* the death of the testator, the acceptance is lawful. If a legatee should die before acceptance, his heirs come into his place, and may accept the bequest. If, however the legatees should leave no heirs, the legacy reverts to those of the testator. (*Bai. Im.* 229, 230, 247.)

The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far as it may be consistent with law. (*Mac. N.* 54.)

Persons Competent to Bequeath.

Any person who is free, sane, and adult whether man or woman, married or unmarried, is competent to make bequest. (*Bai. H.* 627.)

If a youth, however, make a bequest, and after attaining his majority allows it, the bequest is valid *ab initio.* (*Ibid.*)

A wife can bequeath her own property without the consent of her husband. (*Elb.* 140.)

According to Mahomedan law, a woman is absolute proprietor of all property, real and personal, whether acquired by her on the occasion of her marriage, or otherwise. The wife's property does not vest in the husband by marriage. A married woman has unlimited power over her own property, and she is competent to dispose of her own effects without the permission of the husband. (*Mac. N.* 254, 255.)

A will may be made by signs, as in the case of a dumb person who does not possess the faculty of speech, but who can express his meaning by signs, (*Ameer Ali. Vol. I.* 460.)

An act of disposal which is not to take effect till after the death of the disposing party is good only to the extent of a third of his property, even though it were made in health. (*Bai. H.* 651.)

An acknowledgment of debt on death-bed in favour of an heir resembles a legacy ; inasmuch as it does not avail for more than a third of the estate. (*Mac. N.* 53.)

To whom can legacy be given and to what extent.

A bequest to a stranger is valid without the consent of the heirs, but not beyond a third of the estate unless assented to by them *after* the testator's death. (*Bai. H.* 425.)

The Mahomedan law recognizes the testamentary power which however without the consent of the heirs does not extend to more than one-third of the testator's estate.

Where a Mahomedan, by his will, bequeathes more than one-third of his property to a stranger, the consent of his heirs to such bequest required by the Mahomedan law, need not be express; it may be signified by conduct showing a fixed and unequivocal intention. (*Doulatram v. Abdul*, 26 Bom. 497.)

The consent of the heirs can validate a testamentary disposition of property in excess of one-third of the property of the testator, if the consent be given *after* the death of the testator. But if the consent be given during the lifetime of the testator, it will not render valid the alienation, for it is an assent given before the establishment of their own rights. (*Cherachom Vittil v. Valia Pudiakel*, 2 M. H. C. 350 ; *Nusrut Ali v. Zeminnisa*, 15 W. R. 146.)

A bequest to an heir is not lawful without the consent express or implied, of the other heirs. (*Abedoonissa v. Ameeroonissa*, 9 W. R. 257.)

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. (*Khojooroonissa v. Rowshan Jehan*, 2 Cal. 184.)

Under the *Shiah* law, the consent in the case of a legacy to an heir or to a stranger is lawful and effective when given *after* the testator's death as well *before* his death, unlike the *Sunni* law, according to which the consent to be effective should be given *after* his death. (*Bai. Im.* 233.)

When there are no heirs, nor creditors, the law allows of the entire estate being bequeathed by will, and it is not necessary (as in case of gift) that the legacy should be express. (*Mac. N.* 243, note.)

In determining whether a person is an heir or not, regard is to be had to the time of the testator's death. A person not being an heir at the time of the execution of the will, but becoming one previously to the testator's death, cannot take the legacy left to him by such will; *e. g.*, if a person, having a son leaves a legacy to his brother, and the son dies during the lifetime of the testator, the bequest to the brother is cancelled. But a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will; *e. g.*, if a man makes a bequest in favour of his brother, who is his heir at the time, and a son is afterwards born to him, the bequest to the brother is valid. (*Bai. H.* 625.)

A bequest to or of a child in the womb, if born within six months from the date of the bequest, is valid. (*Ibid.* 627.)

According to Mahomedan law as well as Hindu law, persons not in existence at the death of the testator are incapable of taking any bequest, under his will. (*Abdul Kadur v. Official Assignee*, 9 Bom. 158.)

Payment of Legacies.

Legacies are to be paid out of a third of what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third. Then the residue is to be divided among the heirs according to their shares in the inheritance. (*Bai. H.* 694.)

The preference of a legatee to the heirs is only when the legacy is of something specific; for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference, nay, the legatee in that kind of legacy is a partner with heirs, and his interest rises or falls with any increase or diminution of the testator's estate. *Ibid.*

When a testator bequeathes more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies. (*Mac. N.* 54.)

Where a legacy is left to an individual and subsequently a larger legacy to the same individual, the larger legacy will take effect; but where the larger legacy was prior to the smaller one, the latter only will take effect. (*Ibid.*)

A legacy being left to two persons indiscriminately if one of them die before the legacy is payable, the whole will go to the survivor; but if half was left to each of them, the survivor will get only half and the remaining moiety will devolve on the heirs; so also in the case of an heir and a stranger being left joint legatees. (*Ibid.* 55.)

Revocation of Bequests.

A will is essentially revocable in its nature. It may be revoked at any time, even during the last illness of the testator. (*Ameer Ali. Vol. I.* 529.)

A testator may revoke his bequest, and the revocation may be either express—as when he says 'I have revoked' or where the will is destroyed, or is superseded by a codicil, or the like; or implied, as when he does some act from which it may be inferred *e. g.*, where the testator increases or diminishes the legacy or alienates it to others subsequent to the will. (*Bai. H.* 628; *Elb.* 145.)

If a man bequeath property to one person and subsequently makes a bequest of the same property to another individual, the first bequest is annulled by implication; so also if he sell or give the legacy to any other individual, even though it may have reverted to his possession before his death as these acts amount to retraction of the legacy. (*Mac. N.* 54.)

A bequest made to a person without provision for its descent to his heirs, reverts on his death before the testator to the latter. (*Elb.* 148.)

Executors and their Powers.

Formerly a Mahomedan could not employ a person of a different persuasion to be his executor, and such appointment was liable to be annulled by the

ruling power. This restriction no longer exists, a Hindu or Christian may legally be the executor of a Mahomedan, and *vice versâ*. (*Mac. N.* 55.)

Though the appointment of other than a Mussulman as executor to the will of a Mussulman, is legal, yet the Kàzi might remove him ; but the whole of his official acts are valid until he should be regularly displaced by the Kàzi. (*Mahomed Aminuddin v. Mahammed Kabiruddin*, 4 S.D.A. Ben. Rep. 49 ; *Jehan Khan v. Mondy*, 10 W. R. 185.)

The appointment of a minor or of an insane person, whether permanently so or with lucid intervals, is unlawful. But a woman, a blind person, or "one who has even undergone the specific punishment for slander," may lawfully be appointed an executor. (*Bai. H.* 680.)

Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors. (*Mac. N.* 55.)

Under 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. 106.)

An executor may decline or accept the office before or after the death of the testator. But if he has once accepted, he cannot retract after the death of the testator, nor in his lifetime without his knowledge. (*Bai. H.* 676.)

Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, *e. g.*, for the performance of the deceased's funeral ceremony, and where benefit to the estate must certainly accrue. (*Mac. N.* 55.)

When one of two executors dies, the survivor cannot act without the authority from the Judge, unless the deceased one has appointed him his executor, when the surviving executor can act for the original testator as the sole executor. (*Bai. H.* 682, 683.)

In case of necessity, an executor has the power of selling the property for adequate consideration and investing the proceeds in other and more profitable

kinds of property, after discharging any debts of the testator or debts incurred in the maintenance of his infant children. He cannot sell the property to himself or to any relative of his. He can enter into a partition with the co-sharers of the deceased or the legatee, if any, in respect of the minor's shares in all kinds of property, both movable and immovable. A partition where inadequacy in the terms is manifest or glaring is ineffective. (*Ameer Ali. Vol. I.* 561.)

CHAPTER VII.

INHERITANCE.—(*Furaiz.*)

General Rules of Inheritance.

The Mahomedan law of inheritance comprises, beyond question, the most refined and elaborate system of rules for the devolution of property that is known to the civilized world, and its beauty and symmetry are such that it is worthy to be studied, not only by the lawyers, with a view to its practical application, but its own sake, and by those who have no other object in view than their intellectual culture and gratification. (*Rumsey.* Preface.)

Charges upon Inheritance.

The estate of a deceased person is applicable to four different purposes—his funeral, his debts, his legacies, and the claims of his heirs.

1. Funeral expenses are first to be paid.

2. Debts are next to be paid.

Every description of debt takes precedence of legacies and the claims of heirs. But debts acknowledged on death-bed are postponed to all others, unless they appear to have been incurred for known and sufficient reasons. All other debts are on an equal footing; no creditor is preferred to another. All receive the full amount of their debts, unless the property is insufficient, in which case they are paid *pro rata.* (*Grady.* 4.)

Heirs are answerable for the debts of their ancestors to the extent of the estate they inherit. (*Sheik Kasim Ally, Petr*; *Narsing Das v. Nazmoddin*, 8 Cal. 20.)

The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona-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. (*Bazayet Hossein v. Doolichand*, 4 Cal. 402.)

A suit for money due by a deceased Mahomedan lies against one of his heirs in respect of his share in the property left by the deceased, though it may not bind the share of another heir. (*Ambashanker v. Sayad Ali*, 19 Bom. 273.)

Under the Mahomedan law the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. The discharge of a debt is a matter of necessity, the right of the heirs is connected with the estate on the sole condition of its being free from incumbrance, whence it is that the discharge of the funeral expenses precedes the right of the heirs as that is also a matter of necessity. Nevertheless, the circumstance of a small debt attaching to the estate of a deceased person does not prevent the heirs from inheritance, whereas if the estate were completely involved in debt they would be prevented. While then the heirs might lawfully take possession of an estate, not completely involved in debts, the creditors have a right to sue such of the heirs, as have taken the estate ; but they are entitled to have a recourse to such heir only, where all the effects are in the hands of that heir and the reason given is that although any one of them may act as plaintiff in a cause on behalf of others, yet he cannot act as dependent on their behalf unless the *whole of the effects are in his possession*. If a creditor denies to realize his debt out of the immovable property of the deceased he cannot obtain a decree to the prejudice of heirs, who are not parties to the suit on the mere confession of some of the heirs. (*Hamir Singh v. Zakia*. 1 All. at pp. 58,59.)

The heirs to a deceased Mahomedan divided his estate among themselves to their shares under the Mahomedan law of inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt. *Held* that, inasmuch as such heirs had not, by sharing in the estate, rendered themselves liable for the whole of such debt, the Mahomedan law allowing the heirs of a deceased person to divide his estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt ; but 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*. 4 All. 361.)

A debtor on his death-bed cannot devise or otherwise alienate his property to the prejudice of a creditor. (*Mac. N.* 346.)

3. Legacies are next to be paid out of a third of what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third.

4. The residue is, then, to be divided among the heirs, according to their shares in the inheritance. (*Bai. H.* 693, 694.)

Until a division takes place the estate is considered to belong to the deceased, so that any increase accruing after his death, is held to be part of the estate. (*Elb.* 59.)

All kinds of property inheritable alike.

There is no distinction, as regards the rules of inheritance among Mahomedans, between ancestral and self-acquired property.

Under the *Shiah* law, a childless widow or one who has no issue surviving at the time of her husband's death is not entitled to a share in immovable property; but only to a share in movable property, houses, buildings, &c. (*Toonanjan v. Mehndee Begam*, 3 Agra. 13; *Umdutoonissa v. Asloo*, 20 W. R. 297.)

When the members of a Mahomedan family live in commensality, they do not form a "joint family" in the sense in which that expression is used with regard to Hindus; and in Mahomedan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly. (*Hakim Khan v. Gul Khan*, 8 Cal. 823; *Abdul v. Mahomed*, 10 Cal. 562.)

Primogeniture.

There is no right of primogeniture, so that, for instance, if a man leave three sons, the eldest will take no more than each of the other two. (*Rumsey.* pp. 7, 8.)

Primogeniture confers no superior right. All the sons, whatever their number, inherit equally. Among the *Shiahs* however, on a distribution of the estate, the elder son, if he be worthy, is entitled to his father's sword, his koran, his wearing apparel and his ring. (*Mac. N.* 1, 41.)

Right of Representation.

The Mahomedan law does not recognize the right of representation. So that a person who would be an heir of another if he survived him, does not transmit any right to his own heirs or representatives, if he dies before the other. (*Bai. H.* Intro.)

When a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have *interests in the inheritance*. But the son of a person

deceased shall not represent such a person, if he died before his father. He shall not stand in the same place as the deceased would have done, had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B and C are grand-father, father and son. B dies in the lifetime of A. In this case C shall not take *jure representationis*, but the estate will go to the other sons of A. (*Mac. N.* 272.)

A Mahomedan son does not take a vested interest in ancestral property on his birth, as a Hindu son does. (*Mustaq Ahmed v Amjad Ali*, 19 All. 311.)

The Mahomedan doctors assign as a reason for denying the right of representation, that a person has not even an inchoate right to the property of his ancestor, until the death of such ancestor, and that consequently, there can be no claim through a deceased person, in whom no claim could by possibility have been vested. (*Mac. N.* Prem. Rem. IX)

Whatever may be the position and rights of a husband, being the only surviving heir of his wife, according to Mahomedan law, there is no representative in matters of succession and therefore those rights do not descend to the heirs of a husband who had predeceased the wife, and who are themselves no relation of wife. (*Elkin Bibee v. Ashruf Ali*, 1 W. R. 152.)

Plurality of Heirs.

To the estate of a deceased person, a plurality of persons having different relations to the deceased, may succeed simultaneously, according to their respectively allotted shares, and inheritance may partly ascend lineally and partly descend lineally at the same time. (*Mac. N.* 2.)

Shares of Males and Females.

The share of a female is half the share of a male of parallel grade when they inherit together. The cases of father and mother, and of half-brothers and sisters by the same mother but by different fathers are exceptions. (*Elb.* 42.)

Among heirs of the same grade, those of the full-blood are preferred to those of the half. Half-brothers and sisters on the mother's side are exceptions to this rule. (*Mac. N.* 5.)

Females are not excluded from inheriting property, nor are their powers of alienation restricted. The property of a female, however acquired, devolves on her own heirs. (*Elb.* 42; *Mac. N.* 85.)

Illegitimate Children.

Illegitimate children do not inherit their father's property. They take the maternal estate only, but not the paternal, nor can the father inherit from them. (*Boodhun v. Jan Khan*, 13 W. R. 265.)

The children of fornication or adultery have no *nasab* or consanguinity, hence the right of inheritance being founded on *nasab*, one illegitimate brother cannot succeed to the estate of another. (*Shahebzadi Begam v. Himmot Bahadhur*, 4 B. L. R. 103.)

Posthumous Children.

It is not necessary that the heir should be actually born; if he has been begotten before the death of the person from whom he claims, and was actually born alive, it suffices for all legal purposes. (*Elb.* 40.)

Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born; but where there are other relatives, who would succeed in the event only of his having no child, (as would be the case, for instance, with a brother or sister) no immediate distribution of the property takes place. But if those other relations would succeed at all events, to some portion, (larger without than with a child, as would be the case, for instance, with a mother), the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to one-third. (*Mac. N.* 30.)

Adoption.

Adoption amongst Mahomedans is similar to that among the English. It confers no right of inheritance, as amongst Hindus. Adopted children are entitled to nothing more than what their adoptive father gives them. (*Mac. N.* 86; *Oheed Khan v. Shahabad*, 9 W. R. 502.)

Exclusion from Inheritance.

Exclusion is either entire (total) or partial. By entire exclusion is meant the total privation of right

to inherit. This is brought about by some of the personal disqualifications (slavery, homicide, difference of religion, and difference of allegiance), or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance. By partial exclusion is meant a diminution of the portion to which the heir would otherwise be entitled.

Those who are entirely excluded by reason of personal disqualifications, do not exclude other heirs, either entirely or partially ; but those who are excluded by reason of some intervening heir, do in some instances partially exclude others. (*Mac. N.* 21.)

As regards total exclusion there are six persons who are not subject to it. These are the father, the son, the husband, the mother, the daughter, the wife. (*Bai. H.* 705.)

These six persons must, in all cases, get shares whatever may be the number of degree of other heirs. As regards all others besides these, the nearer excludes the more remote ; and persons who are related through others do not inherit with them, except only the children of the mother, that is half-brothers or sisters on her side, who are not excluded by her. (*Ibid.*)

Mahomedan lawyers have recognized four causes of exclusion for inheritance :—

1. Slavery.

(Slavery has been abolished by Act V. of 1843.)

2. Homicide.

Homicide, of whatever description, however accidental, if fully proved, excludes the person who committed it, from inheriting the property of the person slain, provided he was the cause, but not if he was the occasion merely. Mere suspicion of murder is not sufficient. The crime must be fully established. (*Mac. N.* 87.)

Under the *Shiah* law, the homicide must be intentional to be a bar to succession. Among the *Shiahs*, homicide whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide to disqualify must have been of *malice prepense*. (*Morley.*)

3. Difference of religion.

The impediment as regards difference of religion has been removed by Act 21 of 1850, which enacts that "So much of any law or usage as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or effect 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 the country. This removes the disqualifications of the apostate himself ; but his children, if brought up in his new faith, would be still excluded from the inheritance of their Mussulman relatives by mere difference of religion—an objection that is left untouched by the Act ; while apparently, there would be no objection to the relatives inheriting from the apostate or his children, for being no longer of the Mussulman religion, his or their succession could hardly be regulated by Mahomedan law. (*Bai. H.* 711.)

4. Difference of Allegiance.

Difference of allegiance has been removed by the subversion of the Mahomedan rule.

Mental derangement, or any other description of insanity and blindness are not among the impediments to succession ; but persons afflicted in this manner are entitled to their legal shares as other heirs. (*Mac. N.* 89 ; *Mahar Ali v. Amani*, 2 B. L. R. 306.)

A father may disinherit any one of his sons on a division of his property, during his lifetime. (*Mac. N.* 83.)

A repudiation on account of a private quarrel by a father cannot legally operate to exclude from the inheritance a child born in lawful wedlock or whose parentage he had acknowledged. (*Mac. N.* 121.)

Surrender of Inheritance.

A right of inheritance vests by operation of law and cannot, therefore, be disclaimed or rejected. Thus an heir, who refuses to take the share in a deceased person's estate to which he is entitled, cannot deprive his own heirs of its benefit, and accordingly, upon his death his right would devolve upon them and they would be entitled to claim his share. (*Ameer Ali. Vol. II.* 41.)

Renunciation of the right of inheritance implies the yielding up a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. Renunciation of inheritance in the lifetime of an ancestor is null and void, as it is in fact the giving up of that which has no existence. (*Mac. N.* 89.)

A person taking by inheritance cannot disclaim ; in other words, inheritance requires no acceptance, and cannot be annulled by rejection ; while, on the other hand, a bequest may be accepted or rejected at pleasure. It seems to follow that, if a person entitled by inheritance purport to reject the property inherited, it will nevertheless be his during his life, and will go, after his death, to his heirs or other successors, and not to those of the person from whom he inherited. (*Rumsey.* p. 10.)

If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus in the case of there being a husband, a mother and paternal uncle, the shares are one-half, one-third and one-sixth. Now supposing the estate left to amount to six lacs of rupees, and the husband to content himself with two, still as far as affects the mother, the division must be made, as if she had been a party, and of the remaining four lacs the mother must get two ; otherwise, were he not made a party, the mother would get one-third of four, instead of one-third of sixth lacs as her legal share, and the remainder would go to the uncle as residuary. (*Mac. N.* 22.)

Missing Person.

The property of missing person should be kept in abeyance for ninety years from the time of his birth. His estate in this interval cannot deprive any accession from the intermediate death of others, nor can any person who dies during the interval inherit from him. (*Mac, N.* 29 ; *Hasan Ali v. Maherban,* 2 All. 625.)

A missing person is considered defunct, as far as regards the property of others, and living as far as regards his own property. He shall not inherit from others during the period of ninety years which is allowed for his reappearance, nor shall others inherit from him during this interval. (*Mac. N.* 92.)

If a missing person be a co-heir with others, the estate will be distributed as far as others are concerned, provided they would take at all events, whether the living person were living or dead. (*Ibid.* 29.)

Under the old *Hanafi* law, missing persons were supposed to be alive for 90 years. The more reasonable principle, however, of the *Maliki* law is now in force among the *Hanafis*, viz., that if a person be unheard of for four years he is presumed to be dead. The same principle is in force among the *Shiahs*. Among the *Shafeis* the recognised period is seven years. (*Ameer Ali.*)

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

Contemporaneous Death.—(*De Commorientibus.*)

When two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed, that the death of the whole party was simultaneous and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died at the same time with the original proprietor had never existed. (*Mac. N.* 30.)

For example A, B, C are grandfather, father and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law does not recognise any right by representation, and sons exclude grandsons. (*Ibid.* 31.)

The Sunni Law of Succession.

Grounds of Inheritance.

The right of inheritance is founded on three different qualities—(1) *nasab* or kindred ; (2) special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void ; (3) *walâ*, which is of two kinds—*walâ* of emancipation and *walâ* of mutual friendship. (*Bai. H.* 694.)

Kinds of Heirs.

The *Sunnis* recognise three different kinds of heirs :—

I. The (*legal*) sharers.

II. The agnates, or *residuaries.*

III. The cognates or uterine relatives, or the *distant kindred.* (*Bai. H.* 695.)

The "sharers" take their specified portions, and the residue is then divided among the agnates. If there should be no agnates, the residue reverts or "returns" to the sharers. If neither sharers nor agnates should exist, then the estate is divided among the uterine relations. (*Ameer Ali. Vol. II.* 55.)

1. The (legal) sharers.

The "sharers" are certain relations of the deceased to whom the law has allotted certain specific shares to be satisfied in the first instance after payment of the charges upon inheritance. These shares, however, are liable to be increased, diminished or even withheld, according to the number and classes of persons entitled to them, and to the residue. (*Elb.* 43.)

The sharers are twelve in number, of whom the rights of ten are founded on *nasab* or kindred, and of two on *special cause.* Of the former there are three males, and seven females. (*Bai. H.* 696.)

The three male sharers entitled by *nasab* are :—

1. The Father.

He has three characters :—

(*a*) The character of a *mere sharer* ; and it is when the deceased has left a son, or son's son, how low soever ; and then his share is $\frac{1}{6}$.

(*b*) The character of a *mere residuary* ; and that is when there is no successor but himself, and he takes the whole property as residuary or when there is only a

sharer with him who is not a child, nor child of a son (how low soever), as a husband or a wife, a mother or a grandmother, and the sharer takes his share, and the father takes what remains as residuary.

(*c*) The character of both *sharer* and a *residuary* ; as when there are with him a daughter and son's daughter, but no son, or son's son and he has $\frac{1}{6}$ as a sharer,—the daughter $\frac{1}{2}$,—or $\frac{2}{3}$ when there are two or more—the son's daughter $\frac{1}{6}$, and the father the remainder as residuary.

2. True Grandfather.

He is entirely excluded by the father ; but in default of him comes into his place, and takes $\frac{1}{6}$. He, however, does not, like the father, reduce a mother's share to $\frac{1}{3}$ of the residue, nor entirely exclude a paternal grandmother. (*Ibid.*)

True grandfather takes generally, the father's portion both as residuary and as sharer when there is no father.

The *Sunnis* divide ascendants for purposes of succession into two classes, *viz. true* and *false*. A *true grandfather* is an ascendant in whose line of relationship to the deceased no female enters, as the father's father or the father's father's father ; one into whose relationship to the deceased a female enters being termed a false grandfather, as the father of the father's mother. A *true grandmother* is a female ancestor, into whose line of relationship to the deceased, a false grandfather does not enter, thus a mother's mother, how high soever and a father's mother, how high soever, are true grandmothers, whereas mother's father's mother is a false grandmother. None of these distinctions exist in the *Shiah* law. (*Ameer Ali. Vol. II.* 56.)

It must be borne in mind that two or more of a particular class (except where otherwise specified) take equally among them the same portion that one of that class, if alone, would take ; *e. g.*, one wife taking $\frac{1}{8}$, two wives will take $\frac{1}{8}$ between them ; and the share of a true grandmother being $\frac{1}{6}$, three true grandmothers will divide $\frac{1}{6}$ among them. (*Rumsey.* p. 21.)

3. **Uterine Brother. (Half-brother by the same mother only.)**

One uterine brother is entitled to $\frac{1}{6}$, provided there are no children of the deceased nor son's children, how low soever, nor father nor grandfather; and when there are two or more of them their share is $\frac{1}{3}$ which is equally divided amongst them all. (*Mac. N.* 5,6.)

The seven female sharers entitled by *nasab* are:—

1. **The Daughter.**

When she is alone her share is $\frac{1}{2}$; and when there are two or more, they have $\frac{2}{3}$ between them. (*Bai. H.* 697.)

When there are both sons and daughters, the sons make the daughters residuaries with them. (*Ibid.*)

Sons, son's sons and their lineal descendants in how low a degree soever, have no specific shares assigned to them; they take all the property after the legal sharers are satisfied, unless there are daughters; in which case each daughter takes a share equal to half of what is taken by each son. (*Mac. N.* 2.)

A step-daughter, *i. e.*, a daughter by another wife of a woman's husband has no title to any share in the woman's property. (*Ibid.* 99.)

2. **Son's Daughter.**

When there is no child of the loins, son's daughters are like daughters *i. e.*, if one, she gets $\frac{1}{2}$, if two or more, they get $\frac{2}{3}$ between them. When there is a son, the children of a son take nothing; but when there is one daughter, she takes $\frac{1}{2}$, and the son's daughters have $\frac{1}{6}$; and if there are two daughters, they take $\frac{2}{3}$ and there is nothing for the son's daughters; that is when there is no male among the children of a son. (*Bai. H.* 697.)

A son's daughter becomes a residuary with a son's son, whether he is in the same or lower grade with herself—when she is not a sharer (*Ibid.*)

3. Mother.

Like the father she has three characters :—

(*a*) When there is with her a child or child of a son, how low soever, or two or more brothers or sisters of the whole or half blood, and on whatever side they may be her share is $\frac{1}{6}$.

(*b*) When there are none of these, her share is $\frac{1}{3}$.

(*c*) When there is a husband or a wife, and both parents, she gets $\frac{1}{3}$ of what remains, after deducting the share of the husband or wife, and the residue goes to the father. But if in the place of the father there were a grandfather the mother would have $\frac{1}{3}$ of the whole property for her share. (*Bai. H.* 698.)

A stepmother is not considered in law a mother. She is called the wife of the father. She only who bears the child is termed mother. (*Mac. N.* 99.)

4. True Grandmother.

The share of the true grandmother, on the father's or the mother's side is $\frac{1}{6}$, whether there be one or more, all partaking of it equally who are in the same degree. (*Bai. H.* 698.)

The mother excludes both the paternal and the maternal grandmothers, but the father excludes only the paternal grandmother. (*Elb.* 48 ; *Mac. N.* 6.)

When there are two grandmothers, one of whom is related to the deceased on both sides, and the other only on one side, $\frac{1}{6}$ is to be divided between them equally. (*Bai. H.* 698.)

5. Full Sisters.

In the absence of children or children of a son how low soever, father, true grandfather, and full brothers, one full sister gets $\frac{1}{2}$, and two or more get $\frac{2}{3}$ between them. (*Mac. N.* 4.)

When there is a full brother with them, the male has the share of two females; and when there are daughters or daughters of a son, the full sisters take the residue. (*Bai. H.* 698.)

If there are daughters, or daughters of a son, how low soever, but neither sons, nor son's sons, nor father, nor true grandfather, nor brothers, the sisters as residuaries take what remains after daughters, or son's daughters have taken their shares; such residue being $\frac{1}{2}$ where there is one daughter or son's daughter; or $\frac{1}{3}$ where there are two or more. Full sisters, however, cannot affect the shares of husband, or wife, mother or true grandmother. (*Mac. N.* 5.)

6. **Half-Sisters by same Father only.** (*Consanguine.*)

They are like full sisters, when there are none, one taking $\frac{1}{2}$, and two or more $\frac{2}{3}$. With one full sister however, they take $\frac{1}{6}$. (*Bai. H.* 669.)

With two full sisters they have no portion in the inheritance, unless there happens to be with them a half-brother by the father to make them residuaries, when full sisters take their $\frac{2}{3}$, and the children of the father only have the residue between them, in the proportion of two parts to the male, and one part to each female. (*Ibid.*)

7. **Half-Sisters by Mother only.**

In the absence of children of the deceased, or son's children, how low soever, father and true grandfather, if there is one, she takes $\frac{1}{6}$; if there are two or more, they take $\frac{1}{3}$ amongst them. (*Mac. N.* 5.)

All brothers and sisters are excluded by a son or son's son how low soever, or a father or true grandfather. (*Bai. H.* 699.)

Amongst the half-brothers and sisters by the same mother only the male shares equally with the females without distinction of sex; but the general rule of a double share to the male applies to their issue. (*Mac. N.* 5.)

The two sharers who are entitled for *special cause* are :—

1. **Husband.**

When there is no child, nor child of a son, how low soever, his share is $\frac{1}{2}$. With a child or child of a son he takes $\frac{1}{4}$.

2. **Wife.**

The wife's share is $\frac{1}{4}$ when there is no child nor child of a son, how low soever ; and if there is a child or child of a son, she takes $\frac{1}{8}$; the $\frac{1}{4}$ or $\frac{1}{8}$, as the case may be, being equally divided among all the wives when there are more than one. (*Bai. H.* 699.)

The twelve legal *sharers* may be arranged under four classes.

1st Class.	Father	Mother.	Daughter.		Husband.	Wife.	*Remarks.*	
							1. The first class of *sharers* are *always* entitled to some share or other.	
2nd Class.	True grand-father.	True grand-mother.	Daughter of a son how low soever.		.....	.....	2. The other three classes are excluded by the one above him or her in the same column except brothers and sisters by same mother only who are not excluded by her.	
3rd Class.	.....	.....	Full sisters.	Half brother & sister by same mother only.	.....	.....	3. The father not only excludes true grandfather, but also paternal true grandmother. The father or true grandfather excludes also the *sharers* of the 3rd and 4th classes.	
4th Class.	.....	.....	Half-sister by same father only.	.....	.....	.....		

(S. G.)

Number of Shares and persons entitled to them.

The shares appointed or ordained by the sacred text are six in number :—$\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{3}$, and $\frac{1}{6}$.

(1) One-half ($\frac{1}{2}$) is appointed for five different persons :—

(*a*) A husband when there is neither a child nor child of a son.

(*b*) One daughter of the loins.

(*c*) One son's daughter, when there is no daughter of the loins.

(*d*) One full sister.

(*e*) One half-sister on the father's side when there is no full sister.

(2) One-fourth ($\frac{1}{4}$) is the share of two persons :—

(*a*) A husband when there is a child or child of a son.

(*b*) A wife or wives when there is neither a child nor child of a son.

(3) One-eighth ($\frac{1}{8}$) is the share of :—

One or more wives, when the deceased has left a child or child of a son.

(4) Two-thirds ($\frac{2}{3}$) are the share of four different persons :—

(*a*) Two daughters or more of the loins.

(*b*) Two or more daughters of a son, when there is none of the loins.

(*c*) Two full sisters or more.

(*d*) Two half-sisters by the father, when there is no full sister.

(5) One-third ($\frac{1}{3}$) is the share of two persons :—

(*a*) A mother, when there is neither a child nor child of a son, nor two or more brothers or sisters.

(*b*) The uterine brothers and sisters when two or more in number.

(6) One-sixth ($\frac{1}{6}$) is the share of six persons :—

(*a*) A father when there is a child or a child of a son.

(*b*) A grandfather, when there is no father.

(*c*) A mother when there is a child or child of a son, or two or more brothers or sisters.

(*d*) A single grandmother, or several grandmothers when there are more at the time of inheriting.

(*e*) One son's daughter with a daughter of the loins.

(*f*) One uterine sister or brother.

(*Bai. H.* 699, 700.)

II. The Agnates or Residuaries.

The Residuaries are all persons for whom no share has been appointed, and who take the residue after the sharers have been satisfied or the whole estate when there are none. The residue varies with the number, and classes of persons entitled to legal shares. (*Bai. H.* 701 ; *Elb.* 43.)

The sharers and agnates commonly succeed together; but as it is only the surplus after satisfying the shares, that passes to the agnates, they have been from that circumstance styled 'residuaries'. (*Bai. H.* Intro.)

Classes of Residuaries.

Residuaries are of two kinds ; residuaries by *nasab*, or kindred to the deceased ; and residuaries for *special cause.*

Of residuaries by *nasab* there are three classes :—

(1) *Residuary in his own right or by himself* is defined to be every male into whose line of relation to the deceased no female enters ; and such residuaries are of four sorts :—(*a*) The offspring of the deceased ; his lineal male descendants, *viz.*, son, son's son, son's son's son, and so on. (*b*) His root ; that is the ascendants, the paternal lineal ancestors of the deceased, *viz.*, father, grandfather, great-grandfather and so on. (*c*) The offspring of his father, *viz.*, full brother, half-brother by father, son of full brother, son of half-brother by father, then their sons, how low soever, the full blood being preferred to the half-blood at each stage of descent. (*d*) The offspring of his (true) grandfather *viz.*, full paternal uncle, half paternal uncle by father, son of full paternal uncle, son of half paternal uncle by father, then their sons how low soever. (*Bai. H.* 701.)

The nearest in degree is preferred to the more remote, and of those related in the same degree, those of the whole blood are preferred to those of the half. (*Elb.* 51.)

When there are several residuaries in the same degree the property is divided between them by bodies, not by families (*per capita* and not *per stripes*). As for instance, when there is a son of one brother and ten sons of another, the property is divided into eleven parts, of which each takes one part. (*Bai. H.* 702.)

The residue is divided equally among residuaries in the same degree and of the same sex; but, if they differ in sex, each male takes twice as much as each female.

(2) *Residuaries by another or in another's right* are those females who become or are made residuaries by males who are parallel to them. (*Bai. H.* 703.)

They are certain females who, though entitled to legal shares in the absence of males of the same degree, become residuaries with them. (*Elb.* 51.)

These are four in number :—(1) A daughter by a son. (2) A son's daughter by a son's son. (3) A full sister by her brother. (4) A half-sister by the father by her brother. (*Bai. H.* 703.)

When the females are of the same degree as the males each female takes half the share of a male.

A Mahomedan lady died leaving a husband, two daughters, a sister and the sons of her father's paternal uncle. The husband and the daughters took their shares. The residue was claimed by the sister and by the sons of the uncle of the father of the deceased. *Held* that the sister was entitled in preference to the paternal kinsmen, to the residue of the deceased's estate after the husband and daughters had taken their shares. (*Meherjan v. Shajadi*, 24 Bom. 112.)

The remaining residuaries take the residue alone, that is, the males take it without any participation of the females.

They are also four in number :—(1) The paternal uncle. (2) His son. (3) The son of a brother. (4) The son of an emancipator. These males, in certain contingencies, become residuaries, but it does not follow that in all cases the sisters of the males becoming residuaries would become residuaries *with* them. It is only when the female is a sharer herself that, instead of taking a share, she takes as a residuary when co-existing with a male residuary. (*Bai. H.* 703; *Ameer Ali.*)

The rule by which certain females become residuaries in the presence of an equal male residuary is not universal, but applies only to cases in which such females are primarily sharers. Thus a paternal aunt, who is not a sharer, does not become a residuary in the presence of a paternal uncle although the latter is a residuary. But a son's daughter may become a residuary by the presence of a son's son, although deprived of a share by the presence of daughters, &c., for she was originally a sharer. (*Rumsey*. p. 54.)

(3) *The Residuary with another or together with others* is every female who becomes a residuary with another female ; as full sisters or half-sisters by the father who become residuaries with daughters, or son's daughters. (*Bai. H.* 703.)

When there are several residuaries of different kinds, one a residuary in himself, another residuary by another, and the third a residuary with another, preference is given to propinquity to the deceased ; so that the residuary with another, when nearer to the deceased than residuary in himself, is the first. (*Ibid.* 704.)

Daughters as sharers take a specific portion of the estate, but they do not take the whole, and when a man dies leaving a daughter, a full-sister and the son of a half-brother by the father, $\frac{1}{2}$ of the inheritance goes to the daughter, and the other $\frac{1}{2}$ to the sister, who is a residuary with the daughters and nearer to the deceased than the brother's son. So also, where there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance. (*Ameer Ali.*)

The residuaries *for special cause* are the emancipator, or emancipatrix, of a freedman dying without residuary male heirs. (*Elb.* 52.)

Slavery being abolished by Act 5 of 1843 this provision is inoperative.

III. Uterine Relatives or Distant Kindred.

On failure of legal sharers and residuaries, the inheritance is divided amongst the distant kindred. (*Elb.* 52.)

As it was only when there is neither sharer nor residuary, that there is any room for the succession of the uterine relatives, they have been from that circumstance styled "distant kindred." (*Bai. H. Intro.*)

The mere absence of residuaries would not be sufficient to cause the admission of distant kindred, for, although the shares might not exhaust the property, the residue would be divided among the sharers (exclusive of the husband and wife, if any) by the doctrine of the "return." In such a case; therefore, there would be nothing left for the distant kindred. (*Rumsey*. p. 56)

A husband or wife, though a sharer, does not exclude the "uterine relations" from taking a share in the estate of the deceased.

According to Mahomedan law the term "distant kindred" includes all relations who are neither sharers nor residuaries: therefore a great-grandson of the brother of the grandfather of the deceased comes within the term "distant kindred." (*Abdul Serang v. Puteebibi*, 29 Col. 738.)

Classes of Distant Kindred.

Of the distant kindred there are four classes :—

(1) The children of daughters and son's daughters. (2) The false grandfathers and false grandmothers. (3) The daughters of full brothers and of half-brothers by same father, the children of half-brothers by same mother, and the children of all sisters. (4) The paternal uncle by same mother (that is, half-brothers of the father by same mother) and their children, maternal uncles and aunts and their children, and the daughters of full paternal uncles and half-paternal uncles by same father. (*Bai. H.* 715.)

These and all that are connected with the deceased through them, are his distant kindred. The first class of the distant kindred is first in the succession, though the individual claimant should be more remote than one of another class. The second is next; then the third; then the fourth; according to the order of the residuaries. (*Ibid.*)

The preference of individuals in different classes is regulated by the following rules :—

(1.) The nearer to the deceased is preferred to the more remote. Thus the daughter of a daughter is preferred to the daughter of a daughter's daughter.

(2.) When there is an equality in degree, that is, in proximity to the deceased, the child of an heir whether sharer or residuary, is preferred. Thus the daughter of a son's daughter is preferred to the son of a daughter's daughter.

3. If the claimants are equal in proximity to the deceased and there is no child of an heir among them, the property is to be equally divided among them, if they are all males or all females; and if there is a mixture of males and females, then in the proportion of two parts for a male and

one to a female. This is when the sex of ancestors, whether male or female, is the same. But when the ancestors are of different sexes, the claimants take *per stirpes*.

4. If one of the claimants is connected with the deceased in two or more ways, he will inherit by each way. (*Bai. H.* 716, 717.)

Successor by Contract or Mutual Friendship.

Should none of the distant kindred be living, and capable of inheriting (unless there be a widow, or a widower, who is first entitled to share), the estate goes to him who may be called *the successor by contract*, *i. e.*, a stranger, appointed as heir by the owner of the estate, such appointment being accepted by the person so named. (*Elb.* 44.)

The term "heir" is used in its broadest sense, to signify any person who has a right to inherit any species of property.

When the deceased leaves no natural relation, but leaves him or her surviving a husband or a widow, as the case may be, such husband or widow takes the entire inheritance.

Acknowledged Kindred.

Next comes a person in whose favour the deceased has made a declaration of *Nasab;* or descent as against another. But not such as to establish his descent, and has persisted in such declaration to his death. (*Bai. H.* 695.)

Universal Legatee.

The person next in succession is one to whom the deceased has bequeathed the whole of his property. (*Ibid.*)

Public Treasury.

Lastly the succession goes to the *beit-ul-mal*, or public treasury.

In default of all, there being no will, the property will escheat to public treasury; but this only where no individual has the slightest claim. (*Mac. N.* 12.)

Rule of Distribution.

Whenever there are different sets of heirs, and several individuals in each set entitled to partition, the following rule of distribution should be observed. Write in a line the fractions representing the shares to which the given heirs, or sets of heirs are entitled. Divide these fractions by the number of individuals in each set, to obtain the share of each claimant separately. The least common multiple of the denominators of these fractions will show the number of parts into which the whole estate ought to be divided (*Elb.* 60.)

Example 1.—The heirs are a father, a wife and ten daughters. Father's share = $\frac{1}{6}$ as a sharer, wife's share = $\frac{1}{8}$. Ten daughters' share together = $\frac{2}{3}$; there remains $\frac{1}{24}$ as residue, which added to $\frac{1}{6}$ of the father's share as a sharer makes $\frac{5}{24}$ the share of the father. Next $\frac{2}{3}$ is to be divided among ten daughters; therefore, each daughter's share = $\frac{2}{3} \times \frac{1}{10} = \frac{1}{15}$.

Thus, $\frac{5}{24}$, $\frac{1}{8}$, and $\frac{1}{15}$ represent the share to which each individual of each set is entitled. The least common multiple of the denominator of these fractions is 120, which are the parts into which the estate should be divided, and then the father gets $120 \times \frac{5}{24} = 25$ share; the wife $120 \times \frac{1}{8} = 15$ shares; and each daughter, $120 \times \frac{1}{15} = 8$ shares.

Example 2.—The heirs are two wives, six true grandmothers, ten daughters and seven paternal uncles. The shares are respectively:—

Two wives = $\frac{1}{8}$ or $\frac{1}{16}$ each; six grandmothers = $\frac{1}{6}$ or $\frac{1}{36}$ each; ten daughters, = $\frac{2}{3}$ or $\frac{1}{15}$ each; seven paternal uncles = $\frac{1}{24}$ the residue or $\frac{1}{168}$ each.

Thus $\frac{1}{16}$, $\frac{1}{36}$, $\frac{1}{15}$, and $\frac{1}{168}$ represent the shares to which each individual of each set is entitled. The least common multiple of the denominator of these fractions is 5040, which are the parts into which the estate should be divided, and then each wife gets $5040 \times \frac{1}{16} = 315$ parts; each grandmother gets $5040 \times \frac{1}{36} = 140$ parts; each daughter gets $5040 \times \frac{1}{15} = 336$ parts; and each uncle gets $5040 \times \frac{1}{168} = 30$ parts.

Example 3.—The heirs are mother, wife, son's daughter, daughter, half-brother by the same father, half-brother by the same mother. The last is excluded by the daughter and son's daughter. Mother's share $=\frac{1}{6}$; wife's share$=\frac{1}{8}$; son's daughter's share$=\frac{1}{6}$; daughter's share$=\frac{1}{2}$; the residue $\frac{1}{24}$ goes to the half-brother by the same father as residuary.

Thus $\frac{1}{6}$, $\frac{1}{8}$, $\frac{1}{6}$, $\frac{1}{2}$, and $\frac{1}{24}$ represent the shares of each individual. The least common multiple of the denominator of these fractions is 24, which are the parts into which the estate should be divided, and then mother gets $24 \times \frac{1}{6} = 4$ parts; wife $24 \times \frac{1}{8} = 3$ parts; son's daughter $24 \times \frac{1}{6} = 4$ parts; daughter $24 \times \frac{1}{2} = 12$ parts; and half-brother by the father $24 \times \frac{1}{24} = 1$ part.

Example 4.—A Mahomedan dies, leaving him surviving, his widow, father, a sister and five daughters. The property is worth 1,200 Rs. The widow gets $1,200 \times \frac{1}{8} = 150$ Rs. as her share; five daughters $1,200 \times \frac{2}{3} = 800$ Rs. between them or each 160 Rs. The remaining 250 Rs. the father takes as a sharer and a residuary. The sister gets nothing.

Example 5.—The heirs are husband, mother, father. Here remembering that the mother under the particular circumstances, only takes a third of the residue after deducting the husband's share, we have:—husband's share, $= \frac{1}{2}$; mother's share $= \frac{1}{3}$ of $(1-\frac{1}{2}) = \frac{1}{6}$; father's share $= \left\{ \frac{1}{6} \text{ (as sharer)} + \frac{1}{6} \text{ (as residuary)} \right\} = \frac{1}{3}$. Thus $\frac{1}{2}$, $\frac{1}{6}$, and $\frac{1}{3}$ represent the shares of the individuals. The least common multiple of the denominator of these fractions is 6 which are the parts into which the estate should be divided, and then husband gets $6 \times \frac{1}{2} = 3$ parts; mother $6 \times \frac{1}{6} = 1$ part; and father $6 \times \frac{1}{3} = 2$ parts.

Note.—Where there is a husband or a wife, and both parents, the mother gets $\frac{1}{3}$ of what remains after deducting the share of the husband or wife, and the residue goes to the father.

The doctrine of Increase.—(*Aúl.*)

Definition.

The increase is where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of the

shares into which it is necessary to make the estate that there is not a sufficient number to satisfy the just demands of all the claimants. (*Mac. N.* 22.)

Whenever the sum of sharers to which persons are entitled to the whole estate each of the sharers must suffer a proportionate reduction, or, in other words, the number of the shares must be increased. (*Elb.* 58.)

Cases in which it takes effect.

It takes effect in three cases :—

(1) When the estate should be made into six shares ; or (2) when it should be made into twelve ; or (3) when it should be made into twenty-four. (*Mac. N.* 23.)

The four remaining extractors—two, three, four, and eight —never increase, because in the cases in which they are required, the estate is either equal to or in excess of the shares. (*Bai. H.* 724.)

Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine or ten. (*Mac. N.* 13.)

Example of increase of *six* to *seven*.

The heirs are a husband and two full sisters. Their respective shares would be $\frac{1}{2}$. The common divisor is 6 which represents the shares into which the estate will have to be divided, 3 being the husband's share, and 4 the full sisters'. But 3 and 4 make 7. In order, therefore, to give the exact number of shares to each heir, divide the property into 7 shares.

Example of increase of *six* to *eight*.

The heirs are a husband, two full sisters, and a mother. Their respective shares would be $\frac{1}{2}$, $\frac{2}{3}$, and $\frac{1}{6}$. The common divisor is 6 which represents the shares into which the estate will have to be divided, 3 being the husband's share, 4 the full sisters' and 1 the mother's. But 3, 4, and 1 make 8. In order therefore, to give the exact number of shares to each heir, divide the property into 8 shares.

Example of increase of *six* to *nine*.

The heirs are a husband, two full sisters, and two half-sisters by the mother. Their respective shares would be $\frac{1}{2}$, $\frac{2}{3}$ and $\frac{1}{3}$. The common divisor is 6 which represents the shares into which the estate will have to be divided, 3 being the husband's share, 4 the full sisters', and 2 the half-sisters.' But 3, 4, and 2 make 9. In order, therefore, to give the exact number of shares to each heir, divide the property into 9 shares.

Example of increase of *six* to *ten*.

The heirs are a husband, two full sisters, two half-sisters by the mother, and a mother. Their respective shares would be $\frac{1}{2}$, $\frac{2}{3}$, and $\frac{1}{6}$. The common divisor is 6 which represents the shares into which the estate will have to be divided, 3 being the husband's share, 4 the full sisters', 2 the half-sisters', and 1 the mother's. But 3, 4, 2, and 1 make 10. In order, therefore, to give the exact number of shares to each heir, divide the property into 10 shares.

Where twelve is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to thirteen, fifteen, or seventeen. (*Mac. N.* 14.)

Example of increase of *twelve* to *thirteen*.

The heirs are a widow, mother, and sister. Their respective shares would be $\frac{1}{4}$, $\frac{1}{3}$ and $\frac{1}{2}$. The common divisor is 12, which represents the shares into which the estate will have to be divided, 3 being the widow's shares, 4 the mother's, and 6 the sister's. But 3, 4, and 6 make 13. In order, therefore, to give the exact number of shares to each heir, divide the property into 13 shares.

Example of increase of *twelve* to *fifteen*.

The heirs are a wife, two full sisters, and two half-sisters by the mother. Their respective shares would be $\frac{1}{4}$, $\frac{2}{3}$, and $\frac{1}{3}$. The common divisor is 12, which represents the shares into which the estate will have to be divided, 3 being the wife's share, 8 the full sisters', and 5 the half-sisters'. But 3, 8, and 4, make 15. In order, therefore, to give the exact number of shares to each heir, divide the property into 15 shares.

Example of increase of *twelve* to *seventeen.*

The heirs are a wife, two full sisters, two half-sisters by the mother, and a mother. Their respective shares would be $\frac{1}{4}$, $\frac{2}{3}$, and $\frac{1}{6}$. The common divisor is 12, which represents the shares into which the estate will have to be divided, 3 being the wife's share, 8 the full sisters', 4 the half-sisters', and 2 the mother's. But 3, 8, 4, and 2 make 17. In order, therefore, to give the exact number of shares to each heir, divide the property into 17 shares.

Where twenty-four is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to twenty-seven. (*Mac. N.* 14.)

Example of increase of *twenty-four* to *twenty-seven.*

The heirs are a widow, two daughters, father, and mother. Their respective shares would be $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{6}$, and $\frac{1}{6}$. The common divisor is 24, which represents the shares into which the estate will have to be divided, 3 being the widow's share, 16 the daughters', 4 the father's, and 4 the mother's. But 3, 16, 4, and 4, make 27. In order, therefore, to give the exact number of shares to each heir, divide the property into 27 shares.

Increase according to *Shiahs.*

The legal number of shares into which it is necessary to make the property, cannot be increased if found insufficient to satisfy all the heirs without a fraction, but a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. (*Mac. N.* 40.)

For instance, where the heirs are a widow, a mother, and a sister. Here the property must be divided into 12 parts, of which the widow is entitled to 3; the mother to 4; and the sister to 6; but there only remain 5 shares for her instead of 6 to which she is entitled. In this case according to the *Sunnis*, the property would have been made into 13 parts to give the sister her 6 shares; but according to the *Shiahs* the sister must be content with five shares that remain, because in certain cases her right as a legal sharer is liable to extinction. (*Ibid.*)

The Doctrine of Return.—(*Radd.*)

When, on distributing the estate among the legal sharers, there is a surplus, such surplus goes to the residuaries; if there be no legal sharers, the whole estate goes to the residuaries; but if, in the first case, there be no residuaries to receive the surplus, that surplus reverts to those legal sharers who are *connected with the deceased by consanguinity*. This is called the *return*. (*Elb.* 58.)

The return is the converse of the increase. Where there is no residuary the surplus of the shares of the sharers reverts to them in proportion to their shares. (*Bai. H.* 725.)

The heirs are a grandmother and a sister by the same mother. The share of each is $\frac{1}{6}$. The remaining $\frac{2}{3}$ will be divided between them equally.

The husband and widow get no share of the return as long as there are any heirs by blood alive; but when the deceased leaves no relative at all, the husband or widow takes the whole estate. (*Mahomed v. Sajida Banco*, 3 Cal. 702; *Koonari Bibi v. Dalein Bibi*, 11 *Cal.* 14.)

The heirs are a widow and two daughters. Their respective shares are $\frac{1}{8}$ and $\frac{2}{3}$. The remaining $\frac{5}{24}$ will go to the daughters as return.

The heirs are a mother and husband. The husband takes $\frac{1}{2}$ as his share, the remaining $\frac{1}{2}$ goes to the mother as her share and return.

The heirs are mother, wife and daughters of uterine brother. Mother takes $\frac{1}{3}$ as her share, and wife $\frac{1}{4}$ as her share. Uterine brother's children are distant kindred and can take nothing so long as there are sharers. But $\frac{1}{3}$ and $\frac{1}{4}$ do not exhaust the whole estate; the case is that of *return*; and as a wife cannot partake in the return, mother gets all, after payment of wife's share. Thus wife gets $\frac{1}{4}$ and mother $\frac{3}{4}$.

Persons entitled to Return.

All the persons to whom there may be a return are seven in number :—(1) mother, (2) grandmother, (3) daughter, (4) son's daughter, (5) full sister, (6) half-

sister by the father, and (7) half-brother or sister by the mother. And a return may take place to one, two, or three classes of sharers at the same time. But no more than three can take by return at one and the same time. (*Bai. H.* 725.)

Return according to *Shiahs*.

Where the assets exceed the number of heirs, the surplus reverts to the heirs. The husband is entitled to share in the return, but not the wife. The mother also is not entitled to share in the return, if there are brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual. (*Mac. N.* 41.)

The Shiah Law of Succession.

Principles of Succession.

According to the tenets of the *Shiah* sect, the right of inheritance proceeds from three different sources :—

1. *It accrues by virtue of consanguinity.*

The relations, who are entitled to succession by virtue of consanguinity (blood), are divided into three classes :—

The *first* class comprises the parents, and the children and grandchildren, how low soever.

The *second* class comprises the grandfather and grandmother, and other ancestors, and brothers and sisters, and their descendants, how low soever.

The *third* class comprises the paternal and maternal uncles and aunts and their descendants.

In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed; and in their default, their descendants, to the remotest generation, according to their degree of proximity to the deceased. In

default of all those heirs, the paternal and maternal uncles and aunts of the grandparents and great-grandparents inherit, according to their degree of proximity to the deceased. (*Mac. N.* 34-36.)

Rules of Succession.

Among the three classes of heirs who succeed by virtue of consanguinity, so long as there is any one of the first class, even though a female, none of the second class can inherit; and so long as there is any one of the second class, none of the third can inherit. But the members in each class succeed together.

No claimant has a title to inherit with children, except the parents, or the husband and wife.

The children of sons take the portions of sons, and those of daughters take the portions of daughters, however low in descent.

It is a general rule that the individuals of the whole blood exclude those of the half blood, who are of the same rank; but this rule does not apply to individuals of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half blood: a son of the brother of the whole blood, however, does not exclude a brother of the half blood; but he would exclude the son of a half-brother who is of the same rank.

The legal shares allotted to the several heirs are the same as those prescribed in the Sunni Code, both having the precepts of the Koran as their guide. (*Mac. N.* 34-36, 41.)

2. *It accrues by virtue of Marriage.*

The heirs who succeed in virtue of marriage are the husband and wife, who can never be excluded in any possible case. Their shares are $\frac{1}{2}$ for the husband, and $\frac{1}{4}$ for the wife, where there are no children, and $\frac{1}{4}$ for the husband, and $\frac{1}{8}$ for the wife, where there are children.

Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband dies, leaving no other heir but his wife, she is only entitled to $\frac{1}{4}$ of his property, and the remaining $\frac{3}{4}$ will escheat to the public treasury. (*Mac. N.* 38, 39.)

3. *It accrues by virtue of Wala.*

Wala is of two descriptions :—

(1) That which is derived from manumission, where the emancipator by such act derives a right of inheritance.

Slavery being abolished by Act 5 of 1843 the *wala* of emancipation can no longer exist.

(2) That which depends on mutual compact, where two persons reciprocally engage, each to be heir of the other.

The claimants by *wala* can never inherit so long as there is any claimant by consanguinity or marriage. (*Ibid.*)

Principal points of difference between *Shiah* and *Sunni* law of inheritance.

1. According to the *Shiah* school the causes of heritable right are these :—consanguinity, conjugality, *wala*. The heirs are comprised in three classes :—(1) children and parents. (2) Grandparents, brothers and sisters. (3) Maternal and paternal uncles and aunts and their decendants. The first class excludes the second, and so on. This is contrary to the *Sunni* school :—If a *Shiah* leave a daughter and a grandfather, the former would entirely exclude the latter.

2. In succession of male agnates, the *Sunnis* prefer the nearer in degree to the more remote ; whilst the *Shiahs* apply the rule of nearness to all cases without distinction of class or sex.

3. A childless widow gets no share in land or the like among *Shiahs*.

So far as succession is concerned, there is no distinction between real and personal property, accepting in the case of a childless widow under the *Shiah* law. (*Umdut Oonnissa v. Asloo*, 20 W. R. 247.)

4. The Primogeniture system prevails among the *Shiahs* to a limited extent.

5. The doctrine of increase is not recognized among the *Shiahs*.

6. Among the *Shiahs* though the husband gets a share in the return, the wife does not ever get it.

7. The mother according to the *Shiahs*, gets no share in the return, if there be brethren.

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